

DECONSTRUCTING ENVIRONMENTAL DEREGULATION UNDER THE TRUMP  
ADMINISTRATION

*Hannah Perls*<sup>††</sup>

INTRODUCTION ..... 1

I. STRATEGY 1: UNDERMINE AGENCIES’ SCIENTIFIC AND EXPERT CAPACITIES..... 2

*Step 1: Block the collection of information needed to justify forward-looking regulation..... 3*

*Step 2: Undermine the integrity of scientific expert review committees..... 5*

*Step 3: Preclude EPA from relying on critical public health studies..... 8*

II. STRATEGY 2: RESTRICT THE PUBLIC’S SCRUTINY OF AND PARTICIPATION IN AGENCY DECISION-  
MAKING..... 10

*Step 1: Eliminate or restrict mechanisms designed to promote meaningful consultation with affected  
communities..... 11*

*Step 2: Restrict public access to agencies’ internal documents and decision-making processes..... 13*

*Step 3: Restrict pathways for the public to challenge EPA decisions..... 14*

III. STRATEGY 3: AVOID REGULATION-TRIGGERING EVENTS..... 15

*Step 1: Expand exemptions for projects and impacts otherwise subject to environmental review and regulation.  
16*

*Step 2: Restructure cost-benefit analyses to minimize or exclude benefits to human health and the  
environment..... 20*

IV. STRATEGY 4: ADOPT NOVEL STATUTORY INTERPRETATIONS THAT ABDICATE OR NARROW  
AGENCIES’ REGULATORY AUTHORITY ..... 29

V. CONCLUSION ..... 34

INTRODUCTION

Over the past four years, Harvard’s Environmental & Energy Law Program (EELP) has tracked the Trump administration’s environmental rollback efforts, analyzing both individual regulations and broader attacks on EPA’s mission-critical capacities.<sup>1</sup> Our 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 incoming administration must operate.

In those four years, political appointees have turned environmental agencies’

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<sup>††</sup> Legal Fellow, Harvard Law School’s Environmental & Energy Law Program (EELP). Special thanks go to our executive director Joe Goffman, who contributed to this paper. This article also draws heavily upon work by EELP colleagues past and present including Ari Peskoe, Hana Vizcarra, Caitlin McCoy, Laura Bloomer, and William Niebling; as well as by HLS students including James Pollack. All errors are the author’s own.

<sup>1</sup> 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*, EELP (last visited Dec. 3, 2020), <https://eelp.law.harvard.edu/regulatory-rollback-tracker/>. Our Mission Tracker includes an online database tracking 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*, EELP (last visited Dec. 2, 2020), <https://eelp.law.harvard.edu/EPA-mission-tracker/>.

interpretations of key statutes upside down, transforming broad mandates into a series of constraints on agencies' regulatory authorities. Officials have 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 Administrator Scott Pruitt began, Administrator Andrew Wheeler has 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 have lost access to the scientific, legal, and public accountability mechanisms that previously enabled them to respond to new 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 sections, 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 administration undermined EPA's expert capacities, forcing an exodus of academic scientists from the agency's expert bodies and opening 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 industries over the communities most affected by those industries' activities.

Third, the Trump administration minimized regulation-triggering events by expanding the projects and impacts exempt from environmental review and modifying the assessments agencies use to determine when new projects or events merit analysis or oversight. In promoting a Frankenstein's monster version of cost-benefit analysis to justify the administration's deregulatory goals, President Trump established arbitrary limits on the costs agencies can impose on private industry and 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 own authority to regulate at all. While the ink is still wet on many of these interpretations, if approved by federal courts, the Trump administration's legacy will prevent future administrations from exercising the broader regulatory authority necessary to address both longstanding and novel public health and environmental challenges.

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

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<sup>2</sup> For a more comprehensive assessment of how the Trump administration implemented its deregulatory agenda at DOI, see Laura Bloomer, Peter Daniels, Eric Wriston, & Joseph Goffman, *MANAGING PUBLIC LANDS UNDER THE TRUMP ADMINISTRATION AND BEYOND*, EELP (Oct. 2020), <http://www.npshistory.com/publications/doi/hls-eelp-2020.pdf>.

Scientific understanding and advancement are 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, including the Clean Air Act (CAA), the Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA), the Toxic Substances Control Act (TSCA), and Superfund.<sup>3</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>4</sup>

Under the Trump administration, political appointees have 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. Within EPA, leadership obstructed the processes that EPA uses to integrate science when issuing health-based regulations. The agency's exclusion of qualified experts from its advisory committees and welcoming of industry-affiliates to fill the empty seats also undermined scientific decision-making. The result of these actions is to blind the agency to the best available science, contrary to its own statutory mandates, and to politicize the determination of health-based standards.

