

**DECONSTRUCTING ENVIRONMENTAL DEREGULATION  
UNDER THE TRUMP ADMINISTRATION**

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## INTRODUCTION

Over the past four years, Harvard's Environmental & Energy Law Program (EELP) tracked the Trump Administration's environmental rollback efforts, analyzing both individual regulations and broader attacks on the United States Environmental Protection Agency's (EPA) mission-critical capacities.<sup>1</sup> The goal was to provide a real-time accounting of the Administration's deregulatory efforts and the lawsuits brought by coalitions of states, nonprofits, and community organizations to stop or delay those efforts. In this Article, I present an overview of that work, summarizing the new baseline from which the Biden Administration must operate.

Under President Trump, political appointees turned environmental agencies' interpretations of key statutes upside down, transforming broad mandates into a series of constraints on agencies' regulatory authorities. Officials paired that effort with rules and practices designed to blunt the force of EPA's scientific expertise, while narrowing opportunities for public participation and scrutiny, both of which are instrumental to driving EPA's congressionally prescribed regulatory agenda. What EPA Administrator Scott Pruitt began, Administrator Andrew Wheeler pursued, but far more strategically and successfully—not only deconstructing the administrative state, but also subverting agencies' decision-making processes. As a result, environmental agencies lost access to the scientific, legal, and public accountability mechanisms that enable them to respond to environmental and public health concerns.

The Trump Administration's environmental legacy is more than the sum of individual attacks on public health protections and pollution restrictions. I summarize this legacy in four Parts, focusing on changes at EPA, and to a lesser extent, the Department of the Interior (DOI).<sup>2</sup> First, I address the ways that the Administration undermined EPA's expert

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1. For a comprehensive overview of regulatory rollbacks under the Trump Administration, please visit EELP's Regulatory Rollback Tracker, which provides the history of each rule and its current status, including litigation and court decisions. *Regulatory Rollback Tracker*, HARV. ENV'T & ENERGY L. PROGRAM, <https://eelp.law.harvard.edu/regulatory-rollback-tracker/> (last visited May 22, 2021). EELP's Mission Tracker includes an online database reviewing how EPA administrators under President Trump undermined the Agency's capacities to safeguard scientific expertise; public health; agency accountability; enforcement and compliance; and environmental justice. See *EPA Mission Tracker*, HARV. ENV'T & ENERGY L. PROGRAM, <https://eelp.law.harvard.edu/EPA-mission-tracker/> (last visited May 22, 2021).

2. For a more comprehensive assessment of how the Trump Administration implemented its deregulatory agenda at DOI, see LAURA BLOOMER ET AL., HARV. ENV'T & ENERGY L. PROGRAM, *MANAGING PUBLIC LANDS UNDER THE TRUMP ADMINISTRATION AND BEYOND 5–10* (2020) [hereinafter BLOOMER ET AL., *MANAGING PUBLIC LANDS*], <http://eelp.law.harvard.edu/wp-content/uploads/Managing-Public-Lands-Under-the-Trump-Administration-and-Beyond.pdf>.

capacities, forced an exodus of academic scientists from the agency's expert bodies, and opened the door to representatives of regulated industries.

Second, I assess the many ways the Trump Administration narrowed mechanisms designed to invite public comment and critique of agency decisions. In doing so, the Administration not only ignored information essential for reasoned decision-making, but also created explicit preferences for the interests of regulated entities over the communities most affected by those entities' activities.

Third, the Trump Administration minimized regulation-triggering events by expanding the projects and impacts exempt from environmental review. It also modified the assessments agencies use to determine when new projects or events merit analysis or oversight. The Administration then promoted a Frankenstein's monster version of cost-benefit analysis in order to justify its deregulatory goals. President Trump established arbitrary limits on the costs agencies can impose on private industry, while EPA issued new protocols to consistently undervalue or ignore the benefits of regulating greenhouse gases and other pollutants.

Fourth, and perhaps most consequential, EPA adopted novel interpretations of its own statutory mandates to severely narrow or, in some cases, abdicate its authority to regulate at all. If federal courts accept these interpretations, future administrations will be unable to exercise the broader regulatory authority necessary to address both longstanding and novel public health and environmental challenges.

These four strategies collectively represent the Trump Administration's environmental deregulatory toolbox. Reviewing EPA's successes and failures in wielding these strategies over the last four years is necessary not only to understand the deeper, more structural impacts that the Trump Administration had on the environmental administrative state, but more importantly, the ambitious regulations and reforms necessary to repair it.

#### I. STRATEGY 1: UNDERMINE AGENCIES' SCIENTIFIC AND EXPERT CAPACITIES

Scientific understanding and advancement is baked into nearly every mandate and function of EPA. The executive order that created EPA consolidated the host of research, monitoring, standard-setting, and enforcement activities required under core environmental statutes,<sup>3</sup>

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3. Joseph Goffman, *Reconstruct an Administrative Agency*, ENV'T. L. INST., Nov.–Dec. 2018, at 40, 41 [hereinafter Goffman, *Reconstruct an Administrative Agency*], [http://eelp.law.harvard.edu/wp-content/uploads/Goffman\\_Forum\\_2018\\_Nov-Dec-ELI.pdf](http://eelp.law.harvard.edu/wp-content/uploads/Goffman_Forum_2018_Nov-Dec-ELI.pdf).

including the Clean Air Act (CAA),<sup>4</sup> the Clean Water Act (CWA),<sup>5</sup> the Resource Conservation and Recovery Act (RCRA),<sup>6</sup> the Toxic Substances Control Act (TSCA),<sup>7</sup> and Superfund.<sup>8</sup> The agency's scientific bodies and information-gathering processes are essential to satisfying the clear and consistent mandate established in these statutes "to enhance [environmental] quality for the sake of public health, welfare, and productivity; to promote research and development in service of pollution control; and to provide financial [and technical] assistance to states and localities in support of anti-pollution programs."<sup>9</sup>

Under the Trump Administration, political appointees undermined these capacities and promoted skepticism in the need for science-informed environmental and public health regulations. President Trump terminated the collection and use of scientific data, as did political appointees at both EPA and DOI. At EPA, leadership also obstructed processes designed to ensure the agency rely on the best available science and make decisions in a transparent, democratic fashion. Leadership also excluded or dismissed qualified experts from EPA's scientific advisory committees, replacing them with industry affiliates. The result was to willfully blind the agency to the best available science, contrary to its own statutory mandates, and politicize the determination of health-based standards.

*A. Step 1: Block the Collection of Information Needed to Justify Forward-Looking Regulation*

In Trump's first year as President, environmental agencies terminated Obama-era investigations that would have supported stricter regulation of air pollutants, including greenhouse gases. For example, in March 2017, President Trump issued an executive order disbanding the Interagency Working Group on Social Cost of Greenhouse Gases (IWG).<sup>10</sup> The IWG, established in 2009, was tasked with assessing the costs associated with

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4. Clean Air Act of 1990, 42 U.S.C. §§ 7401–7671q (2006).

5. Clean Water Act of 1972, 33 U.S.C. §§ 1251–1388 (2012).

6. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2012).

7. Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601–2697 (2012).

8. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2012).

9. Goffman, *Reconstruct an Administrative Agency*, *supra* note 3, at 41.

10. The order also withdrew various technical documents the IWG had produced as "no longer representative of governmental policy." Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 16,095–96 (Mar. 31, 2017); *see also* Hana Vizcarra, *EPA's Final Methane Emissions Rule Rolls Back Standards and Statutory Authority*, HARV. ENV'T & ENERGY L. PROGRAM (Sep. 9, 2020), <https://eelp.law.harvard.edu/2020/09/EPAs-final-methane-emissions-rule-rolls-back-standards-and-statutory-authority/>.

greenhouse gas emissions, which federal agencies would then use to evaluate the benefits of relevant regulation, including fuel and energy efficiency standards and emissions reductions.<sup>11</sup> Disbanding the IWG thus served the double purpose of rescinding critical work quantifying the devastating impacts of climate change, and undercutting the sole mechanism requiring federal agencies to account for the costs of greenhouse gas emissions in a uniform way.

In addition to the executive order, agencies halted Obama-era investigations designed to review and update regulatory health and safety standards. For example, on December 7, 2017, DOI halted an independent study by the National Academies of Sciences, Engineering, and Medicine designed to review and update the Bureau of Safety and Environmental Enforcement's (BSEE) offshore oil and gas operations inspection program.<sup>12</sup> Three weeks later, on December 29, BSEE proposed to revise or rescind core provisions of the Obama-era Offshore Production Safety Systems Rule, which updated safety and pollution prevention equipment design, maintenance, and repair requirements, responding to the deficiencies that caused the horrific Deepwater Horizon explosion and oil spill in 2009.<sup>13</sup> DOI's final rule eliminated "unduly burdensome" requirements that independent third parties certify that offshore oil and gas production equipment will function in extreme conditions, a conclusion that the National Academies' study would have likely contradicted.<sup>14</sup>

In addition to easing safety restrictions for offshore oil and gas programs, DOI similarly sought to undermine public health research on the effects of coal mining. In August 2017, DOI's Office of Surface Mining

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11. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-254, SOCIAL COST OF CARBON, IDENTIFYING A FEDERAL ENTITY TO ADDRESS THE NATIONAL ACADEMIES' RECOMMENDATIONS COULD STRENGTHEN REGULATORY ANALYSIS 2–3 (2020) ("In 2009, [the Office of Management and Budget] and the Council of Economic Advisors convened the Interagency Working Group on Social Cost of Carbon (IWG) to develop government-wide estimates of the social cost of carbon for federal agencies to use in conducting regulatory impact analyses for rulemaking.").

12. *Statement on Stop-Work Order for National Academies Study on the Department of the Interior's Offshore Oil and Gas Operations Inspection Program*, NAT'L ACADS. OF SC., ENG'G. & MED. (Dec. 21, 2017), <https://www.nationalacademies.org/news/2017/12/statement-on-stop-work-order-for-national-academies-study-on-the-department-of-the-interiors-offshore-oil-and-gas-operations-inspection-program>.

13. See *BSEE Offshore Production Safety Systems Rule Update*, HARV. ENV'T & ENERGY L. PROGRAM (May 14, 2020), <https://eelp.law.harvard.edu/2020/05/bsee-offshore-production-safety-systems-rule-update/> (tracking the history and progression of the Offshore Production Safety Systems Rule through administrations); *Oil and Gas and Sulphur Operations on the Outer Continental Shelf—Oil and Gas Production Safety Systems—Revisions*, 82 Fed. Reg. 61,703, 61,705–06 (proposed Dec. 29, 2017) (codified at 30 C.F.R. pt. 250).

14. *Oil and Gas and Sulphur Operations on the Outer Continental Shelf—Oil and Gas Production Safety Systems*, 83 Fed. Reg. 49,216, 49,217 (Sep. 28, 2018) (codified at 30 C.F.R. pt. 250).

Reclamation and Enforcement (OSMRE) halted another National Academies study on the potential health effects of surface coal-mining sites in Central Appalachia on neighboring communities.<sup>15</sup> DOI stated that it was only pausing the study as part of an agency-wide review of all grants and cooperative agreements exceeding \$100,000, but the study never resumed.<sup>16</sup> Earlier that year, then-Interior Secretary Zinke lifted an Obama-era moratorium on new coal leasing on public lands, which was designed to give the agency a chance to evaluate the environmental and social effects of such activities.<sup>17</sup> Under Zinke, the Bureau of Land Management (BLM) published a final environmental assessment with a Finding of No Significant Impact for lifting the moratorium.<sup>18</sup> Had DOI continued to fund the National Academies study, the findings would have likely provided fuel for the public to challenge DOI's finding. Halting the study also prevented an incoming administration from relying on the study's findings to promulgate regulations addressing the air and water pollution generated by surface coal mining, which is estimated to cause at least 1,000 deaths per year in neighboring communities.<sup>19</sup>

*B. Step 2: Undermine the Integrity of Scientific Expert Review Committees*

Expert and scientific review committees assist EPA in making decisions that consider the best available science and proactively protect public health. Historically, the federal government has insulated these committees from regulated industries, which often have other opportunities and capacity to participate in rulemaking and other decision-making processes. The Trump Administration reversed course in two key ways. First, the Trump EPA excluded or eliminated academic experts from

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15. *Statement Regarding National Academies Study on Potential Health Risks of Living in Proximity to Surface Coal Mining Sites in Central Appalachia*, NAT'L ACADS. OF SCI., ENG'G. & MED. (Aug. 21, 2017), <https://www.nationalacademies.org/news/2017/08/statement-regarding-national-academies-study-on-potential-health-risks-of-living-in-proximity-to-surface-coal-mining-sites-in-central-appalachia>.

16. Kate Mishkin, *Without Federal Funding, Study on Health Effects of Mountaintop Removal Ends*, CHARLESTON GAZETTE MAIL (Mar. 21, 2018), [https://www.wvgazettemail.com/news/health/without-federal-funding-study-on-health-effects-of-mountaintop-removal-ends/article\\_24a6d16a-face-59c9-a44b-e1be9494c0ad.html](https://www.wvgazettemail.com/news/health/without-federal-funding-study-on-health-effects-of-mountaintop-removal-ends/article_24a6d16a-face-59c9-a44b-e1be9494c0ad.html).

17. *DOI Coal Leasing Moratorium*, HARV. ENV'T & ENERGY L. PROGRAM (Sep. 4, 2017), <https://eelp.law.harvard.edu/2017/09/doi-coal-leasing-moratorium/>.

18. BLM prepared the environmental assessment only after the District Court for the District of Montana held that lifting the moratorium constituted a major Federal action, and thus was subject to NEPA review. *Citizens for Clean Energy v. DOI*, 384 F.Supp.3d 1264, 1279 (D. Mont. 2019).

19. Richard Schiffman, *A Troubling Look at the Human Toll of Mountaintop Removal Mining*, YALE ENV'T 360 (Nov. 21, 2017), <https://e360.yale.edu/features/a-troubling-look-at-the-human-toll-of-mountaintop-removal-mining>.

scientific advisory committees in favor of industry-affiliated scientists. Second, the Trump EPA subverted committees' transparent, democratic deliberations by concentrating decision-making power in the hands of political appointees.

The Trump EPA justified the politicization of scientific decision-making by invoking baseless transparency concerns. For example, in October 2017, Administrator Pruitt issued a directive prohibiting recipients of EPA grants from serving on the agency's federal advisory committees in order to avoid a conflict of interest,<sup>20</sup> despite the fact that at least one federal appeals court has previously found "[w]orking for or receiving a grant from [an agency], or co-authoring a paper with a person affiliated with the [agency], does not impair a scientist's ability to provide technical, scientific peer review of a study sponsored by [the agency]."<sup>21</sup> EPA is one of the primary sources of environmental-science funding in the country; thus, Pruitt's directive effectively purged leading university researchers from EPA's advisory boards. Notably, the directive did not impose parallel prohibitions on experts compensated by, or affiliated with, industries regulated by EPA—opening the door for industry-funded experts to dominate the agency's scientific advisory committees. Ultimately, two federal courts struck down the directive in 2020.<sup>22</sup> However, the directive successfully incapacitated EPA's advisory councils for the majority of Trump's four years in office.

In addition to Pruitt's directive, EPA changed its appointment processes for vetting members of the Science Advisory Board and the Clean Air Scientific Advisory Committee (CASAC), resulting in significant changes to the committees' composition, regional affiliation, and turnover rate.<sup>23</sup> In both cases, EPA did not include staff rationales for recommending

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20. See EPA, Directive on Strengthening and Improving Membership on EPA Federal Advisory Committees (Oct. 31, 2017), [https://www.epa.gov/sites/production/files/2017-10/documents/final\\_draft\\_fac\\_directive-10.31.2017.pdf](https://www.epa.gov/sites/production/files/2017-10/documents/final_draft_fac_directive-10.31.2017.pdf) (directing that no members serving on EPA federal advisory committees "be currently in receipt of EPA grants, either as principal investigator or co-investigator, or in a position that otherwise would reap substantial benefit from an EPA grant.").

21. *Cargill, Inc. v. United States*, 173 F.3d 323, 339 (5th Cir. 1999).