*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>5</sup> The IWG, established in 2010, was tasked with assessing the costs associated with 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. Disbanding the IWG thus served the double purpose of rescinding critical work to quantify 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

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<sup>3</sup> Joseph Goffman, *Reconstruct an Administrative Agency*, ENVIRONMENTAL LAW INSTITUTE 41 (Nov. 2018), [http://eelp.law.harvard.edu/wpf-content/uploads/Goffman\\_Forum\\_2018\\_Nov-Dec-ELI.pdf](http://eelp.law.harvard.edu/wpf-content/uploads/Goffman_Forum_2018_Nov-Dec-ELI.pdf).

<sup>4</sup> *Id.*

<sup>5</sup> 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 (March 31, 2017). *See also* Hana Vizcarra, EPA'S FINAL METHANE EMISSIONS RULE ROLLS BACK STANDARDS AND STATUTORY AUTHORITY, EELP 2 (Sep. 9, 2020), <https://eelp.law.harvard.edu/2020/09/EPAs-final-methane-emissions-rule-rolls-back-standards-and-statutory-authority/>.

(BSEE) offshore oil and gas operations inspection program.<sup>6</sup> Three weeks later, on December 29, BSEE proposed to rescind the Obama-era Offshore Production Safety and 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>7</sup> DOI's final rule eliminated "unduly burdensome" requirements that independent third parties certify offshore oil and gas production equipment will function in extreme conditions, a conclusion that the National Academies' study would have likely contradicted.<sup>8</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 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>9</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>10</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>11</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>12</sup> Had DOI continued to fund the National Academies study, its findings would have likely provided fuel for the public to challenge DOI's finding. Halting the study also prevents 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 one thousand deaths per year in neighboring

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<sup>6</sup> *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 ACADEMIES OF SCIENCE, ENG. & 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>.

<sup>7</sup> See *BSEE Offshore Production Safety Systems Rule Update*, EELP (May 14, 2020), <https://eelp.law.harvard.edu/2020/05/bsee-offshore-production-safety-systems-rule-update/>; Oil and Gas and Sulphur Operations on the Outer Continental Shelf-Oil and Gas Production Safety Systems-Revisions, 82 Fed. Reg. 61703 (proposed Dec. 29, 2017) (codified at 30 C.F.R. pt. 250).

<sup>8</sup> 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).

<sup>9</sup> *Statement Regarding National Academies Study on Potential Health Risks of Living in Proximity to Surface Coal Mining Sites in Central Appalachia*, NAT'L ACADEMIES OF SCIENCE, ENG. & 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>.

<sup>10</sup> 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-faee-59c9-a44b-e1be9494c0ad.html](https://www.wvgazettemail.com/news/health/without-federal-funding-study-on-health-effects-of-mountaintop-removal-ends/article_24a6d16a-faee-59c9-a44b-e1be9494c0ad.html).

<sup>11</sup> *DOI Coal Leasing Moratorium*, EELP (Sep. 4, 2017), <https://eelp.law.harvard.edu/2017/09/doi-coal-leasing-moratorium/>.

<sup>12</sup> 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 (D. Mont. 2019).

communities.<sup>13</sup>

*Step 2: Undermine the integrity of scientific expert review committees.*

Expert and scientific review committees assist EPA in making decisions that take into account the best available science and proactively protect public health. Historically, the federal government has insulated these committees from industry interests because regulated industries have other opportunities and abundant 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 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," despite the fact that at least one federal appeals court had found "working for or receiving a grant from [an agency], or co-authoring a paper with a person affiliated with the department, does not impair a scientist's ability to provide technical, scientific peer review of a study sponsored by . . . one of its agencies."<sup>14</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. 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 scientific advisory committees.<sup>15</sup> Three federal courts struck down the directive in 2020.<sup>16</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 process for vetting members of the Science Advisory Board (SAB) and the Clean Air Scientific Advisory Committee (CASAC), resulting in significant changes to the committees' composition, regional

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<sup>13</sup> Richard Schiffman, *A Troubling Look at the Human Toll of Mountaintop Removal Mining*, YALEENVIRONMENT360 (Nov. 21, 2017), <https://e360.yale.edu/features/a-troubling-look-at-the-human-toll-of-mountaintop-removal-mining>.

<sup>14</sup> *Cargill, Inc. v. United States*, 173 F.3d 323, 338 (5th Cir. 1999).

<sup>15</sup> [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)

<sup>16</sup> *See Nat. Res. Def. Council v. U.S. Evtl. Prot. Agency*, 2020 WL 2769491 (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 agency advisory committees."); *Union of Concerned Scientists v. Wheeler*, 954 F.3d 11 (1st Cir. 2020); *Physicians for Social Responsibility v. Wheeler*, 956 F.3d 634 (D.C. Cir. 2020) (finding that EPA violated the Administrative Procedure Act in 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*, EELP (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).

affiliation, and turnover rate.<sup>17</sup> In both cases, EPA did not include staff rationales for recommending candidates they deemed to be the best qualified and most appropriate for achieving balanced committee membership, as recommended by EPA’s *Federal Advisory Committee Handbook*.<sup>18</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>19</sup> EPA also failed to ensure that committee members appointed as special government employees (SGEs) met federal ethics requirements, and didn’t conduct periodic ethics reviews, which would evaluate the quality of SGE’s financial disclosures.<sup>20</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>21</sup>

The Trump EPA was especially damaging to 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. The CAA tasks an independent group of experts—the CASAC—with assisting EPA in reviewing and revising these standards every five years. With a focus on scientific assessment, the CASAC reviews all relevant documents, which are also made available for public comment. 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>22</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 CASAC.

Given the power of 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>23</sup> Traditionally, EPA has also convened two auxiliary panels of experts to assist CASAC in reviewing the NAAQS for particulate matter (PM or soot), and ground-level ozone, two common but harmful air pollutants that can cause severe or even fatal respiratory and cardiovascular problems.<sup>24</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 their cohort lacked the experts in the disciplines needed to assess PM, CASAC asked that a PM panel be reassembled to advise

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<sup>17</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-19-280, EPA ADVISORY COMMITTEES: IMPROVEMENTS NEEDED FOR THE MEMBER APPOINTMENT PROCESS (2019).

<sup>18</sup> *Id.* at 17.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 15.

<sup>21</sup> *Id.* at 27–28.

<sup>22</sup> *Murray Energy Corp. v. EPA*, 936 F.3d 597, 614 (D.C. Cir. 2019) (quoting *Mississippi v. EPA*, 744 F.3d 1334, 1340 (D.C. Cir. 2013)).

<sup>23</sup> Joe Goffman & Laura Bloomer, *The Legal Consequences of EPA’s Disruption of the NAAQS Process*, EELP (Sep. 30, 2019), <https://eelp.law.harvard.edu/2019/09/the-legal-consequences-of-EPAs-disruption-of-the-naaqs-process/>.

<sup>24</sup> *Criteria Air Pollutants*, EPA (last visited Nov. 24, 2020), <https://www.EPA.gov/criteria-air-pollutants>.

and interact with CASAC. Instead of agreeing, Administrator Wheeler unilaterally appointed a panel of twelve consultants to whom CASAC had only limited access in developing the PM and ozone NAAQS.<sup>25</sup> In response, 18 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>26</sup>

Finally, EPA corrupted the way these committees make decisions, replacing transparent, democratic processes with closed-door meetings that concentrate decision-making power with political appointees. In February 2020, Administrator Wheeler issued a memorandum fundamentally altering how EPA engages with its Science Advisory Board.<sup>27</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. 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>28</sup> Wheeler's memo contravened this mandate, instead requiring that EPA meet privately with the Board chair and a limited number of Board members to first determine which agency proposals merit Board review. The memo also delayed SAB's review of a rule until after the proposed rule is publicly released, 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. 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, scientists and other outside stakeholders in the SAB prioritization process."<sup>29</sup>

These changes to EPA's advisory committees have direct, tangible effects on health-based air pollution standards. In August 2020, EPA proposed to not update the current National Ambient Air Quality Standards (NAAQS) despite evidence that tightening standards is necessary

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<sup>25</sup> *Administrator Wheeler Announces New CASAC Member, Pool of NAAQS Subject Matter Experts*, EPA (Sep. 13, 2019), <https://www.EPA.gov/newsreleases/administrator-wheeler-announces-new-casac-member-pool-naaqs-subject-matter-experts>.

<sup>26</sup> *Letter to Administrator Wheeler: Advice from the former U.S. EPA Clean Air Scientific Advisory Committee Ozone Review Panel*, EPA (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).

<sup>27</sup> *Science Advisory Board Engagement Process for Review of Regulatory Action Memorandum*, EPA (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).

<sup>28</sup> 42 U.S.C. § 4365(h).