22. See *NRDC v. EPA*, No. 19cv5174 (DLC), 2020 WL 2769491, at \*1 (S.D.N.Y. Apr. 15, 2020) (finding that EPA "failed to articulate any reason for changing [EPA's] longstanding practice of permitting EPA grant recipients to serve on EPA advisory committees."); *Physicians for Soc. Responsibility v. Wheeler*, 956 F.3d 634, 647–48 (D.C. Cir. 2020) (finding that EPA violated the Administrative Procedure Act by failing to address how the directive affected EPA's capacity to satisfy its statutory mandates); see also Joseph Goffman & Laura Bloomer, *DC Circuit Weighs in on EPA's Science Mandates*, HARV. ENV'T & ENERGY L. PROGRAM (May 7, 2020), [https://eelp.law.harvard.edu/2020/05/dc-circuit-weighs-in-on-EPA-s-science-mandates/#\\_ftnref8](https://eelp.law.harvard.edu/2020/05/dc-circuit-weighs-in-on-EPA-s-science-mandates/#_ftnref8).

23. See generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-280, EPA ADVISORY COMMITTEES: IMPROVEMENTS NEEDED FOR THE MEMBER APPOINTMENT PROCESS (2019) (reviewing issues related to EPA's selection of advisory committee members).

candidates deemed to be the best qualified and most appropriate for achieving balanced committee membership, as recommended by EPA's *Federal Advisory Committee Handbook*.<sup>24</sup> Instead, agency leadership claimed they held a series of briefings with EPA staff, and then appointed committee members from the entire list of nominees.<sup>25</sup> EPA also failed to ensure that committee members appointed as special government employees (SGEs) met federal ethics requirements, and EPA did not conduct periodic ethics reviews, which would have evaluated the quality of SGEs' financial disclosures.<sup>26</sup> These changes facilitated a 25% drop in committee members affiliated with academic institutions, and a 60–70% turnover rate in the first two years of the Trump Administration.<sup>27</sup>

The Trump EPA further sought to undermine the CASAC, which plays a crucial role in reviewing the National Ambient Air Quality Standards (NAAQS). Under the CAA, EPA has a statutory duty to set these standards at levels that protect the public health and welfare with an adequate margin of safety.<sup>28</sup> The CAA tasks an independent group of experts—the CASAC—with assisting EPA in reviewing and revising these standards every five years.<sup>29</sup> With a focus on scientific assessment, the CASAC reviews all relevant documents, which are also made available for public comment.<sup>30</sup> The CASAC then issues its recommendations on the NAAQS to the agency. If EPA declines to follow the CASAC's advice, it must provide “substantial evidence” supporting an alternative determination.<sup>31</sup> Thus, the CASAC not only informs how stringently EPA sets these bedrock air quality standards, but also the burden of persuasion federal courts place on the agency should it set or leave in place standards less stringent than those recommended by the CASAC.

Given the power of the CASAC to influence the NAAQS, the Trump EPA prioritized replacing CASAC members with industry affiliates. Between 2017 and 2018, EPA made the unprecedented move of replacing the entire seven-member CASAC panel.<sup>32</sup> Traditionally, EPA has also

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24. *Id.* at 17.

25. *Id.*

26. *Id.* at 15.

27. *Id.* at 27–28.

28. Clean Air Act, 42 U.S.C. § 7409(b)(1) (2012).

29. *Id.* § 7409(d)(2)(B).

30. Joe Goffman & Laura Bloomer, *The Legal Consequences of EPA's Disruption of the NAAQS Process*, HARV. ENV'T & ENERGY L. PROGRAM (Sept. 30, 2019), <https://eelp.law.harvard.edu/2019/09/the-legal-consequences-of-EPAs-disruption-of-the-naaqs-process/>.

31. *Murray Energy Corp. v. EPA*, 936 F.3d 597, 614 (D.C. Cir. 2019) (quoting *Mississippi v. EPA*, 744 F.3d 1334, 1355 (D.C. Cir. 2013)).

32. Goffman & Bloomer, *The Legal Consequences of EPA's Disruption of the NAAQS Process*, *supra* note 30.



convened two auxiliary panels of experts to assist the CASAC in reviewing the NAAQS for particulate matter (PM) and ground-level ozone, two common but harmful air pollutants that can cause severe or even fatal respiratory and cardiovascular problems.<sup>33</sup> The Trump EPA, however, refused to convene an ozone review panel and disbanded the 26-member panel formed by the Obama EPA to review the PM NAAQS. Recognizing that they lacked the expertise necessary to assess PM, the CASAC asked that a PM panel be reassembled to advise and interact with the committee.<sup>34</sup> In response, Administrator Wheeler unilaterally appointed a panel of 12 consultants to whom the CASAC had only limited access in developing the PM and ozone NAAQS.<sup>35</sup> The appointed panelists included one self-described “amateur epidemiologist”; two people endorsed by the National Cattlemen’s Beef Association, which unsuccessfully challenged EPA’s reduction to the 2012 PM NAAQS; and two consultants nominated by the National Rural Electric Cooperative Association, which opposed EPA’s 2015 reduction to the ozone NAAQS.<sup>36</sup> Eighteen former members of the CASAC Ozone Review Panel issued a letter condemning EPA’s changes to the NAAQS review process as “collectively harmful to the quality, credibility, and integrity of EPA’s scientific review process and to CASAC as an advisory body,” noting such changes were made “without advance notice to, or input from, the CASAC, cognizant EPA staff, or the public.”<sup>37</sup>

Finally, EPA corrupted the way these scientific advisory committees make decisions, replacing transparent, democratic processes with closed-door meetings that concentrated decision-making power with political appointees. In February 2020, Administrator Wheeler issued a memorandum fundamentally altering how EPA engages with its Science

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33. *Criteria Air Pollutants*, EPA, <https://www.EPA.gov/criteria-air-pollutants> (last updated Mar. 22, 2021).

34. Letter from Dr. Louis Anthony Cox Jr. to Andrew R. Wheeler, EPA Adm’r (Apr. 11, 2019), [https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebReportsLastMonthCASAC/6CBCBCC3025E13B4852583D90047B352/\\$File/EPA-CASAC-19-002+.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebReportsLastMonthCASAC/6CBCBCC3025E13B4852583D90047B352/$File/EPA-CASAC-19-002+.pdf) (“The CASAC recommends that the EPA reappoint the previous CASAC PM panel (or appoint a panel with similar expertise)” as well as add expertise in several related scientific areas.).

35. *Administrator Wheeler Announces New CASAC Member, Pool of NAAQS Subject Matter Experts*, EPA (Sept. 13, 2019), <https://www.EPA.gov/newsreleases/administrator-wheeler-announces-new-casac-member-pool-naaqs-subject-matter-experts>.

36. Sean Reilly, *Documents Expose Ties Among EPA Panel’s Experts*, E&E NEWS (Feb. 7, 2020), <https://www.eenews.net/stories/1062289617>.

37. Letter from H. Christopher Frey, Ph.D., et al., former CASAC Ozone Review Panel members, to Andrew R. Wheeler, EPA Adm’r (Dec. 2, 2019), [https://yosemite.EPA.gov/sab/sabproduct.nsf/B2AF0B23ABE6A60E852584C4007312E3/\\$File/EPA+CASAC+O3+Review+ISA+PA+Letter+191202+Final.pdf](https://yosemite.EPA.gov/sab/sabproduct.nsf/B2AF0B23ABE6A60E852584C4007312E3/$File/EPA+CASAC+O3+Review+ISA+PA+Letter+191202+Final.pdf).

Advisory Board.<sup>38</sup> The Board is an independent body of almost 50 experts that provides scientific and technical advice to EPA during the internal development of regulations.<sup>39</sup> The Board's founding statute requires the Board to "make every effort . . . to maximize public participation and transparency," including making its meetings and reports public.<sup>40</sup> Wheeler's memo contravened this mandate, instead requiring that EPA staff meet privately with the Board chair and a limited number of Board members to first determine which agency proposals merit Board review.<sup>41</sup> The memo also delayed the Board's review of a rule until after the proposed rule was publicly released,<sup>42</sup> limiting the Board's influence on EPA rulemaking. As noted in a letter from Congresswoman Eddie Bernice Johnson, the chairwoman of the House Committee on Science, Space, and Technology, the memorandum also contravened the Board's authorizing statute, which requires the Administrator to provide the entire Board with a proposed regulation when it provides those regulations to another agency.<sup>43</sup> Congresswoman Johnson also noted that giving the Board chair the power to decide which EPA documents warrant scientific review "eliminate[s] participation of independent science organizations, individual scientists and other outside stakeholders in the [Board's] prioritization process."<sup>44</sup>

These changes to EPA's advisory committees had direct, tangible effects on health-based air pollution standards. In August 2020, EPA proposed to not update the current NAAQS for PM and ground-level ozone, despite evidence that tightening standards was necessary to adequately protect public health.<sup>45</sup> Forty legal scholars commented on the proposal:

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38. Memorandum from Andrew R. Wheeler, EPA Adm'r, on Science Advisory Board Engagement Process for Review of Regulatory Action Memorandum to EPA staff (Feb. 25, 2020), [https://yosemite.EPA.gov/sab/sabproduct.nsf/WebBOARD/RegReviewProcess/\\$File/SAB%20Engagement%20Process%20re%20Regulatory%20Actions.pdf](https://yosemite.EPA.gov/sab/sabproduct.nsf/WebBOARD/RegReviewProcess/$File/SAB%20Engagement%20Process%20re%20Regulatory%20Actions.pdf).

39. Laura Bloomer, *Cutting Science Advisors Out of the Decision Making Process*, HARV. ENV'T & ENERGY L. PROGRAM (Apr. 29, 2020), <https://eelp.law.harvard.edu/2020/04/cutting-science-advisors-out-of-the-decision-making-process/>.

40. Clean Air Act, 42 U.S.C. § 4365(h) (2012).

41. Wheeler Memo, *supra* note 38.

42. *Id.*

43. Letter from Eddie Bernice Johnson, Chairwoman of the Comm. on Sci., Space & Tech, House of Representatives, to Andrew Wheeler, EPA Adm'r (Feb. 11, 2020), <https://science.house.gov/imo/media/doc/2.11.2020%20Letter%20to%20Administrator%20Wheeler%20regarding%20SAB%20Memo.pdf>.

44. *Id.*

45. *40 Law Scholars Oppose EPA's Changes to the Ozone Standards-Setting and Science-Advising Process*, HARV. ENV'T & ENERGY L. PROGRAM (Oct. 13, 2020), <https://eelp.law.harvard.edu/2020/10/40-law-scholars-oppose-epas-changes-to-the-ozone-standards-setting-and-science-advising-process/>.

[R]ecent changes to the science advisory committee's role and composition render the [proposed ozone rule] legally deficient, and will result in standard-setting that contravenes Congress's will . . . [T]he current CASAC lacks the depth and breadth of expertise necessary to review proposed [NAAQS] as Congress intended, to ensure the application of the best and latest science to standard-setting.<sup>46</sup>

In 2020, the Trump EPA finalized its proposal declining to update the PM NAAQS due to “important uncertainties” in the evidence regarding adverse health effects of PM below current standards.<sup>47</sup> The rule ignored a report published in January 2020 by EPA's Office of Air Quality Planning and Standards, which found that the current primary PM standards could allow “a substantial number” of premature deaths in the U.S.<sup>48</sup> Then, on December 31, 2020, the Trump EPA hastily finalized a rule maintaining the ozone NAAQS.<sup>49</sup> In the rule, EPA argued it had “good cause” to make the rule effective immediately (and thus immune to a potential 60-day delay and reconsideration under the incoming Biden Administration<sup>50</sup>) in order to “provide regulatory certainty as soon as possible . . .”<sup>51</sup> Since the rule's publication, various coalitions of states, public health, and environmental organizations have challenged both the PM and ozone NAAQS rules,

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46. Sean B. Hecht et al., Comment Letter on Proposed Action: Review of the Ozone National Ambient Air Quality Standards, 85 Fed. Reg. 49,830 (Oct. 1, 2020), <https://beta.regulations.gov/comment/EPA-HQ-OAR-2018-0279-0465> (click “Download” under “Attachments”).

47. Review of the National Ambient Air Quality Standards for Particulate Matter, 85 Fed. Reg. 82,684, 82,710 (Dec. 18, 2020) (codified at 40 C.F.R. pt. 50).

48. *National Ambient Air Quality Standards for PM and Ozone*, HARV. ENV'T & ENERGY L. PROGRAM (July 15, 2020), <https://eelp.law.harvard.edu/2020/07/national-ambient-air-quality-standards-for-pm-and-ozone/>; Review of the National Ambient Air Quality Standards for Particulate Matter, 85 Fed. Reg. 82,684, 82,694, 82,705 (Dec. 18, 2020); OFF. OF AIR QUALITY PLAN. & STANDARDS, EPA-452/R-20-002, POLICY ASSESSMENT FOR THE REVIEW OF THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR PARTICULATE MATTER 3-105 (2020), [https://www.epa.gov/sites/production/files/2020-01/documents/final\\_policy\\_assessment\\_for\\_the\\_review\\_of\\_the\\_pm\\_naqs\\_01-2020.pdf](https://www.epa.gov/sites/production/files/2020-01/documents/final_policy_assessment_for_the_review_of_the_pm_naqs_01-2020.pdf).

49. Review of the Ozone National Ambient Air Quality Standards, 85 Fed. Reg. 87,256 (Dec. 31, 2020) (codified at 40 C.F.R. pt. 50).

50. If a rule has been finalized, but not yet taken effect, the responsible agency can delay the rule's effective date for 60 days and reconsider the rule, provided the delay is reasonable and satisfies the relevant requirements under the APA. Cole Jermyn & Laura Bloomer, *How to Undo the Trump-Era Regulatory Rollbacks to Redo Environmental Protection*, HARV. ENV'T & ENERGY L. PROGRAM 4-5 (Apr. 23, 2020), <https://eelp.law.harvard.edu/wp-content/uploads/How-to-Undo-the-Trump-Era-Regulatory-Rollbacks-to-Redo-Environmental-Protection-FINAL.pdf>.

51. 85 Fed. Reg. at 87,256.

pointing to EPA's blatant disregard of the scientific consensus on the need for stronger standards with respect to both pollutants.<sup>52</sup>

*C. Step 3: Preclude EPA from Relying on Critical Public Health Studies*

Under President Trump, EPA attempted to severely limit which scientific studies the agency could rely on when issuing regulations, preventing the agency from issuing stricter health-based pollution restrictions. The most infamous of these attempts was EPA's so-called "secret science" rule, finalized only weeks before President Biden took office. The proposed rule, "Strengthening Transparency in Regulatory Science," would have automatically blocked the agency from relying on studies if the underlying data were not made publicly available.<sup>53</sup> The proposal thus sought to bar EPA from relying on epidemiological studies that link negative health outcomes to increased pollution exposure using anonymized or confidential health data, or data that are no longer available or accessible.<sup>54</sup>

Ninety-seven medical and public health experts submitted comments to EPA in response to the proposed rule, warning that it would not only frustrate EPA's mandate to rely on the "best available science," but also "contravene[] five decades of EPA practice" and the agency's statutory mandates under the CAA, the Safe Drinking Water Act (SDWA), and the Toxic Substances Control Act (TSCA).<sup>55</sup> Furthermore, none of the statutes EPA invoked as support for the proposed rule limit EPA from relying on studies in which the underlying data are not publicly available.<sup>56</sup> The D.C.

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52. *National Ambient Air Quality Standards for PM and Ozone*, *supra* note 48 (chronicling the development of the PM and ozone NAAQS under former Presidents Obama and Trump, and the resulting litigation).

53. Strengthening Transparency in Regulatory Science, 83 Fed. Reg. 18,768, 18,768–69 (proposed Apr. 30, 2018) (codified at 40 C.F.R. pt. 30).

54. For example, a key study supporting EPA's regulations limiting childhood lead exposure from air pollution, water systems, and paint analyzed lead concentrations in children's teeth. That study was conducted more than forty years ago, many of the scientists are no longer alive, and it is unclear whether the underlying data are available. See EELP Clinic at Harvard L. Sch., Comment Letter on Proposed Rule, Strengthening Transparency in Regulatory Science, 83 Fed. Reg. 18,768 (Aug. 7, 2018), <http://eelplaw.harvard.edu/wp-content/uploads/Harvard-Comments-re-Docket-ID-No.-EPA-HQ-OA-2018-0259.pdf>.