<sup>29</sup> *Letter to Administrator Wheeler from Chairwoman Eddie Bernice Johnson* (Feb. 11, 2020), <https://science.house.gov/imo/media/doc/2.11.2020%20Letter%20to%20Administrator%20Wheeler%20regarding%20SAB%20Memo.pdf>.

to adequately protect public health.<sup>30</sup> Forty legal scholars commented on the proposal: “recent changes to the science advisory committee’s role and composition render the [proposed rule] legally deficient, and will result in standard-setting that contravenes Congress’s will. . . the current CASAC lacks the depth and breadth of experience necessary to review the proposed [NAAQS] as Congress intended, to ensure the application of the best and latest science to standard-setting.”<sup>31</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. The rule bypasses a report published by EPA’s Office of Air Quality Planning and Standards finding that the current primary PM standards fail to prevent “a substantial number” of premature deaths each year.<sup>32</sup>

*Step 3: Preclude EPA from relying on critical public health studies.*

On April 24, 2018, EPA issued a proposed rule, *Strengthening Transparency in Regulatory Science*, that would limit the agency’s ability to consider science if the underlying data are not publicly available. However, research on threats to human health often relies on confidential data from human subjects; thus the rule would prevent the agency 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>33</sup> The D.C. Circuit has soundly rejected the rule’s purpose, 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>34</sup> After EPA published the proposed rule, 97 medical and public health experts submitted comments warning that the rule would not only frustrate EPA’s stated goal of relying 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>35</sup>

<sup>30</sup> 40 Law Scholars Oppose EPA’s Changes to the Ozone Standards-Setting and Science-Advising Process, EELP (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/>.

<sup>31</sup> <https://beta.regulations.gov/comment/EPA-HQ-OAR-2018-0279-0465>.

<sup>32</sup> *National Ambient Air Quality Standards for PM and Ozone*, EELP (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 C.F.R. 82,684 (Dec. 18, 2020); POLICY ASSESSMENT FOR THE REVIEW OF THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR PARTICULATE MATTER, EPA 3-105 (Jan. 2020), [https://www.epa.gov/sites/production/files/2020-01/documents/final\\_policy\\_assessment\\_for\\_the\\_review\\_of\\_the\\_pm\\_naaqs\\_01-2020.pdf](https://www.epa.gov/sites/production/files/2020-01/documents/final_policy_assessment_for_the_review_of_the_pm_naaqs_01-2020.pdf).

<sup>33</sup> 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, and many of the scientists are no longer alive, and it is unclear whether the underlying data are available. See Harvard Law School Emmett Environmental Law & Policy Clinic, *Comments on Proposed Rule, Strengthening Transparency in Regulatory Science*, 83 Fed. Res. 18,768 (Apr. 30, 2018) (Aug. 7, 2018), <http://eelp.law.harvard.edu/wp-content/uploads/Harvard-Comments-re-Docket-ID-No.-EPA-HQ-OA-2018-0259.pdf>.

<sup>34</sup> *Am. Trucking Associations, Inc. v. EPA*, 283 F.3d 355, 372 (D.C. Cir. 2002).

<sup>35</sup> *Id.* at 4.



EPA rushed to finalize the rule on January 6, 2021,<sup>36</sup> claiming the final rule is “much narrower” in scope than the proposed rule.<sup>37</sup> However, the final rule broadly applies its standards to the agency’s use of “dose-response data”<sup>38</sup> in both “significant regulatory actions” and the general sharing of “influential scientific information,” such as on EPA’s website.<sup>39</sup> The final rule states that “for pivotal science where there is no access to dose-response data, or access is limited, the Agency *may* still consider these studies but will give them lesser consideration.”<sup>40</sup> The rule thus creates a new default in which key epidemiological studies are assumed to be excluded from EPA review unless the agency affirmatively opts to include those studies in its decision and rule-making processes. Even then, EPA must give those studies “lesser consideration” simply because the underlying data are not publicly available. The final rule also invites EPA to conduct additional internal peer review of “pivotal” science, even if those studies have already undergone independent peer review.<sup>41</sup>

Public health experts are 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—that form the bedrock of particulate matter (PM) pollution regulations.<sup>42</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. Administrator Wheeler stated that “pivotal studies” like the Harvard study “will [not] automatically be cut from review by the agency,” provided that EPA can justify the study’s use and publish its reasoning behind that decision.<sup>43</sup> Thus, the rule imposes new procedural burdens discouraging EPA from relying on these studies. And if EPA does choose to use these studies, they must give those studies less weight because they rely on

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<sup>36</sup> Prior to issuing the final rule, EPA issued a supplemental notice of proposed rulemaking in March 2020 to address the numerous issues raised in public comments on the proposed rule. Yet instead of addressing the public’s concerns, the supplemental rule broadened the scope of the proposed rule to all “influential science” relied on by EPA, not just science used in regulatory efforts. Furthermore, under the supplemental rule, the EPA administrator would have complete discretion to decide which studies are subject to the rule. Kelsey Brugger, *Trump admin expands reach of secret science proposal*, E&ENEWS (Mar. 4, 2020), <https://www.eenews.net/stories/1062516587/>.

<sup>37</sup> Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information, 86 Fed. Reg. 469, 470 (Jan. 6, 2021). As with many of the rules the Trump EPA has pushed through in its final month, the final *Strengthening Transparency* rule is effective immediately upon publication.

<sup>38</sup> Dose-response studies evaluate how much a person’s exposure to a potentially harmful substance increases the risk of harm.

<sup>39</sup> 86 Fed. Reg. at 470.

<sup>40</sup> *Id.* at 492 (emphasis added). The rule exempts pivotal science based on dose-response data that includes confidential business information, proprietary information, or personally identifiable information if those data are made available to EPA through restrict access “in a manner sufficient for independent validation.” *Id.*

<sup>41</sup> *Id.* at 487. The final rule’s peer review requirements are narrower than in the proposed rule, which would have required EPA to conduct independent peer review of all “pivotal regulatory science” used in rulemaking decisions.

<sup>42</sup> *EPA is Planning to Limit the Science It Considers*, EELP (April 4, 2018), <https://eelp.law.harvard.edu/2018/04/changing-what-science-the-EPA-will-consider-part-1/>.

<sup>43</sup> Juliet Eilperin & Brady Dennis, *EPA finalizes rule to limit science behind public health safeguards*, WASHINGTON POST (Jan. 5, 2021), <https://www.washingtonpost.com/climate-environment/2021/01/04/epa-scientific-transparency/>.

anonymized data from human subjects.<sup>44</sup> Under the rule the administrator may seek an exemption to use a particular study on a case-by-case basis. To do that, however, the administrator must document their rationale for the exemption, which may then be subject to legal challenges.<sup>45</sup> Thus the rule disincentivizes EPA from relying on these critical studies by increasing the agency’s administrative burden and legal exposure.

in both the proposed and final rule, EPA provides no evidence or rationale for why existing practices are insufficient to guarantee “transparency.”<sup>46</sup> EPA’s own Scientific Advisory Board issued a report in April 2020, finding “minimal justification [] 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>47</sup> The Board also cautioned that the proposed rule may “decrease efficiency and reduce scientific integrity,” and that EPA failed to conduct the “robust analysis” necessary to avoid “serious and perverse outcomes.”<sup>48</sup> EPA’s failure to adequately respond to these comments reveals the rule’s true purpose: to undermine the agency’s capacity to issue robust health-based pollution limits by restricting the science upon which it can rely, imposing arbitrary procedural burdens along the way.

## 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. In order 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. In order for that participation to be inclusive and meaningful,<sup>49</sup> these processes must also account for resource and power differentials between regulated industry and the communities most affected by industrial activity, and create corrective mechanisms to ensure that people and communities with fewer resources are still heard. Only through this transparent give-and-take of information and feedback can EPA be accountable to the public’s needs.

EPA’s statutory mandates often include specific mechanisms promoting citizen oversight of agency decisions. These mechanisms are evidence of Congress’ recognition that public

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<sup>44</sup> 86 Fed. Reg. at 477.

<sup>45</sup> *Id.* at 493.

<sup>46</sup> 86 Fed. Reg. at 487.

<sup>47</sup> Science Advisory Board (SAB) Consideration of the Scientific and Technical Basis of EPA’s Proposed Rule Titled *Strengthening Transparency in Regulatory Science* (Apr. 24, 2020), [https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebReportsLastMonthBOARD/2DB3986BB8390B308525855800630FCB/\\$file/EPA-SAB-20-005.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebReportsLastMonthBOARD/2DB3986BB8390B308525855800630FCB/$file/EPA-SAB-20-005.pdf).

<sup>48</sup> *Id.* at 18.

<sup>49</sup> EPA’s commitment to foster environmental justice includes the “meaningful involvement” of communities disparately impacted by environmental harms. See *Environmental Justice*, EPA (last updated Nov. 25, 2020), <https://www.epa.gov/environmentaljustice>.

accountability plays an essential role in healthy, responsive governance. These mechanisms are critical in the environmental realm, where the primary stakeholders (project proponents) often hold disproportionate economic and political leverage in the decision-making process over affected people and communities, who may be dispersed, disconnected, and living at the intersection of other structural injustices including racism or poverty. Providing inclusive opportunities for feedback helps to amplify the voices of populations or communities with less access or opportunity to have their interests fully considered.

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. These actions also pave the way for project proponents to face fewer restraints on their investments and actions, including those restraints that would appropriately be in place because they reflect the interests and values of other stakeholders, namely people and communities.