55. *Id.*

56. For example, in the proposed rule, EPA points generally to section 103 of the Clean Air Act, which outlines EPA's research and development program under the statute. 83 Fed. Reg. at 18,769. However, nothing in that section grants EPA the authority to exclude certain studies from its research program, let alone rulemaking unrelated to the research program, nor distinguishes studies where the underlying data are publicly available from those where the data are not. 42 U.S.C. § 7403; *see also* Dan Farber, *The Questionable Legal Basis of the "Transparency" Proposal*, LEGAL PLANET (Apr. 30, 2018),

Circuit has also rejected the idea underlying this rule, stating in 2002 that “requiring agencies to obtain and publicize the data underlying all studies on which they rely ‘would be impractical and unnecessary.’”<sup>57</sup>

EPA finalized the secret science rule on January 6, 2021, claiming it was “much narrower” in scope than the proposed rule.<sup>58</sup> However, the final rule still broadly applied to the agency’s use of “dose-response data” in both “significant regulatory actions” and the general sharing of “influential scientific information,” such as information on EPA’s website.<sup>59</sup> Unlike the proposed rule, the final rule allowed EPA to consider “pivotal science” for which the underlying data are not available, but those studies would still receive “lesser consideration.”<sup>60</sup> Alternatively, the EPA administrator could issue an exemption on a case-by-case basis, provided the rationale for such an exemption was documented and made public. In either case, however, the rule would arbitrarily force the agency to assign less weight to these crucial epidemiological studies, or leap over several extralegal procedural hurdles that simultaneously concentrated decision-making power with political appointees.

Public health experts were especially concerned with the rule’s effect on two studies—the Harvard Six Cities Study and the American Cancer Society’s Cancer Prevention Study II. These studies form the bedrock of particulate matter (PM) pollution regulations, finding that people exposed to more PM are more likely to die prematurely.<sup>61</sup> In these studies, the researchers tracked personal medical, occupational, and home location data for tens of thousands of participants for nearly two decades—on the condition that the participants’ personal information would remain confidential.<sup>62</sup> After the rule was finalized, Administrator Wheeler stated that “‘pivotal studies’ like the Six Cities Study ‘will [not] automatically be

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<https://legal-planet.org/2018/04/30/the-questionable-legal-basis-of-the-transparency-proposal/> (explaining how the cited provisions provide “flimsy” support for the proposed rule).

57. *Am. Trucking Ass’ns, Inc. v. EPA*, 283 F.3d 355, 372 (D.C. Cir. 2002) (citing National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,689 (July 18, 1997) (codified at 40 C.F.R. pt. 50)).

58. *Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information*, 86 Fed. Reg. 469, 470 (Jan. 6, 2021) (codified at 40 C.F.R. pt. 30). Like the ozone NAAQS rule, EPA asserted “good cause” to make the rule effective immediately. *Id.* at 472.

59. Hannah Perls, *The Downfall of the “Secret Science” Rule, and What It Means for Biden’s Environmental Agenda*, HARV. ENV’T & ENERGY L. PROGRAM (Mar. 5, 2021), <https://eelp.law.harvard.edu/2021/03/final-secret-science-rule/> (quoting 86 Fed. Reg. at 469, 470).

60. 85 Fed. Reg. at 477.

61. *EPA is Planning to Limit the Science It Considers*, HARV. ENV’T & ENERGY L. PROGRAM, <https://eelp.law.harvard.edu/2018/04/changing-what-science-the-EPA-will-consider-part-1/> (last updated Jan. 16, 2020).

62. *Id.*

cut from review by the agency,” provided the EPA administrator can justify the use of those studies and is willing to publish their reasoning (which could further subject the decision to legal challenges).<sup>63</sup> Alternatively, EPA could rely on these studies, but it would have to give them “lesser weight,” based on the rule’s arbitrary and unfounded rationale that scientific studies are less reliable if the underlying data are not publicly available. Thus, by preventing EPA from relying on the best available epidemiological science, the secret science rule would have severely inhibited or even jeopardized the agency’s ability to issue air and other pollution standards protective of human health.<sup>64</sup>

The final secret science rule also invited the agency to conduct additional peer review of “pivotal” studies, even if those studies had already undergone independent peer review.<sup>65</sup> In the proposed rule, EPA argued that such provisions were necessary to promote transparency and validate the science underlying EPA rulemaking.<sup>66</sup> But peer-review within the scientific community already fulfills these goals without undermining EPA’s statutory duty to consider the “best available science.”<sup>67</sup> Peer review ensures independent scientific organizations completely reanalyze these studies, and their results are confirmed by repeated similar studies from across the globe. The proposed rule also failed to explain why peer review and other existing practices are insufficient. EPA’s own Science Advisory Board issued a report in April 2020 finding “minimal justification provided in the Proposed Rule for why existing procedures and norms . . . are inadequate, and how the Proposed Rule will improve transparency and the scientific integrity of the regulatory outcomes in an effective and efficient manner.”<sup>68</sup> The Board also cautioned that the rule might “decrease efficiency and reduce scientific integrity,” and that EPA failed to conduct the “robust analysis” necessary to avoid “serious and perverse outcomes.”<sup>69</sup>

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63. Perls, *The Downfall of the “Secret Science” Rule*, *supra* note 59; Juliet Eilperin & Brady Dennis, *EPA Finalizes Rule to Limit Science Behind Public Health Safeguards*, THE WASH. POST (Jan. 5, 2021), <https://www.washingtonpost.com/climate-environment/2021/01/04/epa-scientific-transparency/>.

64. *Id.*

65. *Id.*

66. *EPA is Planning to Limit the Science it Considers*, *supra* note 61.

67. *Id.* (“EPA’s Peer Review Policy . . . sets the expectation that EPA will use the best available science, relying on the professionally-developed peer-review process to ensure its credibility.”).

68. OFF. OF THE ADM’R SCI. ADVISORY BD., SCIENCE ADVISORY BOARD (SAB) CONSIDERATION OF THE SCIENTIFIC AND TECHNICAL BASIS OF EPA’S PROPOSED RULE TITLED *STRENGTHENING TRANSPARENCY IN REGULATORY SCIENCE* 18 (2020), [https://yosemite.epa.gov/sab/sabproduct.nsf/0/2DB3986BB8390B308525855800630FCB/\\$File/EPA-SAB-20-005.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/0/2DB3986BB8390B308525855800630FCB/$File/EPA-SAB-20-005.pdf).

69. *Id.*

In recognition of the secret science rule's debilitating impact on rulemaking across EPA, President Biden issued an executive order on his first day in office instructing the agency to revise or rescind the rule "as soon as possible," one of only two rules to be reviewed on such a short deadline.<sup>70</sup> At the same time, Congressional Democrats were reportedly considering using the Congressional Review Act to undo the rule.<sup>71</sup> On February 1, 2021, a federal court vacated the rule, based on a finding that EPA improperly relied on a federal statute governing procedural rules to issue the secret science rule, which was substantive in nature.<sup>72</sup> However, the secret science rule remains an emblematic example of the Trump Administration's deregulatory pursuits—especially the lengths to which EPA tried to limit its own ability to comply with its statutory mandates to issue regulations protective of public health.

## II. STRATEGY 2: RESTRICT THE PUBLIC'S SCRUTINY OF AND PARTICIPATION IN AGENCY DECISION-MAKING

Where environmental regulations fall short, public participation and accountability mechanisms serve as a check to ensure that EPA's decisions align with its mandate to safeguard public health and the environment. For these mechanisms to function properly, however, EPA must provide the public with accessible, timely information. And in turn, the public must have opportunities to comment on and participate in agency decision-making processes. That participation must therefore be inclusive and meaningful,<sup>73</sup> and these processes must account for resource and power differentials between regulated industry and the communities most affected by industrial activity. These processes must also create corrective mechanisms to ensure that people and communities with fewer resources can participate in agency decision-making. Only through this transparent and equitable give-and-take of information and feedback can EPA be accountable to the public's needs.

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70. Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037, 7038 (Jan. 20, 2021).

71. Juliet Eilperin & Dino Grandoni, *In Trump's Last Days, a Spree of Environmental Rollbacks*, THE WASH. POST (Jan. 15, 2021), <https://www.washingtonpost.com/climate-environment/2021/01/15/trump-environmental-rollbacks/>.

72. Perls, *The Downfall of the "Secret Science" Rule*, *supra* note 59 (citing *Env't Def. Fund v. EPA*, No. 4:21-CV-00003, 2021 WL 402824 (D. Mont. 2021)).

73. EPA's commitment to foster environmental justice includes the "meaningful involvement" of communities disparately impacted by environmental harms. *See Environmental Justice*, EPA <https://www.EPA.gov/environmentaljustice> (last updated Feb. 1, 2021).

EPA's statutory mandates often include specific mechanisms promoting citizen oversight of agency decisions.<sup>74</sup> These mechanisms are evidence of Congress's recognition that public accountability plays an essential role in healthy, responsive governance. Such mechanisms are especially critical in the environmental realm, where the primary stakeholders (project proponents) often hold disproportionate economic and political leverage in decision-making process over affected people and communities, who may be dispersed, disconnected, and living at the intersection of other structural injustices, including racism and poverty.

The Trump EPA intensified these disparities by blocking the transparent dissemination of information, dismantling public participation and accountability mechanisms, and imposing procedural burdens to discourage affected communities from rightfully challenging agency decisions. At the same time, the Administration created *more* opportunities for regulated states and industry to participate in agency decision-making, thus facilitating the development and approval of projects while simultaneously sidelining, or silencing, the very communities and stakeholders most vulnerable to those projects' impacts.

*A. Step 1: Eliminate or Restrict Meaningful Consultation Mechanisms*

In his first 100 days, President Trump eliminated Obama-era programs that promoted meaningful consultation with communities disparately impacted by environmental harms or proposed agency action. One such program, the Bering Sea Intergovernmental Tribal Advisory Council, was created as part of a 2016 executive order addressing climate change-related impacts in the Northern Bering Sea.<sup>75</sup> The order established a "policy of the United States to recognize and value the participation of Alaska Native tribal governments in decisions affecting the Northern Bering Sea Climate Resilience Area and for all agencies to consider traditional knowledge in decisions affecting the . . . Area."<sup>76</sup> In April 2017, President Trump revoked the order as part of "Implementing an America-First Offshore Energy

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74. *See, e.g.*, 33 U.S.C. § 1365 (authorizing citizen suits under the CWA against "any person" to address certain statutory violations, including suits against the EPA Administrator for an alleged failure to perform certain nondiscretionary duties); 42 U.S.C. § 7604 (authorizing citizen suits under the CAA to address certain statutory violations, including against the EPA Administrator for failure to perform certain nondiscretionary duties); 16 U.S.C. § 1540(g) (authorizing citizen suits under the Endangered Species Act (ESA) to address certain statutory violations, including against the Secretary of the Interior or the Secretary of Commerce for an alleged failure to perform certain nondiscretionary duties).

75. Exec. Order No. 13,754, 81 Fed. Reg. 90,669 (Dec. 14, 2016).

76. *Id.*



Strategy”<sup>77</sup> without consulting Alaska Native groups (despite the Administration’s claims to the contrary).<sup>78</sup> In response, the Bering Sea Elders Group, representing 39 coastal Tribes, issued a statement condemning Trump’s order, noting that the,

Northern Bering Sea Climate Resilience [initiative] “was the product of years of tireless work by local Alaskans, Tribes and nonprofits who – when faced with the devastating effect of climate change and the dramatic increase of large scale shipping right [on] our front doorstep – sought to create a way for us to have a say in what happens in and to our waters.”<sup>79</sup>

DOI also evaded public input on environmental reviews, complying with public participation laws “in form only,”<sup>80</sup> while restricting public participation mechanisms through regulatory rollbacks. In 2017, Secretary Bernhardt issued Secretarial Order 3355, directing bureaus to pursue new categorical exclusions under the National Environmental Policy Act (NEPA).<sup>81</sup> The order also directed bureaus to complete environmental impact statements (EISs) within one year and shorten most environmental reviews to 150 pages or less.<sup>82</sup> Categorical exclusions preclude public input by excluding projects from NEPA review, while the timing and length restrictions limit meaningful public engagement.<sup>83</sup> When my colleagues at EELP conducted interviews with DOI employees, those employees also highlighted changes to DOI’s public hearings, such as limiting the number of hearings per project and holding those hearings in inconvenient locations.<sup>84</sup> DOI officials also routinely ignored oversight requests from Congress, leading the House Natural Resources Committee to threaten them

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77. Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (May 3, 2017).

78. Diana Haecker, *Trump Issues Executive Order Revoking Northern Bering Sea Protection and Tribal Participation*, THE NOME NUGGET (May 5, 2017), <http://www.nomenugget.com/news/trump-issues-executive-order-revoking-northern-bering-sea-protection-and-tribal-participation>.

79. *Id.*

80. BLOOMER ET AL., *MANAGING PUBLIC LANDS*, *supra* note 2, at 7.

81. Dep’t of the Interior, Order. No. 3355, Streamlining National Environmental Policy Act Reviews and Implementation of Executive Order 13807, “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects” (Aug. 31, 2017), [https://www.doi.gov/sites/doi.gov/files/elips/documents/3355\\_-\\_streamlining\\_national\\_environmental\\_policy\\_reviews\\_and\\_implementation\\_of\\_executive\\_order\\_13807\\_establishing\\_discipline\\_and\\_accountability\\_in\\_the\\_environmental\\_review\\_and\\_permitting\\_process\\_for.pdf](https://www.doi.gov/sites/doi.gov/files/elips/documents/3355_-_streamlining_national_environmental_policy_reviews_and_implementation_of_executive_order_13807_establishing_discipline_and_accountability_in_the_environmental_review_and_permitting_process_for.pdf).

82. *Id.*

83. BLOOMER ET AL., *MANAGING PUBLIC LANDS*, *supra* note 2, at 7–8.

84. *Id.* at 8.

with subpoenas.<sup>85</sup> The Bureau of Land Management (BLM) also finalized a rollback in December 2020 that eliminated the 15-day protest period after a decision is made about forest management projects, including timber harvests and sales.<sup>86</sup> BLM argued that this protest period was “duplicative” of public participation opportunities under NEPA, conveniently ignoring the agency’s own efforts to eliminate or curtail NEPA review.<sup>87</sup>

The Trump Administration also sought to curtail NEPA review government-wide, threatening one of the most crucial pathways through which communities affected by proposed agency actions can comment on and contribute to agency decision-making. In July 2020, the Council on Environmental Quality (CEQ) issued the first comprehensive revision of the NEPA rules since 1978.<sup>88</sup> The final rule excludes several projects from NEPA review and reduces the number and type of impacts and alternatives considered as part of that review.<sup>89</sup> The rule also raises the bar for public comments on NEPA documents, requiring more detailed analysis and information from commenters while limiting opportunities for public engagement in other stages of the environmental review process.<sup>90</sup> For example, the final rule requires comments on draft EISs to be “timely received and at a level of specificity where they can be meaningfully taken into account,” or else the comments will be thrown out.<sup>91</sup> The rule also discourages public comment by allowing agencies to require commenters to post a bond to cover the potential damages that may result from administrative delays.<sup>92</sup> These changes will result in community groups being automatically excluded from commenting on exempted projects, including pipelines, large-scale logging operations, waste incinerators, and highways, and being blocked from commenting on other projects if they fail to satisfy the more stringent commenting requirements or are unable to afford a required bond payment. The Trump Administration thus succeeded in simultaneously fast-tracking the approval process for large-scale

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85. *Id.*

86. Forest Management Decision Protest Process and Timber Sale Administration, 85 F.R. 82,359, 82,371 (Dec. 18, 2020) (codified at 43 C.F.R. pts. 5000, 5400, 5420, 5440, 5450, 5460, 5470, 5500).

87. 85 Fed. Reg. at 82,360.

88. *NEPA Environmental Review Requirements*, HARV. ENV'T & ENERGY L. PROGRAM (Aug. 15, 2018), <https://eelp.law.harvard.edu/2018/08/NEPA-environmental-review-requirements/>.

89. *See infra* Part III.A (analyzing the Trump Administration’s undermining of NEPA); *see also NEPA Environmental Review Requirements*, *supra* note 88 (describing the revisions to NEPA issued in July 2020).

90. *NEPA Environmental Review Requirements*, *supra* note 88.

91. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,314 (July 16, 2020) (codified at 40 CFR 1503).

92. 85 Fed. Reg. at 43,358.

polluting infrastructure and silencing or minimizing the voices of those most impacted by those projects.

*B. Step 2: Restrict Public Access to Agencies' Internal Documents and Decision-Making Processes*

In addition to limiting opportunities for the public to inform agencies' decisions, the Trump Administration insulated those decisions from legitimate public scrutiny by weakening bedrock transparency mechanisms. In June 2019, EPA issued a final rule that changed EPA's review process under the Freedom of Information Act (FOIA), a transparency law that allows the public to inquire into agency decision-making by submitting a formal request.<sup>93</sup> The new rule, which was posted without prior notice and without a public comment period, requires all FOIA requests to be sent to EPA's headquarters, where they must be approved by a political appointee or other agency official.<sup>94</sup> That official decides which portions of the document are "responsive" to the request, and thus should be released to the public, and which portions should be withheld.<sup>95</sup> This rule upends previous agency practice in which EPA's regional offices would produce responsive documents in their entirety unless the document contained confidential or FOIA-exempt material.<sup>96</sup> The new rule thus politicizes the FOIA process by empowering political appointees to redact or withhold documents that would otherwise be available for public examination. Critics also feared that the new rule will delay EPA's response to FOIA requests by creating a bottleneck in which officials at EPA's headquarters must review and approve the release of "responsive" documents.

One month after EPA published its final FOIA rule, a bipartisan coalition of legislators sent a letter to Administrator Wheeler, warning that the rule "undermin[es] the American people's right to access information

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93. Freedom of Information Act, 5 U.S.C. § 552 (2018); DOI also updated its FOIA review processes to restrict public access to information, delay FOIA responses, and politicize FOIA decisions by instituting "political awareness" review, in which political appointees are made aware of upcoming FOIA productions that include their names. BLOOMER ET AL., *MANAGING PUBLIC LANDS*, *supra* note 2, at 8.

94. Freedom of Information Act Regulations Update, 84 Fed. Reg. 30,028, 30,029–30 (June 26, 2019) (codified at 40 C.F.R. pt. 2).

95. *Id.* at 30,032–33; James Pollack, *Restricting Access to Public Records*, HARV. ENV'T & ENERGY L. PROGRAM (July 19, 2019), <https://eelp.law.harvard.edu/2019/07/EPA-restricts-access-to-public-records/>.

96. Libby Dimenstein, *Legal and Legislative Challenges to EPA's FOIA Restrictions*, HARV. ENV'T & ENERGY L. PROGRAM (Feb. 26, 2020), <https://eelp.law.harvard.edu/2020/02/legal-and-legislative-challenges-to-EPAs-foia-restrictions/>.

from the EPA” and contradicts federal precedent.<sup>97</sup> The coalition pointed to a 2016 decision from the D.C. Circuit, which found “no statutory basis for redacting ostensibly non-responsive information from a record deemed responsive” under FOIA.<sup>98</sup> The court affirmed that “the sole basis on which [an agency] may withhold particular information within [a responsive] record is if the information falls within one of the statutory exemptions from FOIA’s disclosure mandate.”<sup>99</sup> In the words of the coalition, EPA’s “rule appears to authorize exactly what the D.C. Circuit’s holding prohibits.”<sup>100</sup>

In addition to limiting access to EPA documents, the agency also eliminated a longstanding practice that facilitates the public’s ability to understand EPA’s otherwise technical, jargon-filled assessments. Since 1984, EPA has assigned a letter-number rating to draft EISs issued by other agencies.<sup>101</sup> These ratings reflect both the quality of the analysis and the degree of environmental impact associated with the project.<sup>102</sup> These ratings provide a quick and easy way for people concerned about proposed projects to assess the potential health risks associated with that project. The Trump EPA abruptly discontinued this rating system in October 2018, citing concerns with efficiency and consistency in the ratings.<sup>103</sup> However, in reversing this nearly four-decades-old policy, EPA only consulted other federal agencies, not the general public. EPA thus made it more difficult for communities to assess the potential threat of proposed projects to their own health and wellbeing before these projects are finalized.

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97. Letter from Senators Patrick Leahy, Diane Feinstein, Charles Grassley & John Cornyn, United States Senate, to Andrew Wheeler, EPA ADM’R (July 22, 2019), <https://www.leahy.senate.gov/press/senators-leahy-grassley-feinstein-and-cornyn-raise-concerns-about-epas-foia-rule>.

98. *Am. Immigr. Lawyers Ass’n v. Exec. Off. for Immigr. Rev.*, 830 F.3d 667, 670 (D.C. Cir. 2016).

99. *Id.*

100. Letter from Senators to Andrew Wheeler, *supra* note 97.

101. Section 309 of the CAA allows EPA to review EISs prepared by other agencies and requires EPA to make those reviews available to the public. Clean Air Act, 42 U.S.C. § 7609 (2012).

102. *Environmental Impact Statement Rating System Criteria*, EPA, <https://www.EPA.gov/NEPA/environmental-impact-statement-rating-system-criteria#:~:text=EPA%20discontinued%20the%20use%20of,system%20on%20October%2022%2C%20> (last updated on Oct. 22, 2018).

103. *See* Memorandum from Brittney Bolen, EPA Assoc. Adm’r, on Changes to EPA Environmental Rating Review System to EPA Regional Administrators (Oct. 22, 2018), [https://www.epa.gov/sites/production/files/2018-](https://www.epa.gov/sites/production/files/2018-10/documents/memorandum_on_changes_to_epas_environmental_review_rating_process.pdf)

10/documents/memorandum\_on\_changes\_to\_epas\_environmental\_review\_rating\_process.pdf (“EPA believes that discontinuing use of the 1984 rating system will not lessen environmental protections, but will help to focus attention on resolving issues, eliminate perceptions that ratings are inconsistently applied across the Agency, and minimize any confusion on the part of our partner agencies and the public.”).

*C. Step 3: Restrict Pathways for the Public to Challenge EPA Decisions*

Several environmental laws, including the CWA and the CAA, allow citizens to challenge EPA's actions through private right-of-action provisions.<sup>104</sup> For example, seven environmental laws empower citizens to bring "deadline suits" against EPA, compelling the agency to issue rules by specific deadlines set under the statute.<sup>105</sup> These citizen suits, and the settlement agreements and consent decrees that often result, play a crucial role in ensuring that EPA complies with its mandates to set and enforce health-based standards.<sup>106</sup> Recognizing the importance of citizen suits to the enforcement of environmental laws, Congress also provided for the payment of plaintiffs' attorneys' fees.<sup>107</sup> Absent this promise to pay the complaining party's legal fees, most parties would never bring citizen suits given the often prohibitive costs of litigation.

Historically, EPA has embraced and facilitated these accountability mechanisms by working with litigants to reach settlement agreements that establish mutually agreed upon schedules and include the complaining party's statutory right to collect attorney's fees.<sup>108</sup> However, in October 2017, Administrator Pruitt issued a new directive, "Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements." Despite its name, the directive added several procedural hurdles for citizens and their attorneys seeking to compel EPA to meet its statutory obligations.<sup>109</sup> The directive required EPA to first consult states and regulated industries affected by the suit before reaching a settlement agreement, but included no parallel requirement for affected communities or members of the general public.<sup>110</sup> The directive also required EPA to "exclude the payment of attorney's fees and costs to any plaintiff or

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104. See *supra* note 74 (reviewing citizen suit provisions under the CWA, CAA, and ESA).

105. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-34, ENVIRONMENTAL LITIGATION – IMPACT OF DEADLINE SUITS ON EPA IS LIMITED 5 (2014) [hereinafter DEADLINE SUITS].

106. See, e.g., Karl S. Coplan, *Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law*, 25 COLO. NAT. RESOURCES, ENERGY & ENV'T L. REV. 61, 66–67 (2014) (assessing the impact of citizen enforcement on regulatory standards under the CWA, including increased enforcement and the development of environmental jurisprudence).

107. Goffman, *Reconstruct an Administrative Agency*, *supra* note 3, at 46.

108. *Id.*

109. See *EPA Changes Its Settlement Practices*, HARV. ENV'T & ENERGY L. PROGRAM (Feb. 26, 2018), <https://eelp.law.harvard.edu/2018/02/the-settlement-memo/>.

110. The directive states that EPA must "take any and all appropriate steps to achieve the participation of affected states and/or regulated entities." EPA, Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements (Oct. 16, 2017), <https://archive.epa.gov/epa/newsroom/directive-promoting-transparency-and-public-participation-consent-decrees-and-settlement.html>.

petitioner in the litigation.”<sup>111</sup> Taken together, these changes explicitly tilted the scales in favor of regulated industry while limiting the capacity of affected communities, and the nonprofit legal organizations that often represent them, to challenge EPA’s actions or inaction.

In the directive, EPA argued that these changes to settlement protocols are necessary to remedy past “collusion with outside groups” and “backroom deals,”<sup>112</sup> yet the directive included no evidence of such collusion, and a 2014 report from the Government Accountability Office found no basis for such claims.<sup>113</sup> Furthermore, EPA’s press release erroneously claimed the directive provided “an unprecedented level of public participation and transparency in EPA consent decrees and settlement agreements.”<sup>114</sup> More than fifty retired career EPA attorneys issued a public rebuttal “to correct the many mistakes of law and fact made in [the] October 16, 2017 Directive,” and to condemn the directive’s “patent[] bias[]” “giv[ing] regulated parties, but not other members of the public, a seat at the settlement table.”<sup>115</sup> The directive, despite EPA’s claims to the contrary, thus “work[ed] against the agency and the public’s interest in fair and efficient EPA operations and reasonable timeframes for EPA action.”<sup>116</sup> These changes to EPA’s settlement practices, combined with unprecedented attacks on public participation, accountability, and transparency mechanisms, paved the way for deregulatory action at each step of the rulemaking process.

### III. STRATEGY 3: AVOID REGULATION-TRIGGERING EVENTS

There is a basic principle embedded in all our major environmental statutes that industries should not be allowed to externalize their costs and force a nonconsenting public to bear those costs. For example, under the Administrative Procedure Act (APA), agencies must provide notice to the public of a proposed rulemaking and provide a meaningful opportunity to comment on the rule.<sup>117</sup> Under NEPA, agencies must take a holistic look at the potential individual and cumulative impacts of their proposed actions

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111. *Id.*

112. *Id.*

113. DEADLINE SUITS, *supra* note 105, at 1–3.

114. Press Release, EPA, Administrator Pruitt Issues Directive to End EPA “Sue & Settle” (Oct. 16, 2017), <https://archive.epa.gov/epa/newsreleases/administrator-pruitt-issues-directive-end-epa-sue-settle.html>.

115. Letter from Cynthia Anderson, Former Atty. Off. of Gen. Couns., et al., to Scott Pruitt, EPA Adm’r. (Nov. 13, 2017), <http://eelp.law.harvard.edu/wp-content/uploads/Response-to-Directive-re-Consent-Decrees-and-Settlements.pdf>.

116. *Id.*

117. Administrative Procedure Act, 5 U.S.C. § 553(b)–(c) (2018).

and assess whether it is fair for the public to bear those impacts. These analyses are buttressed by cost-benefit assessments, which are designed to compare the anticipated costs of regulation with the cumulative benefit to both present and future generations.

In order to limit environmental regulation, the Trump Administration changed the methodologies agencies use to decide when regulation is necessary, frustrating this core principle. These changes allowed agencies to greenlight projects that would otherwise be closed, disapproved, or subject to enhanced regulation and review. The Administration began by expanding existing regulatory exemptions, especially under NEPA, and narrowing the scope of its environmental assessments to exclude climate change-related impacts. President Trump elevated the importance of cost-benefit analyses as a prerequisite or even determining factor in agency decision-making. Agencies then transformed how these analyses are conducted by minimizing the anticipated benefits of regulation to public health and the environment. By manipulating agencies' decision-making processes, the Trump Administration preordained deregulatory outcomes while willfully ignoring or minimizing the very real and consequent harms to public health and the environment.

*A. Step 1: Expand Exemptions for Projects and Impacts Otherwise Subject to Environmental Review and Regulation*

When NEPA was signed into law in 1970, it embodied Congress's guarantee that the federal government would first consider the potential environmental consequences and alternatives of major projects or significant decisions before approving them. NEPA imposes a series of procedural requirements that force agencies to "look before you leap," that is, to perform an environmental review for each proposed "major Federal action," including the adoption of agency policy or rules, formal planning, agency programs or projects, permitting decisions, and other actions.<sup>118</sup> This review is designed to assess both the direct and cumulative environmental, social, economic, health, or cultural impacts of the project. Such reviews not only help inform the agencies' decision-making processes, but also empower communities by providing them with essential information and the opportunity to comment on the proposed project. The agency must then address these comments and, where possible, make changes to mitigate the project's anticipated impacts. NEPA does not require agencies to choose the least impactful option. Rather, it helps

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118. *NEPA Environmental Review Requirements*, *supra* note 88; 40 C.F.R. § 1508.18(b) (2010).

provide transparency and opportunities for public education and participation, with the goal of ensuring federal agencies make informed decisions through a transparent, democratic process.

Dismantling NEPA became a clarion call for President Trump and his supporters, with the false promise to simultaneously “modernize” NEPA regulations and “[s]afeguard our communities and maintain a healthy environment.”<sup>119</sup> Prior to the Administration’s overhaul of NEPA regulations in 2020, many agencies, including EPA, systematically exempted high-priority projects and geographic areas from environmental review altogether. While some agencies included such exemptions within broader regulatory rollbacks,<sup>120</sup> many expanded “categorical exclusions” under NEPA to exempt projects and areas from review under the statute.<sup>121</sup> For example, the Forest Service issued proposed revisions to its NEPA regulations in June 2019, replacing the section on categorical exclusions to exempt certain projects in National Forests.<sup>122</sup> The final rule, published in November 2020, exempted timber cuts up to 4,200 acres when coupled with nearby habitat restoration; agency roads of up to five miles in length; and mines up to one square mile in size.<sup>123</sup> As a result, the Forest Service is no longer required to assess the environmental impacts of these projects, nor will the public have an opportunity to comment on these projects before they are approved.

Many agencies replicated this strategy to fast-track the approval of high-priority projects that might otherwise be delayed by NEPA review. For example, the Department of Homeland Security issued a determination waiving NEPA, the Endangered Species Act (ESA), the CWA, and most other environmental laws as they related to the construction of the border wall near San Diego,<sup>124</sup> Calexico,<sup>125</sup> and the Santa Teresa Land Port of

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119. Exec. Order 13,807, 82 Fed. Reg. 40,463, 40,463–67 (Aug. 15, 2017).

120. For example, in 2020, EPA issued two final rules rescinding Obama-era methane standards. In the second of these two rules, the “Reconsideration Rule,” EPA expanded technical feasibility exemptions, and changed the definition of “well sites” to exclude low production facilities and third-party equipment and disposal wells from fugitive emissions monitoring requirements. Vizcarra, *EPA’s Final Methane Emissions Rules Roll Back Standards and Statutory Authority*, *supra* note 10.

121. See *NEPA Environmental Review Requirements*, *supra* note 88.

122. National Environmental Policy Act (NEPA) Compliance, 84 Fed. Reg. 27,544, 27,546 (proposed June 13, 2019) (codified at 36 C.F.R. pt. 220); *NEPA – USDA/Forest Service*, HARV. ENV’T & ENERGY L. PROGRAM (Aug. 15, 2018), <https://eelp.law.harvard.edu/2018/08/NEPA-usda-forest-service/>.

123. National Environmental Policy Act (NEPA) Compliance, 85 Fed. Reg. 73,620, 73,628 (Nov. 19, 2020) (codified at 36 C.F.R. pt. 220).

124. Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 82 Fed. Reg. 35,984, 35,985 (Aug. 2, 2017).



Entry in New Mexico.<sup>126</sup> In March 2018, the Federal Communications Commission adopted an order determining that small wireless facilities do not constitute “major Federal action,” and thus are not subject to any kind of NEPA analysis.<sup>127</sup> In June 2018, BLM issued a Permanent Instruction Memorandum limiting the agency’s NEPA review of applications regarding directional drilling into federal minerals from non-federal lands.<sup>128</sup> The memo replaced an Obama-era policy,<sup>129</sup> drawing heavily on recommendations from the industry-dominated Royalty Policy Committee.<sup>130</sup> DOI also pushed through two notices in the final months of the Trump Administration, creating categorical exclusions for projects designed to remove pinyon pine and western juniper trees that threaten sagebrush habitat,<sup>131</sup> and projects harvesting dead or dying trees, increasing the maximum acreage from 250 to 3,000 acres of BLM land.<sup>132</sup> Another rule finalized in December 2020 by the Department of Energy (DOE) expanded categorical exclusions under NEPA to exempt the construction and operation of liquefied natural gas (LNG) export facilities from NEPA review, arguing that the agency lacks the authority to approve those activities.<sup>133</sup>

The Trump-appointed Republican-majority of the Federal Energy Regulatory Commission (FERC) went one step further, transforming the commission’s NEPA analysis to exclude certain impacts from all future reviews. In May 2018, FERC issued a 3-2 decision to not consider the

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125. Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 82 Fed. Reg. 42,829, 42,830 (Sep. 12, 2017).

126. Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 83 Fed. Reg. 3,012 (Jan. 22, 2018).

127. *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, WT Docket No. 17-79, Report and Order, 2018 WL 1559856, at \*12 (Mar. 22, 2018); *NEPA – Federal Communications Commission*, HARV. ENV’T & ENERGY L. PROGRAM (Aug. 15, 2018), <https://elp.law.harvard.edu/2018/08/NEPA-federal-communications-commission/>.

128. BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, PIM 2018-014, DIRECTIONAL DRILLING INTO FEDERAL MINERAL ESTATE FROM WELL PADS ON NON-FEDERAL LOCATIONS (2018), <https://www.blm.gov/policy/pim-2018-014>.

129. BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, IM 2009-078, PROCESSING OIL AND GAS APPLICATIONS FOR PERMIT TO DRILL FOR DIRECTIONAL DRILLING INTO FEDERAL MINERAL ESTATE FROM MULTIPLE-WELL PADS ON NON-FEDERAL SURFACE AND MINERAL ESTATE LOCATIONS (2009), <https://www.blm.gov/policy/im-2009-078>.

130. Pamela King, *BLM Memo Checks Box on Industry Wish List*, E&E NEWS (June 14, 2018), <https://www.eenews.net/stories/1060084455>.

131. National Environmental Policy Act Implementing Procedures for the Bureau of Land Management (516 DM 11), 85 Fed. Reg. 79,504, 79,505 (Dec. 10, 2020).

132. National Environmental Policy Act Implementing Procedures for the Bureau of Land Management (516 DM 11), 85 Fed. Reg. 79,517, 79,518 (Dec. 10, 2020).

133. NEPA Implementing Procedures, 85 Fed. Reg. 78,197, 78,198 (Dec. 4, 2020) (codified at 10 C.F.R. pt. 1021).

climate change impacts of natural gas production (“upstream” emissions) and consumption (“downstream” emissions) during NEPA review for proposed natural gas pipelines.<sup>134</sup> Instead, FERC limited its analysis to “direct greenhouse gas emissions from the construction and operation” of the proposed project and recommended mitigation measures, stating it would only consider upstream and downstream effects when those effects are “sufficiently causally connected to and are reasonably foreseeable effects” of the proposed action.<sup>135</sup> This interpretation not only blinded the Commission to the very real climate change-related impacts of the development of natural gas pipelines, but also contravened NEPA regulations at that time, which required agencies to consider the cumulative and indirect impacts of a new project.<sup>136</sup> Nevertheless, FERC’s decision to ignore upstream and downstream emissions enabled the Commission to determine that an EIS is not necessary for proposed natural gas pipelines, thereby fast-tracking projects that would otherwise be subject to enhanced review under NEPA.

In July 2020, the Council on Environmental Quality (CEQ) published a final rule that changed how federal agencies implement NEPA, marking the first time since 1978 that the NEPA regulations have been significantly revised. The rule represents the culmination of a decades-long assault on NEPA’s protections for both communities and the environment. The new rule reduces the number of “major Federal actions” triggering NEPA review by redefining which projects and impacts should be considered, and which analyses should be reduced or omitted, under NEPA.<sup>137</sup> One way the rule achieves this is by redefining key terms—including “major Federal action,” “effects,” and “reasonable alternatives”<sup>138</sup>—in order to severely narrow the types of actions, impacts, and alternatives that agencies must consider when conducting their NEPA reviews. These new definitions

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134. *NEPA – Federal Energy Regulatory Commission*, HARV. ENV’T & ENERGY L. PROGRAM (Aug. 15, 2018), <https://eelp.law.harvard.edu/2018/08/NEPA-federal-energy-regulatory-commission/>.

135. *See* Dominion Transmission Inc., 163 FERC ¶ 61,128 at PP 20–21 (May 18, 2018), <https://www.lawandenvironment.com/wp-content/uploads/sites/5/2018/05/20180518-301732898057.pdf>. In 2017, the D.C. Circuit remanded a certificate order to FERC because “the EIS for the Southeast Market Pipelines Project should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so.” *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (2017). The Republican majority at FERC attempted to limit this decision to its facts, requiring consideration of downstream emissions only where all of the gas’s end use is disclosed by the applicant.

136. National Environmental Policy Act, 43 Fed. Reg. 55,990, 56,004 (Nov. 29, 1978) (codified at 40 C.F.R. pts. 1500–08).

137. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,342 (July 16, 2020).

138. *Id.* at 43,343, 43,345, 43,351.

eliminate crucial elements of the NEPA analysis, stripping safeguards for affected communities while undermining the essential purpose of NEPA, which is to force agencies to take a “hard look” at the impacts of proposed projects on human health and the environment.<sup>139</sup>

For those actions still subject to NEPA review, the new rule eviscerates the quality and meaningfulness of that review. The rule eliminates the requirement that agencies analyze the cumulative effects of a project;<sup>140</sup> limits the geographic scope of review;<sup>141</sup> makes it easier for agencies to ignore evidence relevant to foreseeable significant adverse impacts;<sup>142</sup> and allows applicants (i.e., project proponents) to prepare their own environmental analyses, deleting previous conflict-of-interest protections.<sup>143</sup> Finally, the rule undermines the very purpose of NEPA—to force agencies to “look before you leap”<sup>144</sup>—by allowing applicants to take actions, including acquiring land, before the NEPA review process is complete.<sup>145</sup> The rule also curtails agencies’ consideration of alternatives.<sup>146</sup> The result is to willfully blind both agencies and the public to the foreseeable impacts of a proposed project and the available alternatives; discourage the public from questioning the quality of that substandard review; and allow project applicants to frontload significant project investments prior to NEPA review, depriving agencies of the power to halt projects before they’ve commenced. Thus, the final rule all but reduces NEPA review to a streamlined checkbox on the way to project approval, and deprives the public of essential information on the potential cultural, public health, and environmental impacts of major agency actions.

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139. *Id.* at 43,326, 43,343.

140. *Id.* at 43,375.

141. *Id.* at 43,364.

142. Under the previous rule, agencies were required to obtain incomplete but available information relevant to assessing the foreseeable significant adverse impacts of the proposed action, and include that information in the EIS, provided the overall costs of obtaining that information were “not exorbitant.” National Environmental Policy Act, 43 Fed. Reg. 55,990, 55,984 (Nov. 28, 1978) (codified at 40 C.F.R. pts. 1500–08). The new rule significantly lowers this standard from “not exorbitant” to “not unreasonable.” 85 Fed. Reg. at 43,332, 43,366.

143. 85 Fed. Reg. at 43,371.

144. *NEPA Environmental Review Requirements*, *supra* note 88.

145. 85 Fed. Reg. at 43,370 (allowing an agency considering a proposed action to authorize “such activities, including, but not limited to, acquisition of interests in land . . . purchase of long lead-time equipment, and purchase options made by applicants.”).

146. The previous rule required agencies to “rigorously explore and objectively evaluate all reasonable alternatives” to the proposed action. 43 Fed. Reg. at 55,996. The new rule merely requires agencies to “evaluate reasonable alternatives to the proposed action.” 85 Fed. Reg. at 43,365. These changes are largely consistent with the proposed rule. See Sharon Buccino, *Proposed NEPA Rule Changes*, NRDC (Mar. 9, 2020), <https://www.nrdc.org/experts/sharon-buccino/proposed-NEPA-rule-changes>.

*B. Step 2: Restructure Cost-Benefit Analyses to Minimize or Exclude Benefits to Human Health and the Environment*

In addition to gutting NEPA, the Trump Administration also sought to strip EPA of its ability to justify forward-looking regulation by changing how the benefits of pollution reduction are defined and quantified. Both President Trump and agency leadership engaged in a coordinated assault on the integrity of cost-benefit analysis, first by making that analysis a prerequisite to justify environmental regulation, and then weaponizing that analysis to produce the desired outcome. Often without justification, EPA undervalued both the direct and indirect benefits of reducing the emission of harmful pollutants, including greenhouse gases, while offering statutory interpretations to permanently exclude such variables from the agency's analysis. In implementing these changes to cost-benefit analysis, the Trump EPA willfully limited its view of the full range of benefits of reducing harmful pollutants. The result was a false analysis that justified the Administration's deregulatory agenda by ignoring the very real and debilitating impacts of that pollution on public health and the environment.<sup>147</sup>

1. Make Cost-Benefit Analyses a Prerequisite to Justifying Regulation

In his first year in office, President Trump issued a series of executive orders designed to prevent agencies from issuing all but the most insipid public health regulations.<sup>148</sup> The first order, "Reducing Regulation and Controlling Regulatory Costs"—also known as the "2 for 1" order<sup>149</sup>—

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147. Goffman, *Reconstruct an Administrative Agency*, *supra* note 3, at 46.

148. Most of these orders have since been revoked by President Biden. See *Executive Orders Revoked by President Biden's Climate Executive Orders*, HARV. ENV'T & ENERGY L. PROGRAM, [http://eelp.law.harvard.edu/wp-content/uploads/Trump-EOs-Rescinded-Table\\_March-3-2021\\_EELP.pdf](http://eelp.law.harvard.edu/wp-content/uploads/Trump-EOs-Rescinded-Table_March-3-2021_EELP.pdf) (last visited Mar. 31, 2021) (assessing all Trump-era executive orders revoked by President Biden's environment and climate orders in table format).

149. The order required that any agency issuing a new rule must also revoke two existing rules. Exec. Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017). A subsequent memorandum from OMB clarified that the order would cover "significant" regulatory actions and guidance documents. Significant regulatory actions are final rules that impose total costs greater than zero; significant guidance documents are finalized guidance that cost or benefit the US economy \$100 million or more in any given year, or adversely and materially affect the economy. *Guidance Implementing Executive Order 13771*, OFF. OF MGMT. & BUDGET 3 (Apr. 5, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>; Lisa Heinzerling, Speech, *Cost-Nothing Analysis: Environmental Economics in the Age of Trump*, 30 COLO. NAT. RES. ENERGY & ENV'T. L. REV. 287, 301 (2019). President Biden revoked this order on January 20, 2021. Revocation of Certain Executive Orders Concerning Federal Regulation, 86 Fed. Reg. 7049, 7049 (Jan. 20, 2021).

instructed the Office of Management and Budget (OMB) to set “regulatory budgets” for each agency.<sup>150</sup> These budgets did not limit the public funds agencies have available to them, but rather the private expenditures agencies could impose on industry and other regulated bodies. These budgets only considered the costs that regulations impose on regulated entities, not the benefits to public health and the environment resulting from increased regulation of pollution sources.<sup>151</sup> In FY 2019, OMB set many of these regulatory budgets at zero or even negative, meaning that in order for EPA to issue new rules imposing regulatory costs on private entities, the agency would have to offset those new costs by undoing existing rules.<sup>152</sup>

The second related executive order, “Enforcing the Regulatory Reform Agenda,” directed agencies to identify regulations that “impose costs that exceed benefits” as part of implementing the “2 for 1” Executive Order; that is, to help agencies determine which two existing rules to eliminate when issuing a new rule.<sup>153</sup> The order represented the absurd proposition that the value of regulation is exclusively determined by its quantitative benefit-to-cost ratio, regardless of its purpose, exigency, or cumulative benefit, including non-monetizable benefits to present and future generations. The order also created the perfect deregulatory tool. If agencies can selectively determine which costs and benefits are assessed as part of the analysis, they can preordain a deregulatory outcome by undervaluing the benefits of regulation to public health and the environment. Then, as prescribed under the “2 for 1” order, agencies could kill two birds with one stone by issuing a new, more permissive environmental rule, and then, as prescribed by the order, simultaneously eliminate two “costlier” rules that would have imposed stricter limits on pollution.

## 2. Undervalue Future Costs Associated with Climate Change

The Trump Administration consistently undervalued the benefits to both present and future generations associated with reducing greenhouse gas emissions. This tactic played a crucial role in EPA’s repeal of the Obama-era Clean Power Plan.<sup>154</sup> The Clean Power Plan, published in

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150. Heinzerling, *Cost-Nothing Analysis*, *supra* note 149, at 301.

151. *Id.*

152. *Id.*

153. Exec. Order No. 13,777, 82 Fed. Reg. 12,285, 12,286 (Mar. 1, 2017). President Biden revoked this order on January 20, 2021. Revocation of Certain Executive Orders Concerning Federal Regulation, 86 Fed. Reg. 7049, 7049 (Jan. 20, 2021).

154. *Changing How EPA Calculates Regulatory Benefits*, HARV. ENV’T & ENERGY L. PROGRAM, <https://eelp.law.harvard.edu/2018/06/denying-the-health-benefits-pollution-reduction/> (last updated Jan. 15, 2020).

October 2015, set carbon pollution limits on existing power generators,<sup>155</sup> and was projected to reduce emissions from the power sector 32% from 2005 levels by 2030.<sup>156</sup> In repealing the Clean Power Plan, the Trump EPA systematically excluded the very real and significant benefits associated with the Plan's reductions in greenhouse gases and other pollutants.<sup>157</sup> First, EPA only included the benefits of reducing carbon dioxide emissions in its assessment of the Clean Power Plan, excluding the co-benefits of simultaneous reductions in other harmful pollutants.<sup>158</sup> Second, EPA deflated the monetary value of carbon dioxide reductions that the Plan would have achieved, counting only direct domestic benefits rather than the potential benefits of reductions worldwide.<sup>159</sup> Third, EPA ignored the value of pollution-reduction benefits if those benefits would occur in areas already satisfying ambient air quality standards.<sup>160</sup> This strategy embodied another assumption refuted by peer-reviewed research: that reducing pollution beyond the present standard in no way benefits the public, and thus, has no monetary value.<sup>161</sup> Fourth, the rule re-classified energy-efficiency gains as benefits instead of avoided costs, increasing the total cost associated with the Plan.<sup>162</sup>

Fifth and finally, EPA used a high discount rate (7%) for its social cost of carbon analysis.<sup>163</sup> The discount rate is a representation of the value

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155. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,663 (Oct. 23, 2015) (codified at 40 C.F.R. pt. 60).

156. *Clean Power Plan/Carbon Pollution Emission Guidelines*, HARV. ENV'T & ENERGY L. PROGRAM (Sep. 26, 2017), <https://eelp.law.harvard.edu/2017/09/clean-power-plan-carbon-pollution-emission-guidelines/>.

157. See *Changing How EPA Calculates Regulatory Benefits*, *supra* note 154.

158. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520, 32,562 (July 8, 2019) (codified at 40 C.F.R. pt. 60).

159. *Id.* at 32,563.

160. *Id.*

161. This assumption is especially galling in 2021 given recent science showing a correlation between exposure to air pollution and increased COVID-19 mortality in the United States. See *CleanLaw: Joe Goffman with Francesca Dominici on the Intersection of Air Pollution, Coronavirus, and Black Communities*, HARV. ENV'T & ENERGY L. PROGRAM (Aug. 25, 2020), <https://eelp.law.harvard.edu/2020/08/cleanlaw-joe-goffman-with-francesca-dominici-on-the-intersection-of-air-pollution-coronavirus-and-black-communities/>.

162. See *Changing How EPA Calculates Regulatory Benefits*, *supra* note 154.

163. The Trump Administration also relied on the 7% discount rate to revise the Corporate Average Fuel Economy (CAFE) and greenhouse gas emissions standards for cars and light duty trucks. The agencies involved admitted that the revised CAFE and CO<sub>2</sub> program standards overall (i.e., fleetwide) impose a net cost to society when a 3% discount rate is used, and only provide net benefits at a 7% discount rate. See *Final Rollback of Corporate Average Fuel Economy Standards & Greenhouse Gas Standards for Passenger Cars and Light Duty Trucks*, HARV. ENV'T & ENERGY L. PROGRAM, <http://eelp.law.harvard.edu/wp-content/uploads/EELP-Car-Rules-Backgrounder-Final-Updated.pdf> (last visited May 16, 2021).

agencies place on avoiding future harm associated with climate change. For example, using a discount rate of 7% means that the agency believes it is not economically reasonable to spend a dollar today on mitigating climate change impacts unless the annual return on that dollar is 7% or higher (the rate used in standard economic practice is 3%). Increasing the discount rate thus reflects the Trump Administration's unfounded belief that the future financial and human costs associated with climate change are not great enough to warrant implementing commonsense mitigation measures today—except in the most exceptional circumstances. The use of a high discount rate crystallizes, along with the other four tactics, the Administration's steadfast commitment to deregulation at the expense of present and future generations' wellbeing.