*Step 1: Eliminate or restrict mechanisms designed to promote meaningful consultation with affected communities.*

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, formed part of an effort to adapt to climate change-related impacts in the Northern Bering Sea.<sup>50</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>51</sup> In April 2017, President Trump revoked the order as part of “Implementing an America-First Offshore Energy Strategy”<sup>52</sup> without consulting Alaska Native groups (despite the administration’s claims to the contrary).<sup>53</sup> In response, the Bering Sea Elders Group, representing 40 coastal tribes, issued a statement condemning Trump’s order, noting 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>54</sup>

DOI also evaded public input on environmental reviews, complying with public participation laws “in form only,”<sup>55</sup> while restricting public participation mechanisms through regulatory rollbacks. In 2017, Secretary Bernhardt issued Secretarial Order 3355, directing

<sup>50</sup> Exec. Order No. 13,754, 81 Fed. Reg. 90,669 (Dec. 14, 2016).

<sup>51</sup> *Id.*

<sup>52</sup> Exec. Order No. 13,795, 82 Fed. Reg. 13,754 (May 3, 2017).

<sup>53</sup> 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>.

<sup>54</sup> *Id.*

<sup>55</sup> Bloomer et al., *supra* note 2 at 7.

bureaus to pursue new categorical exclusions under the National Environmental Policy Act (NEPA). The order also ordered bureaus to complete environmental impact statements (EISs) within one year, and shorten most environmental reviews to 100 pages or less. Categorical exclusions preclude public input by excluding projects from NEPA review, while the timing and length restrictions limit meaningful public engagement.<sup>56</sup> When our colleagues at EELP conducted interviews with Interior employees, those employees also highlighted changes to Interior’s public hearings, such as limiting the number of hearings per project and holding those hearings in inconvenient locations.<sup>57</sup> Interior officials also routinely ignored oversight requests from Congress itself, leading the House Natural Resources Committee to threaten them with subpoenas.<sup>58</sup> BLM also finalized a lame duck rollback in December 2020 that eliminates the 15-day protest period after a decision is made about forest management projects, including timber harvests and sales.<sup>59</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>60</sup>

NEPA provides 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. The final rule excludes several projects from NEPA review and reduces the number and type of effects and alternatives considered as part of that review.<sup>61</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>62</sup> For example, the final rule now requires comments on draft EISs to be “timely received and at a level of specificity where they can be meaningfully taken into account,” else the comments will be thrown out.<sup>63</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>64</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 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 succeeds in simultaneously fast-tracking the approval process for large-scale polluting

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<sup>56</sup> *Id.* at 7–8.

<sup>57</sup> *Id.* at 8.

<sup>58</sup> *Id.*

<sup>59</sup> Forest Management Decision Protest Process and Timber Sale Administration, 85 F.R. 82,359, 82,371 (Dec. 18, 2020). The rule will be effective on January 19, 2021.

<sup>60</sup> *Id.* at 82,360.

<sup>61</sup> See *infra* Section IV. See also *NEPA Environmental Review Requirements*, EELP (Aug. 15, 2018), <https://eelp.law.harvard.edu/2018/08/NEPA-environmental-review-requirements/>.

<sup>62</sup> *Id.*

<sup>63</sup> Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,314 (July 16, 2020).

<sup>64</sup> *Id.* at 43,358.

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

*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 actively worked to insulate 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 processes by submitting a formal request.<sup>65</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. That official will decide 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>66</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>67</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 fear 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 from EPA" and contradicts federal precedent.<sup>68</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>69</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>70</sup> In the words of the coalition, EPA's "rule appears to authorize exactly what the D.C. Circuit's holding prohibits."<sup>71</sup>

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<sup>65</sup> 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. *See* Bloomer et al., *supra* note 2 at 8.

<sup>66</sup> James Pollack, *Restricting Access to Public Records*, EELP (July 19, 2019), <https://eelp.law.harvard.edu/2019/07/EPA-restricts-access-to-public-records/>.

<sup>67</sup> Libby Dimenstein, *Legal and Legislative Challenges to EPA's FOIA Restrictions* (Feb. 26, 2020), <https://eelp.law.harvard.edu/2020/02/legal-and-legislative-challenges-to-EPAs-foia-restrictions/>.

<sup>68</sup> Letter to Administrator Wheeler (July 22, 2019), <https://www.leahy.senate.gov/imo/media/doc/Letter%20to%20EPA%20Adminstrator%20Wheeler%20re%20FOIA%20Regulations%20Update%20--%20072219.pdf>.

<sup>69</sup> *American Immigration Lawyers Association v. Executive Office for Immigration Review*, 830 F.3d 667, 670 (D.C. Cir. 2016).

<sup>70</sup> *Id.*

<sup>71</sup> Letter to Administrator Wheeler, *supra* note 68.