### 3. Reinterpret Statutes to Exclude Co-Benefits from Cost-Benefit Analyses

Another crucial tool in the Trump Administration's deregulatory toolbox was to diminish or ignore the value of co-benefits of environmental regulation. For example, the Trump EPA used this tool to determine that the Obama-era Mercury and Air Toxics Standards (MATS) rule, which imposes limits on hazardous air pollutants (HAPs) emitted by power plants, is not "appropriate and necessary."<sup>164</sup> Under the CAA, EPA may set pollution-control standards for power plant HAPs emissions if the agency finds it "appropriate and necessary" to do so based on an assessment of the associated hazards to public health.<sup>165</sup> In reversing the finding, the Trump EPA narrowly compared the direct cost to industry of complying with the rule with the monetized benefits of reducing HAPs emissions, minimizing or ignoring all other real, public health co-benefits, including parallel reductions in PM and sulfur dioxide.<sup>166</sup> In addition to minimizing or

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164. National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units-Reconsideration of Supplemental Finding and Residual Risk and Technology Review, 85 Fed. Reg. 31,286 (May 22, 2020) (codified at 40 C.F.R. pt. 63).

165. Clean Air Act § 112(n)(1)(A) (2012). Joseph Goffman & Laura Bloomer, *Disempowering the EPA: How Statutory Interpretation of the Clean Air Act Serves the Trump Administration's Deregulatory Agenda*, 70 CASE W. RESRV. L. REV. 929, 958 (2020) [hereinafter Goffman & Bloomer, *Disempowering the EPA*].

166. 85 Fed. Reg. at 31,286; Goffman & Bloomer, *Disempowering the EPA*, *supra* note 165, at 960. The Trump EPA recognized that excluding or minimizing co-benefits in its cost-benefit analysis is contrary to OMB and EPA guidance, and thus argued that the CAA explicitly directs EPA to focus only on the benefits of reducing HAPs, superseding OMB's guidance. Goffman & Bloomer, *Disempowering the EPA*, *supra* note 165, at 961; *see also* 85 Fed. Reg. at 31,301 ("How costs are to be considered in making the congressionally-directed CAA section 112(n)(1)(A) ['appropriate and necessary']

excluding co-benefits, EPA also underestimated the benefits value for mercury emissions reductions, using the same value it used in 2011 despite significant scientific advancements showing the related benefits are likely magnitudes larger than EPA estimated nine years ago.<sup>167</sup> These choices not only facilitated EPA's dangerous deregulation of toxic air pollutants, but also contradicted EPA's mandate to account for advances in science.<sup>168</sup>

During a press release following the rescission of the MATS "appropriate and necessary" finding, Administrator Wheeler warned that "[the rescission] foreshadows our approach for cost-benefit regulation, where we focus on the targeted pollutants . . . . Co-benefits should never be the driver of a regulation."<sup>169</sup> EPA affirmed this shift in finalizing a rule altering the procedures that EPA must follow before issuing air pollution rules under the CAA. The rule—"Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process"—added several extra-legal and burdensome requirements that EPA must satisfy in order to issue "significant" air pollution regulations, including changing which benefits EPA may consider, and how those benefits must be presented.<sup>170</sup> While the Biden EPA rescinded the rule on May 14, 2021, it serves as an emblematic example of the Trump Administration's efforts to preordain deregulatory outcomes by changing the way EPA makes regulatory decisions.<sup>171</sup>

The final rule required EPA to conduct a cost-benefit analysis for all "significant" regulations issued under the CAA. In that analysis, EPA had to disaggregate economic benefits "targeted by the relevant statutory provision" from other collateral or co-benefits.<sup>172</sup> However, as stated by a coalition of nonprofits and scientific associations in response to the

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determination, however, is not governed independent from statutory requirements, by preexisting OMB or EPA guidelines, nor could it be.").

167. Goffman & Bloomer, *Disempowering the EPA*, *supra* note 165, at 963.

168. *Id.* at 962.

169. Amena H. Saiyid & Jennifer H. Dlouhy, *Mercury Rule 'Foreshadows' Future Air Policy Approach: Wheeler*, BLOOMBERG L. (Apr. 17, 2020), <https://news.bloomberglaw.com/environment-and-energy/mercury-rule-foreshadows-future-air-policy-approach-wheeler>.

170. See Hannah Perls, *New Cost-Benefit Rule Hampers EPA's Ability to Regulate Harmful Air Pollutants*, Harv. Env'T & ENERGY L. PROGRAM (Jan. 12, 2021), <https://eelp.law.harvard.edu/2021/01/new-cost-benefit-rule-hampers-epas-ability-to-regulate-harmful-air-pollutants/>; *Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process*, 85 Fed. Reg. 84,130, 84,130 (Dec. 23, 2020) (codified at 40 C.F.R. pt. 83).

171. *Rescinding the Rule on Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process*, 86 Fed. Reg. 26,406, 26,406 (May 14, 2021) (codified at 40 C.F.R. pt. 83) (rescinding the Trump-era CAA cost-benefit rule because "the changes advanced by the rule were inadvisable, untethered to the CAA, and not necessary to effectuate the purposes of the Act.").

172. 85 Fed. Reg. at 84,156.



proposed rule, “distinguishing between benefits ‘targeted by the statutory provision’ versus ‘other welfare effects’ can be a complex, controversial, and ultimately fruitless endeavor.”<sup>173</sup> Even if it were possible to cleanly separate regulatory impacts between those that fall under the “statutory objective,” and those that do not, doing so minimizes key public health benefits of regulation. For example, under the final rule, EPA would have to separate out the benefits of reducing particulate matter or greenhouse gas emissions that occur when regulating mercury and other toxic pollutants, simply because the pollutants are regulated under different statutory provisions.<sup>174</sup>

The final rule further limited EPA’s assessment of a regulation’s benefits to human health by requiring “a clear causal or likely causal relationship between pollutant exposure and effect” “[b]ased upon human data when available.”<sup>175</sup> The rule also imposed new restrictions on how health endpoints are selected and quantified,<sup>176</sup> which will likely result in the exclusion or underestimation of both direct and co-benefits.<sup>177</sup> Furthermore, the rule stated that EPA’s future compliance with these new

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173. Jason Schwartz et al., Inst. for Pol’y Integrity, Comment Letter on Proposed Rulemaking for Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process (Aug. 3, 2020) (internal quotations omitted), [https://policyintegrity.org/documents/EPA\\_CBA\\_under\\_CAA\\_Joint\\_Comments\\_2020.08.03.pdf](https://policyintegrity.org/documents/EPA_CBA_under_CAA_Joint_Comments_2020.08.03.pdf).

174. Even when a pollutant is “targeted” under a statutory provision, however, the Trump EPA failed to regulate consistent with its statutory mandate. For example, EPA’s argument for excluding the benefits of reducing PM in reversing the MATS “appropriate and necessary” finding was that the statutory scheme situated the regulation of PM under a different authority, i.e., the NAAQS. Yet only a few months after EPA’s reversal of the appropriate and necessary finding, EPA left the PM NAAQS unchanged notwithstanding the agency’s own report that failure to increase the primary PM NAAQS would result in “a substantial number” of premature deaths each year. *National Ambient Air Quality Standards for PM and Ozone*, *supra* note 48; Joe Goffman & Laura Bloomer, *EPA’s Benefit-Cost Proposal in the Context of PM Pollution Regulation*, HARV. ENV’T & ENERGY L. PROGRAM (July 14, 2020), <https://eelp.law.harvard.edu/2020/07/epas-benefit-cost-proposal-in-the-context-of-pm-pollution-regulation/>.

175. 85 Fed. Reg. at 84,136, 84,155.

176. *Id.* at 84,148. Human health endpoints are events or outcomes used to determine whether an intervention (e.g., a regulation) is beneficial. In the case of air pollution regulation, such endpoints could include premature deaths, hospitalizations, or asthma-related school absences. *EPA Cost-Benefit Analysis: Tell EPA to Fully Consider Health Benefits*, AM. LUNG ASS’N, <https://www.lung.org/getmedia/3b300666-ff1a-49f4-9e02-6a5a53ebe9ef/epa-cost-benefit-analysis-in-clean-air-rulemakings-factsheet.pdf> (last updated Aug. 6, 2020).

177. These provisions would have been especially limiting had the so-called “secret science” rule not been struck down by a federal court in February 2021. The rule would have required EPA to give less weight to crucial epidemiological studies if the studies’ underlying data were not publicly available, despite the fact that data from human subjects are often protected by confidentiality agreements. See *supra* Part I.C (analyzing the development and likely impact of the secret science rule on future EPA rulemaking); accord Hannah Perls, *The Downfall of the “Secret Science” Rule*, *supra* note 59.

procedural requirements in CAA rulemaking is subject to judicial review,<sup>178</sup> creating yet another rulemaking hurdle and new source of legal vulnerability, as prior executive orders addressing cost-benefit analysis explicitly precluded judicial review of that analysis.<sup>179</sup>

Attenuating or minimizing the co-benefits of regulation in cost-benefit analyses also breaks from decades of best practices mandated by executive order and the Office of Management and Budget (OMB). Executive Order 12,866, signed in 1993 by President Clinton, makes no distinction between the direct and indirect effects of regulation.<sup>180</sup> Rather, the order instructs agencies to “assess all costs and benefits of available regulatory alternatives” and specifically to assess the rule’s anticipated benefits to “health and safety, [and] the protection of the natural environment” and “any adverse effects on . . . health, safety, and the natural environment . . . .”<sup>181</sup> The order also expressly directs agencies to “select those approaches that maximize *net* benefits (including potential economic, environmental, public health and safety, and other advantages; *distributive impacts*; and equity) . . . .”<sup>182</sup> OMB’s Circular A-4, which provides additional guidance to agencies on how to conduct cost-benefit analyses mandated by the executive order, tells agencies to analyze direct benefits and costs and ancillary benefits or side-effects together, defining ancillary benefits as “a favorable impact of the rule that is typically unrelated or secondary to the statutory purpose of the rulemaking . . . .”<sup>183</sup> EPA provides a paltry justification for circumventing these requirements, arguing without evidence that “[d]isaggregating benefits into those targeted and ancillary to the statutory objective of the regulation may cause EPA to explore whether there may be more efficient, lawful and defensible, or otherwise appropriate ways of obtaining ancillary benefits . . . .”<sup>184</sup> However, this argument conflicts not only with current OMB and EPA guidance (discussed below),

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178. 85 Fed. Reg. at 84,138.

179. *See, e.g.*, Regulatory Planning and Review, 58 Fed. Reg. 51,735 (Sep. 30, 1993) (precluding judicial review of agency action prompted by the order, including cost benefit analyses); Further Amendment to Executive Order 12866 on Regulatory Planning and Review, 72 Fed. Reg. 2,763, 2,765 (Jan. 23, 2007) (amending President Clinton’s executive order on agencies’ cost-benefit analyses, and precluding judicial review of agency actions taken pursuant thereof); Improving Regulation and Regulatory Review, 76 Fed. Reg. 3,821, 3,823 (Jan. 18, 2011) (precluding judicial review of the order’s mandates, including new procedures and policies regarding the qualitative and quantitative assessment of regulatory costs and benefits).

180. *See* Exec. Order. No. 12,866, 58 Fed. Reg. 51,735, 51,736 (Oct. 4, 1993).

181. *Id.* at 51,735, 51,741.

182. *Id.* at 51,735 (emphasis added).

183. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR A-4 (2003).

184. Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 85 Fed. Reg. 35,612, 35,622 (June 11, 2020) (codified at 40 C.F.R. pt. 83).

but also with two decades of consistent agency practice relying on co-benefits to justify air pollution regulation.<sup>185</sup> This approach also directly conflicts with the plain text and purpose of the CAA, which consistently requires the agency to act in furtherance of safeguarding public health and welfare, regardless of whether such benefits are a direct or indirect result of regulation.<sup>186</sup>

The rule was also inconsistent with EPA's own *Guidelines for Preparing Economic Analyses*. The current guidelines require EPA, when assessing the economic impact of regulatory or policy options, to present "all identifiable costs and benefits" together, including "directly intended effects and associated costs, as well as ancillary (or co-) benefits and costs."<sup>187</sup> The rule thus far exceeds EPA's stated purpose of merely "codify[ing] procedural best practices for the preparation, development, presentation, and consideration of [cost-benefit analyses]" in developing CAA regulations.<sup>188</sup> Rather, the rule both circumvents and distorts longstanding practices mandated by the CAA, executive order, and OMB to include co-benefits in agencies' assessments of a proposed rule or policy's net benefits to the general public.

Finally, the rule also required EPA to provide a "clear description of the problem being addressed" and justify the rule by explaining "the compelling need for federal government intervention in the market to correct the problem."<sup>189</sup> This requirement rests on the false default assumption that economic markets voluntarily internalize externalities like air pollution, forcing regulators to face an adverse presumption they can overcome only by showing "compelling need," notwithstanding statutory

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185. Joseph E. Aldy et al., *Co-Benefits and Regulatory Impact Analysis: Theory and Evidence from Federal Air Quality Regulations* 30 (Res. for the Future, Working Paper No. 20-12, 2020), [https://media.rff.org/documents/RFF\\_WP\\_20-12\\_Aldy\\_et\\_al19599.pdf](https://media.rff.org/documents/RFF_WP_20-12_Aldy_et_al19599.pdf) (finding that from 1997 to 2019, "co-benefits make up a significant share of the monetized benefits in EPA regulatory impact analyses" under the Clean Air Act, and the inclusion of co-benefits "has been critical in the majority of [those analyses] for making the determination . . . that the monetized benefits of the rule exceed the costs.").

186. See, e.g., Goffman & Bloomer, *The Legal Consequences of EPA's Disruption of the NAAQS Process*, *supra* note 30 (discussing how the CAA requires EPA to set the NAAQS "at levels that protect the public health and welfare with an adequate margin of safety."); Vizcarra, *EPA's Final Methane Emissions Rules Roll Back Standards and Statutory Authority*, *supra* note 10 (reviewing how the CAA requires EPA to set new source performance standards (NSPS) for a source category if it finds that the category significantly contributes to pollution that endangers the public health or welfare).

187. NAT'L CTR. FOR ENV'T. ECON., *GUIDELINES FOR PREPARING ECONOMIC ANALYSES* 11-2 (2014), <https://www.EPA.gov/sites/production/files/2017-08/documents/ee-0568-50.pdf>.

188. Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 85 Fed. Reg. 84,130, 84,130-31 (Dec. 23, 2020) (codified at 40 C.F.R. pt. 83).

189. *Id.* at 84,142.

mandates to the contrary.<sup>190</sup> The requirement also flies in the face of basic economics. Market failures are most likely to exist in the environmental sector where there are consolidated or monopolized economic actors, such as utilities, power companies, and large-scale agriculture. These industries produce essential goods and services, as well as negative externalities (air and water pollution). Because current pricing mechanisms do not capture these externalities, these industries have no incentive to self-regulate absent additional regulation. In the case of air pollution regulation under the CAA, the rule forced communities to serve as human pollutant detectors, that is, to bear the brunt of pollution until there are sufficient data to demonstrate those pollutants are harmful to human health. Only then could agencies show a “compelling need” that merits governmental intervention.

#### 4. Change How and When EPA Decides if Regulation is Needed

In addition to undervaluing the net benefits associated with reductions in greenhouse gases and other air pollutants, the Trump EPA made subtle but significant changes to *when* agencies consider certain variables in order to avoid regulation-triggering events. For example, EPA revised its regulations implementing the New Source Review (NSR) program under the CAA.<sup>191</sup> The NSR program helps protect communities from increases in pollution when a new facility is built or an existing facility is modified.<sup>192</sup> Previously, when determining whether building a new facility or changing an existing source requires a permit, EPA would conduct a two-step analysis.<sup>193</sup> At Step 1, EPA would ask whether the modification alone would result in a significant emissions increase, regardless of other contemporaneous decreases.<sup>194</sup> If yes, EPA would proceed to Step 2 and ask whether the modification will result in a significant *net* emissions increase, given other contemporaneous increases and decreases at the facility.<sup>195</sup> In October 2020, EPA issued a final rule changing this two-step process,<sup>196</sup>

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190. *Id.* at 84,142–43.

191. See *New Source Review*, HARV. ENV'T & ENERGY L. PROGRAM (Dec. 11, 2018), <https://eelp.law.harvard.edu/2018/12/new-source-review/> (detailing NSR's background, history, and permitting regime that covers a wide variety of facilities, including paper mills, power plants, plastics production, and automobile manufacturing).

192. *Id.*

193. The change can be either a physical change to the facility or a change in the method of operation. *Id.*

194. *Id.*

195. *Id.*

196. Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting, 85 Fed. Reg. 74,890 (Nov. 24, 2020). The rule codified a 2018 guidance memorandum from Administrator Pruitt. See Memorandum from Scott Pruitt, EPA Adm'r, on

allowing the agency to consider both emissions increases *and* decreases at Step 1 in order to determine whether NSR will apply to facility modifications. Yet the two-step analysis was designed precisely to delay netting emissions until Step 2 in order to identify modifications that could trigger unacceptable increases in pollution without additional mitigation. Including decreases at Step 1 would reduce the number of major modifications subject to NSR review, and thus reduce the number of facilities required to install and operate emissions control technology to reduce the emission of harmful pollutants around those facilities.<sup>197</sup>

EPA used a similar strategy to undercut the processes the agency uses to set health-based air quality standards. In May 2018, Administrator Pruitt issued the Back-to-Basics memorandum for reviewing the NAAQS.<sup>198</sup> Similar to EPA's changes to the NSR program, this memo injected variables earlier in the regulatory analysis in order to reduce regulation-triggering events. Previously, to set the NAAQS, EPA would engage in a two-step inquiry: first, EPA determined the level of air quality necessary to safeguard public health, and second, designated the rules necessary to achieve that level. The first step prioritized setting health-based standards, and the second addressed technical feasibility. The Supreme Court affirmed the importance of excluding costs in the first step in *Whitman v. American Trucking Associations, Inc.*, in which the Court barred EPA from considering the costs of implementation when setting the NAAQS.<sup>199</sup> The Pruitt memo collapsed this two-step process into one so that the CASAC and EPA would be compelled to review science, cost, technology, and implementation all at the same time.<sup>200</sup> While Administrator Pruitt asserted

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Project Emission Accounting Under the NSR Preconstruction Permitting Process to Reg'l EPA Adm'rs (Mar. 13, 2018), [https://www.EPA.gov/sites/production/files/2018-03/documents/nsr\\_memo\\_03-13-2018.pdf](https://www.EPA.gov/sites/production/files/2018-03/documents/nsr_memo_03-13-2018.pdf) (stating that Congress intended to apply NSR regulations pertaining to major modifications only to changes that increase "actual," i.e., net, emissions).

197. In December 2017, Administrator Pruitt adopted a new policy allowing firms to provide their own estimates of whether new projects will require enforcement under the NSR program. The policy also stated that EPA will not scrutinize the accuracy of emissions projections, or the performance of new projects. This choice abdicated EPA's authority to double-check emissions estimates, a power the Sixth Circuit recently affirmed. The policy also eliminated any assurance that EPA would use the NSR program to deliver the pollution control and cleaner air it is intended to provide. See *New Source Review Enforcement Memo*, HARV. ENV'T & ENERGY L. PROGRAM (Feb. 27, 2018), <https://eelp.law.harvard.edu/2018/02/new-source-review-enforcement-memo/>; *United States v. DTE Energy Co.*, 845 F.3d 735, 741 (6th Cir. 2017).

198. Memorandum from Scott Pruitt, EPA Adm'r, on Back-to-Basics Process for Reviewing National Ambient Air Quality Standards to Assistant EPA Adm'rs 1, 2 (May 9, 2018).

199. 531 U.S. 457, 465 (2001). Similarly, the D.C. Circuit has held that "[a]ttainability and technological feasibility are not relevant considerations in the promulgation of national ambient air quality standards." *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981).

200. Goffman, *Reconstruct an Administrative Agency*, *supra* note 3, at 44.

this was necessary to speed up the process, the reality is that this change would likely inject cost considerations into the NAAQS setting process—precisely what the Supreme Court forbid in *Whitman*. After releasing the Back-to-Basics memo, EPA issued two NAAQS rules, declining to increase air quality standards for both PM and ground level-ozone.<sup>201</sup> In the final PM NAAQS rule, EPA asserted that it had not crossed the *Whitman* line, yet offered in a footnote a novel interpretation of the Court’s decision suggesting that the straightforward holding in *Whitman* is in fact much more nuanced.<sup>202</sup>

### 5. Disaggregate Pollution Sources

The Trump EPA also altered how the agency assesses both air pollutants and pollution sources to make it easier for the agency to find that further evaluation or regulation is unwarranted.<sup>203</sup> For example, EPA issued novel, unfounded interpretations of the CAA to make it more difficult for the agency to regulate methane emissions from stationary sources. Under section 111 of the CAA, EPA must establish New Source Performance Standards (NSPS) for listed categories of new or modified stationary pollution sources.<sup>204</sup> In order to list a source category, the Administrator must determine that a “category of sources . . . causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare,”<sup>205</sup> called a *significant contribution finding*. The plain text of the CAA thus frames EPA’s regulatory authority to set NSPS for existing sources around the *category* of sources, permitting EPA to regulate air pollution from those categories if the agency finds that

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201. Review of the National Ambient Air Quality Standards for Particulate Matter, 85 Fed. Reg. 82,684, 82,693 (Dec. 18, 2020) (codified at 40 C.F.R. pt. 50); Review of the Ozone National Ambient Air Quality Standards, 85 Fed. Reg. 87,256, 87,257 (Dec. 31, 2020) (codified at 40 C.F.R. pt. 50).

202. 85 Fed. Reg. at 82,687 n.4 (“[W]ere the EPA to consider costs of implementation when reviewing and revising the standards ‘it would be grounds for vacating the NAAQS.’ At the same time, the CAA directs the CASAC to provide advice on ‘any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance’ of the NAAQS to the Administrator . . . . In *Whitman*, the Court clarified that most of that advice would be relevant to implementation but not standard setting . . . . However, the Court also noted that the CASAC’s ‘advice concerning certain aspects of ‘adverse public health . . . effects’ from various attainment strategies is unquestionably pertinent’ to the NAAQS rulemaking record and relevant to the standard setting process.”) (citations omitted). EPA repeated this argument verbatim in the final ozone NAAQS rule. 85 Fed. Reg. at 87,259 n. 5.

203. EPA also used this process to extend or delay the regulatory process itself. *See also* Goffman & Bloomer, *Disempowering the EPA*, *supra* note 165, at 950 (examining the Trump EPA’s narrow, “static interpretation” of the CAA that ignored the latest science and technological capabilities).

204. Clean Air Act, 42 U.S.C. § 7411(b)(1)(B) (2012).

205. *Id.* § 7411(b)(1)(A).

the *total or cumulative* emissions from that category significantly contribute to pollution endangering public health or welfare. In rolling back Obama-era methane standards under section 111, the Trump EPA pulled this framework apart along two axes, disaggregating the source category into segments, and disaggregating a source category's total emissions into individual pollutants, making it doubly hard for EPA to make a significant contribution finding.

In 2016, the Obama EPA set NSPS for methane and volatile organic carbon (VOC) emissions “from the production, processing, transmission, and storage segments within the already-listed ‘crude oil and natural gas production’ source category.”<sup>206</sup> The Trump EPA used two rationales to repeal the NSPS for the transmission and storage segment and rescind methane regulations for the remaining sources within the oil and gas sector. First, EPA disaggregated the “crude oil and natural gas production” source category into individual segments, arguing that the transmission and storage segments are “sufficiently distinct” from the production and processing segments “because the natural gas that enters the transmission and storage segment has different composition and characteristics than the natural gas that enters the production and processing segments.”<sup>207</sup> This “piecemeal approach” ignored reality and the statute’s plain text. The transmission, storage, production, and processing segments together constitute a single-sector enterprise, encompassing the full array of equipment that brings the product from underground to the point of commercial transaction.<sup>208</sup> The differences in product composition have no bearing on the statutory question of whether “the ensemble of equipment the source category comprises contributes significantly to air pollution.”<sup>209</sup> This stark departure from the statute’s plain text, combined with an arbitrary justification, revealed EPA’s determination to hamstring the agency’s own regulatory capacities under section 111 of the CAA.

In addition to disaggregating the source category, EPA interpreted section 111 of the CAA to permanently limit the agency’s authority to regulate pollution. In the new rule, EPA argued that section 111 requires the agency to make a separate significant contribution finding for individually regulated *pollutants*, notwithstanding well-established findings that the source category contributes significant levels of pollution overall.<sup>210</sup> The

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206. Goffman & Bloomer, *Disempowering the EPA*, *supra* note 165, at 964.

207. Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, 85 Fed. Reg. 57,018, 57,028 (Sep. 14, 2020).

208. Goffman & Bloomer, *Disempowering the EPA*, *supra* note 165, at 965–66.

209. *Id.* at 966.

210. 85 Fed. Reg. at 57,019.

rule could thus lead to the perverse outcome in which EPA could determine that a source category contributes significantly to air pollution, but nevertheless lack the authority to regulate that pollution because it cannot show that the source category's emission of a particular pollutant *on its own* "significantly" endangers public health and welfare.<sup>211</sup> This arbitrary disaggregation of pollutants contradicts the plain text of the statute, and breaks from more than four decades of agency practice. Perhaps recognizing the weak justification undergirding this novel interpretation, EPA provided an alternative justification for rescinding the methane NSPS, arguing that facilities' compliance with the NSPS for VOCs will lead to parallel reductions in methane, making the methane NSPS redundant.<sup>212</sup> This rationale not only belied EPA's otherwise steadfast commitment to ignoring the co-benefits of air pollution regulation,<sup>213</sup> but also would preclude future administrations from regulating methane emitted at much higher levels from existing sources.<sup>214</sup>

All these reforms to limit regulation-triggering events target an underlying philosophy behind environmental regulations, and more importantly, the statutes that those regulations interpret and implement. Where federal actions have the potential to perpetrate irreversible harm, particularly with regards to the environment or public health, agencies should adopt the precautionary principle and err on the side of caution. NEPA at its core is a precautionary statute, forcing agencies to "look before you leap," and only approve a major project after a comprehensive assessment of the project's potential impacts. The 1990 CAA Amendments also integrate this principle in regulating 189 toxic air pollutants by requiring major sources to use the maximum achievable control technology (MACT) to restrict emissions of those pollutants.<sup>215</sup> Notably, these statutes do not require federal agencies to always impose the strictest standards possible, but rather to make cautious, well-informed decisions based on the best available science in order to avoid irreversible harms to public health and the environment.

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211. Vizcarra, *EPA's Final Methane Emissions Rules Roll Back Standards and Statutory Authority*, *supra* note 10. This is especially true for new pollutants, for which there are less public health data available.

212. 85 Fed. Reg. at 57,030.

213. *See supra* Part III.B.3 (detailing the Trump EPA's strategy to undermine the Obama-era Mercury and Air Toxics Standards (MATS) rule, which imposes limits on hazardous air pollutants emitted by power plants).

214. EPA can only set comprehensive guidelines for existing sources of methane under section 111(d). Thus, by stripping EPA of the authority to issue methane NSPS under this section, the rule effectively precludes the agency from issuing *any* comprehensive methane guidelines for existing sources. Goffman & Bloomer, *Disempowering the EPA*, *supra* note 165, at 967.

215. Clean Air Act, 42 U.S.C. § 7412(g)(2) (2012).



The Trump Administration's efforts to minimize regulation-triggering events undermined this principle by allowing agencies to "leap" without ever considering the true costs of those actions. Expanding existing exemptions for projects and areas from NEPA review allowed the Administration to pave the way for agencies to greenlight potentially harmful projects without first assessing the potential harm resulting from those projects. Elevating the importance of cost-benefit analyses, and then restricting which benefits can be included in those analyses, gave agencies an artificially narrow view of the true benefits of regulation. Conversely, agencies had a narrower view of the costs of inaction should the agency decide not to impose stricter limits on pollution, including greenhouse gases. The result was a warped, destructive interpretation of these bedrock statutes, where federal agencies willfully blinded themselves to the true impacts of their actions, and only choose to regulate after irreversible harm had been done.

#### IV. STRATEGY 4: ADOPT NOVEL STATUTORY INTERPRETATIONS THAT ABDICATE OR NARROW AGENCIES' REGULATORY AUTHORITY

Under the Trump Administration, EPA issued new interpretations of its governing statutes to severely curtail, or in some cases, abdicate the agency's present and future authority to regulate environmental harms. These interpretations contradicted decades of prior agency practice and constituted a concerted and consistent effort by the Trump EPA to "dismantl[e] its own capacity to develop, implement, and enforce effective pollution reduction rules and programs . . ." <sup>216</sup> If federal courts uphold these interpretations, they have the potential to limit—or even preclude—future administrations from broadly interpreting their statutory mandates to regulate both current and novel environmental threats.

The Trump Administration leaned heavily into this strategy to justify its repeal of the Clean Power Plan (CPP) and promulgate its replacement, the Affordable Clean Energy (ACE) rule. In repealing the CPP, EPA offered a static interpretation of the CAA that would preclude a future administration from adopting the most efficient method of regulating emissions from power plants. The rule purported to interpret the "best system of emissions reduction"—the standard of performance that applies throughout section 111(d) of the CAA—as applying only to site-specific

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216. Joe Goffman, *How Congress Can Curb the Dismantling of the Environmental Protection Agency: An Oversight Agenda*, HARV. ENV'T & ENERGY L. PROGRAM (Jan. 10, 2019), <https://eelp.law.harvard.edu/2019/01/how-congress-can-curb-the-dismantling-of-the-environmental-protection-agency-an-oversight-agenda/>.

pollution controls for power plant emissions.<sup>217</sup> This interpretation precluded EPA from encouraging facilities to shift power generation from higher- to lower-emitting pollution sources as proposed in the CPP, despite the fact that power plants commonly use “generation shifting” to comply with many pollution-control programs.<sup>218</sup>

EPA’s repeal of the CPP rested on its argument that “CAA section 111 unambiguously limits the [best system of emission reduction] to those systems that can be put into operation *at* a building, structure, facility, or installation.”<sup>219</sup> This interpretation embodied a risky legal strategy the Administration often relied on in an attempt to permanently curtail EPA’s regulatory authority. Typically, agencies seek deference from courts for reasonable interpretations of ambiguous statutory provisions. To assess the validity of the agency’s statutory interpretation, a court will apply the two-part *Chevron* test.<sup>220</sup> First, the court will determine whether the relevant statutory language is unambiguous, i.e., having only one clear meaning.<sup>221</sup> If the court finds the language is unambiguous, then the agency must act according to that clear meaning.<sup>222</sup> If the court finds the language is ambiguous, the court proceeds to the second step to determine whether the agency’s interpretation of the statute is reasonable, in which case the court should defer to the agency.<sup>223</sup> The court’s standard at step two is more favorable to agencies; thus, by asserting that the language of the CAA is *unambiguous*, the Trump EPA took an unnecessary litigation risk in order to secure a binding judicial decision permanently restricting the agency’s legal authority.<sup>224</sup> In the case of the ACE rule, this risky strategy proved fatal. On the last day of the Trump Administration, the D.C. Circuit vacated the ACE rule, holding that EPA’s static interpretation was “a fundamental misconstruction of Section [111(d)].”<sup>225</sup> The fact that the Administration was willing to take this risk revealed that EPA’s goal in issuing the ACE

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217. See Goffman & Bloomer, *Disempowering the EPA*, *supra* note 165, at 951–52 (providing examples of pollution controls that fall under the broader interpretation of the “best system of emissions reduction”); Repeal of the Clean Power Plan: Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520, 35,523 (July 8, 2019) (codified at 40 C.F.R. pt. 60).

218. Goffman & Bloomer, *Disempowering the EPA*, *supra* note 165, at 951.

219. 84 Fed. Reg. at 32,524 (emphasis in original).

220. See Cole Jermyn & Laura Bloomer, *How to Undo Trump-Era Regulatory Rollbacks to Redo Environmental Protection*, HARV. ENV’T & ENERGY L. PROGRAM (Apr. 23, 2020), <https://eelp.law.harvard.edu/2020/04/how-to-undo-the-environmental-regulatory-rollbacks/>; *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984).

221. *Chevron*, 467 U.S. at 842–43.

222. *Id.*

223. *Id.* at 843–44.