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>72</sup> These ratings reflect both the quality of the analysis and the degree of environmental impact associated with the project.<sup>73</sup> These ratings provide a quick and easy way for the general public, including affected communities, 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>74</sup> However, in reversing this nearly four decades-old policy, EPA only consulted other federal agencies, not the general public. By removing this crucial tool for community groups, EPA makes it more difficult for communities to assess the potential threat of proposed projects to their own health and wellbeing.

*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. 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>75</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. Recognizing the importance of citizen suits to the enforcement of environmental laws, Congress also provided for the payment of plaintiffs’ attorneys’ fees.<sup>76</sup> 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>77</sup> Absent this promise to pay the complaining party’s legal fees, most citizen suits would never be brought given the often prohibitive costs of litigation.

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 adds several procedural hurdles for citizens and their attorneys seeking to compel EPA

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<sup>72</sup> § 309 of the CAA allows EPA to review EISs prepared by other agencies and requires EPA to make those reviews available to the public. 42 U.S.C. § 7609.

<sup>73</sup> *Environmental Impact Statement Rating System Criteria*, EPA (last updated on Oct. 22, 2018), <https://www.EPA.gov/NEPA/environmental-impact-statement-rating-system-criteria#:~:text=EPA%20discontinued%20the%20use%20of,system%20on%20October%2022%2C%202018>.

<sup>74</sup> *Policy and Procedures for the Review of Federal Actions Impacting the Environment Under Section 309 of the Clean Air Act*, EPA (last updated on Oct. 22, 2018), <https://www.EPA.gov/NEPA/policy-and-procedures-review-federal-actions-impacting-environment-under-section-309-clean-air>.

<sup>75</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-34, ENVIRONMENTAL LITIGATION – IMPACT OF DEADLINE SUITS ON EPA IS LIMITED 5 (2014).

<sup>76</sup> Goffman, *supra* note 3 at 46.

<sup>77</sup> *Id.*

to meet its statutory obligations.<sup>78</sup> The directive requires EPA to first consult states and regulated industries affected by the suit before reaching a settlement agreement, but includes no parallel requirement for affected communities or members of the general public.<sup>79</sup> The directive also requires EPA to “exclude the payment of attorney’s fees and costs to any plaintiff or petitioner in the litigation.”<sup>80</sup> Taken together, these changes explicitly tilt 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 argues that these changes to settlement protocols are necessary to remedy past “collusion with outside groups” and “backroom deals,”<sup>81</sup> yet the directive includes no evidence of such collusion, and a 2014 report from the Government Accountability Office found no basis for such claims.<sup>82</sup> Furthermore, EPA’s press release claimed the directive provides “an unprecedented level of public participation and transparency in EPA consent decrees and settlement agreements.”<sup>83</sup> Yet the directive forecloses one of the most powerful mechanisms for public accountability under federal environmental laws. 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.”<sup>84</sup> The lawyers condemned the directive’s “patent[] bias” “giving regulated parties, but not other members of the public, a seat at the settlement table.”<sup>85</sup> The Directive, despite EPA’s claims to the contrary, will thus “work against the agency and the public’s interest in fair and efficient EPA operations and reasonable timeframes for EPA action.”<sup>86</sup>

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

There is a core underlying assumption embedded in all our major environmental statutes. This assumption reflects a firm and longstanding principle that industries should not be allowed to externalize their costs, and force a nonconsenting public to bear those costs. Under the Administrative Procedure Act (APA), agencies must receive and respond to public notice and comment. Under NEPA, agencies must take a holistic look at the potential individual and

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<sup>78</sup> See *EPA Changes Its Settlement Practices*, EELP (Feb. 26, 2018), <https://eelp.law.harvard.edu/2018/02/the-settlement-memo/>.

<sup>79</sup> The directive states that EPA must “take any and all appropriate steps to achieve the participation of affected states and/or regulated entities.” *Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements*, EPA (Oct. 16, 2017), [https://archive.EPA.gov/EPA/sites/production/files/2017-10/documents/signed\\_consent\\_decree\\_and\\_settlement\\_agreement\\_directiveoct162017.pdf](https://archive.EPA.gov/EPA/sites/production/files/2017-10/documents/signed_consent_decree_and_settlement_agreement_directiveoct162017.pdf) [hereinafter *Transparency Directive*].

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-34, ENVIRONMENTAL LITIGATION – IMPACT OF DEADLINE SUITS ON EPA IS LIMITED (2014).

<sup>83</sup> *Transparency Directive*, *supra* note 79.

<sup>84</sup> Letter to Administrator Scott Pruitt (Nov. 13, 2017), <http://eelp.law.harvard.edu/wp-content/uploads/Response-to-Directive-re-Consent-Decrees-and-Settlements.pdf>.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

cumulative impacts of its proposed actions, 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.