224. See Goffman & Bloomer, *Disempowering the EPA*, *supra* note 165, at 953.

225. *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 930 (D.C. Cir. 2021).

rule was not only to repeal the CPP, but also to block a future administration from interpreting the statute more broadly, imposing a lasting restriction on EPA's capacity to regulate emissions from existing power plants.<sup>226</sup>

The Trump EPA consistently pursued this risky legal strategy, even when the agency could have simply declined to regulate in order to achieve its desired goals. For example, in April 2019, EPA issued a Clean Water Act (CWA) interpretive statement abdicating its authority to regulate groundwater.<sup>227</sup> The statement addressed section 301 of the CWA, which prohibits the unpermitted discharge of any pollutant into EPA's jurisdictional waters.<sup>228</sup> In the statement, the agency concluded that "the best, if not the only, reading of the [CWA]" is that section 301 "exclude[s] *all* releases of pollutants to groundwater from [the National Pollutant Discharge Elimination System] program coverage, regardless of a hydrologic connection or conveyance to jurisdictional surface water."<sup>229</sup> In other words, EPA categorically excluded any discharge of a pollutant into groundwater from regulation under section 301 of the CWA, even if that pollutant then flows into surface waters within EPA's jurisdiction.<sup>230</sup> This interpretation unnecessarily constrained EPA's authority over pollution that flows through groundwater, restricting the intended scope of the CWA in a manner that contradicts prior agency practice and Supreme Court precedent.<sup>231</sup>

Despite EPA's suggestion that its interpretation represented "the only[]" reading of the statute," the agency's "longstanding position is that a discharge from a point source to jurisdictional surface waters that moves through groundwater with a direct hydrological connection comes under the purview of the CWA's permitting requirements."<sup>232</sup> The new interpretation also contradicted basic science. In fact, EPA presented no scientific

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226. *Id.* at 953–54.

227. See CAITLIN MCCOY, HARV. ENV'T & ENERGY L. PROGRAM, CLOSING THE DOOR ON EPA JURISDICTION OVER GROUNDWATER 1–2 (Aug. 5, 2019), <http://eelp.law.harvard.edu/wp-content/uploads/Groundwater-Statement-Final.pdf>.

228. Clean Water Act, 33 U.S.C. § 1311(a) (2012).

229. Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater, 84 Fed. Reg. 16,810, 16,814 (Apr. 23, 2019) (codified at 40 C.F.R. pt. 122).

230. MCCOY, CLOSING THE DOOR ON EPA JURISDICTION OVER GROUNDWATER, *supra* note 226, at 2.

231. See *e.g.*, *Rapanos v. United States*, 547 U.S. 715, 743 (2006) ("The [CWA] does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.") (emphasis added in original).

232. 84 Fed. Reg. at 16,814; Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellees at 5, *Haw. Wildlife Fund v. Cnty. of Maui*, 886 F.3d 737 (9th Cir. 2018) (No. 15-17447).

rationale supporting the interpretive statement. The agency instead purported to defer to Congressional intent, arguing that its new interpretation reflected “the Agency’s most comprehensive analysis of the CWA’s text, structure, legislative history, and judicial decisions,”<sup>233</sup> while simultaneously recognizing this position contradicted legal precedent from several federal courts of appeal.<sup>234</sup>

EPA and the Environment and Natural Resources Division (ENRD) of the Department of Justice (DOJ) took a similar approach to curtail the agencies’ authority to require facilities in violation of environmental laws to mitigate the harm done to nearby communities. In a March 2020 memorandum, Assistant Attorney General for ENRD, Jeffrey Bossert Clark, put a stop to the longstanding but discretionary practice of including supplemental environmental projects (SEPs) in consent decrees and settlements.<sup>235</sup> SEPs have been included in these agreements for decades and are one of the only enforcement tools available to ENRD to directly address the harm done to local communities when facilities violate environmental laws.<sup>236</sup>

Despite having relied on SEPs for decades, in the 2020 memorandum, ENRD asserted a novel interpretation of the Miscellaneous Receipts Act

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233. 84 Fed. Reg. at 16,811.

234. *See, e.g., id.* at 16,823 (explaining that EPA adopted a legal interpretation that conflicts with the relevant tests adopted by the Fourth, Sixth, and Ninth Circuits because “the Agency has concluded [these tests] lack support in the text, structure, and legislative history of the Act.”). The Supreme Court ultimately rejected EPA’s interpretation, holding that the Clean Water Act applies to groundwater pollution when the discharge to groundwater is the “functional equivalent” of a direct discharge to navigable waters. *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1477 (2020).

235. EPA defines an SEP as “an environmentally beneficial project or activity that is not required by law, but that a defendant agrees to undertake as part of the settlement of an enforcement action.” Memorandum from Cynthia Giles, Assistant EPA Adm’r, on the Issuance of the 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy to Reg’l EPA Adm’rs (Mar. 10, 2015), <https://www.EPA.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf>. The 2020 memo cemented a four-year phase out initiated by the Attorney General and ENRD through a series of policy memoranda curtailing DOJ’s and agencies’ authority to reach settlements that include payments to third-party organizations. Hana Vizcarra & Laura Bloomer, *DOJ Phases Out Supplemental Environmental Projects in Environmental Enforcement*, HARV. ENV’T & ENERGY L. PROGRAM (Aug. 6, 2020), <https://eelp.law.harvard.edu/2020/08/doj-phases-out-supplemental-environmental-projects-in-environmental-enforcement/>.

236. For example, in 2019, DOJ and EPA reached a settlement agreement with a chemical company that included \$1.6 million for SEPs, including lead abatement projects; the donation of air monitoring equipment to local responders; more frequent monitoring; and the repair and replacement of equipment containing hazardous air pollutants. This funding was in addition to a penalty of \$4.55 million. Vizcarra & Bloomer, *DOJ Phases Out Supplemental Environmental Projects*, *supra* note 234; *see also* Press Release, DOJ, The United States Reaches Agreement with Dow Silicones Corporation to Resolve Environmental Violations at Midland Michigan Chemical Manufacturing Facility (June 25, 2019), <https://www.justice.gov/opa/pr/united-states-reaches-agreement-dow-silicones-corporation-resolve-environmental-violations>.

(MRA), arguing that SEPs violate the Act and also are “in serious tension with important aspects of our constitutional tradition.”<sup>237</sup> The MRA requires any federal official “receiving money for the Government” to deposit those funds in the Treasury “without deduction for any charge or claim.”<sup>238</sup> AAG Clark argued that SEPs “divert” money from the Treasury to third parties in violation of the MRA.<sup>239</sup> AAG Clark also argued that SEPs unconstitutionally intrude on Congress’s “power of the purse” under the Taxing and Spending Clause.<sup>240</sup> However, EPA’s 2015 Update to EPA SEPs policy expressly prohibits cash donations and requires each discrete project to have a “nexus” to the underlying violation in order to assure compliance with the plain text of the MRA and the Taxing and Spending Clause.<sup>241</sup> AAG Clark’s retort rests not on the text of the MRA nor the Constitution, but rather his own personal opinion: “If direct monetary payments are unallowable, then so too should in-kind payments. In appearance and effect, in-kind payments are no different than direct monetary payments.”<sup>242</sup> Yet this analysis ignores the plain text of the MRA; penalties are not owed to the government until a settlement is finalized, and thus, SEPs do not constitute money received by the government subject to MRA restrictions. This understanding has been further cemented in the DOJ’s Office of Legal Counsel’s determination that SEPs and similar mechanisms do not violate the MRA when: (1) SEPs are not funded with money that was otherwise obligated to the Treasury, and (2) the executive branch retains no post-settlement control of the funds.<sup>243</sup>

If the Trump ENRD believed it lacked the authority to include SEPs in consent decrees and settlement agreements, it could simply decline to do so. Similarly, if the Trump EPA truly believed it lacked the authority to regulate discharges to groundwater, it could have simply chosen to not exercise that authority. Issuing a formal statement on these matters exposes the Administration to public critique and, in the case of the SEPs policy, litigation.<sup>244</sup> If these agencies sought to provide consistency and

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237. Memorandum from Jeffrey Bossert Clark, Assistant Att’y Gen., on Supplemental Environmental Projects (“SEPs”) in Civil Settlements with Private Defendants to U.S. DOJ ENRD Deputy Assistant Att’y Gens. & Section Chiefs 8 (Mar. 12, 2020) [hereinafter SEPs Memo], [https://media.velaw.com/wp-content/uploads/2020/04/03130749/seps\\_public\\_final\\_signed\\_3.13.20.pdf](https://media.velaw.com/wp-content/uploads/2020/04/03130749/seps_public_final_signed_3.13.20.pdf).

238. Miscellaneous Receipts Act, 31 U.S.C. § 3302(b) (2012).

239. SEPs Memo, *supra* note 236, at 1.

240. *Id.* at 3.

241. Giles Memo, *supra* note 234, at 34.

242. SEPs Memo, *supra* note 236, at 14.

243. *Id.* at 4 n.6.

244. In October 2020, the Conservation Law Foundation (CLF) filed suit in the District Court for the District of Massachusetts to vacate the ENRD memorandum and enjoin EPA and ENRD from

predictability, they could offer their interpretations of the statute without asserting that these interpretations represent the *only* reasonable interpretation. In making such arguments, the agencies revealed a broader strategic goal: to diminish the capacity of future administrations to broadly interpret their statutory mandates to regulate sources of pollution and hold accountable those who violate environmental laws.

EPA also used this strategy as part of a joint rulemaking with the National Highway Traffic Safety Administration (NHTSA) to withdraw California's waiver to issue its own motor vehicle greenhouse gas (GHG) standards under the CAA.<sup>245</sup> Recognizing the unique pollution challenges created by California's population density and geography, the CAA permits the state to request a preemption waiver from the statute's nationwide motor vehicle emission standards, and set more stringent standards.<sup>246</sup> Other states may then adopt California's standards approved under the waiver provision.<sup>247</sup> In revoking California's existing waiver, the Trump EPA and NHTSA not only revoked California's previously authorized waiver for its GHG emission and zero-emission-vehicle (ZEV) standards, but also proffered a new interpretation of the CAA precluding EPA from granting such waivers in the first place.

EPA and NHTSA offered two novel interpretations justifying the waiver retraction, both circumventing the plain text and intent of the CAA. First, EPA deferred to NHTSA's finding that California's GHG emission and ZEV standards were preempted by the Energy Policy and Conservation Act (EPCA).<sup>248</sup> NHTSA argued that because EPCA preempts state and local laws "related to fuel economy standards," this preemption necessarily includes California's GHG emission standards, despite the explicit prerogative Congress afforded the state under the CAA.<sup>249</sup> In adopting this interpretation, EPA improperly relied on an executive interpretation as an

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implementing the policy, alleging it violated the APA. Complaint for Declaratory and Injunctive Relief at 28–29, *Conservation L. Found. v. Barr*, No. 1:20-cv-11827 (D. Mass. Oct. 8, 2020).

245. LIA CATTANEO, HARV. ENV'T & ENERGY L. PROGRAM, RETHINKING THE "ONE NATIONAL PROGRAM" FOR CLEAN CARS: WHERE DOES THE BIDEN ADMINISTRATION GO FROM HERE? 1 (2021), [http://eelp.law.harvard.edu/wp-content/uploads/Lia-Cattaneo-SAFE-Rule-Part-1\\_final\\_singlespaced.pdf](http://eelp.law.harvard.edu/wp-content/uploads/Lia-Cattaneo-SAFE-Rule-Part-1_final_singlespaced.pdf); Goffman & Bloomer, *Disempowering the EPA*, *supra* note 165, at 954.

246. Clean Air Act, 42 U.S.C. § 7543(b) (2012); *see also* Goffman & Bloomer, *Disempowering the EPA*, *supra* note 165 (emphasizing that the statute creates an explicit presumption in favor of granting the waiver).

247. Clean Air Act, 42 U.S.C. § 7507 (2012) ("The Administrator shall . . . waive application . . . to any State which has adopted standards . . . for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966 . . .").

248. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310, 51,338 (Sep. 27, 2019) (codified at 40 C.F.R. pts. 85, 86, and 43 C.F.R. pts. 531, 533).

249. Goffman & Bloomer, *Disempowering the EPA*, *supra* note 165, at 955.

independent basis upon which to ignore Congress's clear presumption in favor of granting California's waiver request, and failed to make the requisite findings required under the law to justify denying a waiver.<sup>250</sup>

Second, EPA offered an alternative justification for the withdrawal in which the agency narrowly interpreted section 209(b)(1)(B) of the CAA as only applying to criteria pollutants,<sup>251</sup> not greenhouse gases. This interpretation positioned the agency to defend its conclusion that the CAA does not authorize California to regulate GHG emissions from light duty vehicles.<sup>252</sup> EPA also imposed a heightened standard inconsistent with the CAA's presumption in favor of granting California's waiver, finding: "In order for a waiver request to pass muster under CAA section 209(b)(1)(B) . . . a particularized, state-specific nexus must exist between pollutant sources, resulting pollution, and impacts of that pollution."<sup>253</sup> EPA roughly imposed this nexus requirement on top of the CAA's far broader language of "compelling and extraordinary conditions" in order to preclude California from adopting its own GHG emission and ZEV standards, regardless of the present and future impacts of climate change unique to the state.

These examples represent only some of the many instances in which the Trump Administration adopted novel, unfounded statutory interpretations in order to permanently diminish agencies' regulatory authority.<sup>254</sup> In adopting these static interpretations of statutory text, EPA not only abdicated its duty to protect public health and the environment, but also sought to relegate future administrations to the same fate. Using this strategy, EPA also sought to sabotage the very design of the administrative state, in which executive agencies assist Congress in addressing new threats by leveraging deep institutionalized expertise while creating a forum in which to interface and troubleshoot with both the public at large and particular community partners. Recognizing this potential, Congress often gives agencies broad mandates, framed with the flexibility needed to address as yet unforeseen opportunities, discoveries, and challenges. By permanently limiting the flexibility with which agencies may interpret these

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250. See 42 U.S.C. § 7543(b)(1) (providing that the EPA "shall . . . waive application of this section" unless it makes one of three findings to deny a waiver, including that California "does not need such State standards to meet compelling and extraordinary conditions.").

251. Criteria pollutants are the six common air pollutants regulated under the National Ambient Air Quality Standards (NAAQS) program: carbon monoxide (CO), ground-level ozone (O<sub>3</sub>), nitrogen dioxide (NO<sub>2</sub>), lead (Pb), particulate matter (PM), and sulfur dioxide (SO<sub>2</sub>). *Criteria Air Pollutants*, *supra* note 33.

252. Goffman & Bloomer, *Disempowering the EPA*, *supra* note 165, at 956.

253. *Id.* at 956–57; 84 Fed. Reg. at 51,349 n. 280.

254. See generally Goffman & Bloomer, *Disempowering the EPA*, *supra* note 165.

statutes, the Trump Administration tried to permanently weaken these agencies' capacities to implement their Congressional mandates, and thus, the power of the statutes themselves.

#### CONCLUSION

President Biden has promised to tackle climate change and other imposing environmental threats, and to do so with every policy and programmatic tool at his disposal. EPA's toolbox, populated with a variety of authorities under the CAA and continually evolving expertise, will play an outsized role in the Biden-Harris Administration's climate change policy. As if to preempt that role deliberately, over the past four years, the Trump Administration strategically, and often successfully, sought to gut longstanding environmental regulations while imposing novel statutory interpretations that, if accepted by federal courts, would permanently restrict agencies' regulatory authority and flexibility. At the same time, political appointees alienated scientific experts and career staff; insulated agencies from public scrutiny; openly discouraged public participation and accountability in order to benefit corporate interests; and mandated rulemaking processes that will inevitably result in weaker pollution standards that fail to address the pressing public health and environmental crises that we currently face.

Agencies like EPA developed capacities, expertise, and high-functioning cultures over long periods of time. Though the Trump Administration significantly weakened these features, they are likely not beyond repair. The more daunting challenge is that of time lost, in the form of permanent alterations to ecosystems that are more stressed by development and climate change than ever before; increased greenhouse gas emissions driving up atmospheric concentrations and radiative forcing; protected lands that have been mined and drilled; and logged acres of National Forests opened to development for the first time. Cumulative increases in pollution have fallen, and continue to fall, most heavily on already overburdened communities, even if the Trump Administration refused to account for those impacts. Compounded with the COVID-19 pandemic,<sup>255</sup> large swaths of the population have been pushed to a degree of vulnerability that may or may not be reversible.

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255. Small increases in long-term exposure to particulate matter, specifically PM<sub>2.5</sub>, have been shown to lead to large increases in COVID-19 mortality rates, even after accounting for other area-level variables. X. Wu et al., *Air Pollution and COVID-19 Mortality in the United States: Strengths and Limitations of an Ecological Regression Analysis*, 6 SCI. ADVANCES, no. 45, 2020, at 1–2.



I draw hope from the fact that, as candidates, President Biden and Vice President Harris centered climate change and environmental justice in their appeal to voters. Their victory, bolstered by public demand for bold action on these issues, signals we may have the level of White House leadership needed to confront these challenges and succeed.