Agencies can preordain the outcome of cost-benefit analyses by changing the variables included or excluded from those analyses, and changing the weight assigned to those variables. In order to limit environmental regulation, the Trump administration fundamentally changed the methodologies agencies use to decide when regulation is necessary. 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. But the most significant changes the administration made were to agencies' cost-benefit analyses. The Trump administration elevated the importance of these analyses as a prerequisite or even determining factor in agency decision-making, and transformed how these analyses are conducted by minimizing the anticipated benefits of regulation to public health and the environment.

*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' guarantee that the federal government would first consider the potential environmental consequences and alternatives before approving major projects or making significant decisions. 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 permitting decisions, the adoption of agency policy, formal planning, agency projects, and other actions.<sup>87</sup> This review is designed to assess both the direct and cumulative environmental, social, economic, health or cultural impacts of the project. These 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 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 "safeguard our communities and maintain a healthy environment."<sup>88</sup> Prior to the administration's overhaul of NEPA regulations in 2020, many agencies, including EPA, systematically exempted high-priority projects or geographic areas from environmental review altogether. While some agencies

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<sup>87</sup> *NEPA Environmental Review Requirements*, EELP (Aug. 15, 2018), <https://eelp.law.harvard.edu/2018/08/NEPA-environmental-review-requirements/>.

<sup>88</sup> Exec. Order 13,807, 82 Fed. Reg. 40,463, 40, 463 (Aug. 15, 2017).



included such exemptions within broader regulatory rollbacks,<sup>89</sup> many expanded “categorical exclusions” under NEPA to exclude projects and areas exempt from review under the statute.<sup>90</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>91</sup> The final rule, published in November, 2020, exempts 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>92</sup> As a result, the Forest Service will not be 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 project approval. 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 relate to the construction of the border wall near San Diego,<sup>93</sup> Calexico,<sup>94</sup> and the Santa Teresa Land Port of Entry in New Mexico.<sup>95</sup> The Federal Communications Commission adopted an order in March 2018, determining that small wireless facilities do not constitute “major Federal action,” and thus are not subject to any kind of NEPA analysis.<sup>96</sup> In June 2018, BLM issued a Permanent Instruction Memorandum limiting the agency’s review under NEPA of applications regarding directional drilling into federal minerals from non-federal lands.<sup>97</sup> The memo replaced an Obama-era policy,<sup>98</sup> drawing heavily on recommendations from the industry-dominated Royalty Policy Committee.<sup>99</sup> BLM also published two lame duck rules in December, 2020, creating

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<sup>89</sup> 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. See Hana Vizcarra, *EPA’s Final Methane Emissions Rules Roll Back Standards and Statutory Authority*, EELP (Sep. 9, 2020), <https://eelp.law.harvard.edu/2020/09/EPAs-final-methane-emissions-rule-rolls-back-standards-and-statutory-authority/>.

<sup>90</sup> See *NEPA Environmental Review Requirements*, EELP (Aug. 15, 2018), <https://eelp.law.harvard.edu/2018/08/NEPA-environmental-review-requirements/>.

<sup>91</sup> National Environmental Policy Act (NEPA) Compliance, 84 Fed. Reg. 27,544, 27,546 (codified at 36 C.F.R. pt. 220); *NEPA – USDA/Forest Service*, EELP (Aug. 15, 2018), <https://eelp.law.harvard.edu/2018/08/NEPA-usda-forest-service/>.

<sup>92</sup> *Id.* at 27,549.

<sup>93</sup> Determination Pursuant to Section 201 of the Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 82 Fed. Reg. 35,984 (Aug. 2, 2017).

<sup>94</sup> Determination Pursuant to Section 201 of the Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 82 Fed. Reg. 42,829 (Sep. 12, 2017).

<sup>95</sup> Determination Pursuant to Section 201 of the Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 83 Fed. Reg. 3,012 (Jan. 22, 2018).

<sup>96</sup> *NEPA – Federal Communications Commission*, EELP (Aug. 15, 2018), <https://eelp.law.harvard.edu/2018/08/NEPA-federal-communications-commission/>.

<sup>97</sup> Directional Drilling Into Federal Mineral Estate from Well Pads on Non-Federal Locations, PIM 2018-014, <https://www.blm.gov/policy/pim-2018-014>.

<sup>98</sup> [https://www.eenews.net/assets/2018/06/14/document\\_ew\\_01.pdf](https://www.eenews.net/assets/2018/06/14/document_ew_01.pdf).

<sup>99</sup> Pamela King, *BLM Memo Checks Box on Industry Wish List*, E&ENews (June 14, 2018), <https://www.eenews.net/stories/1060084455>.

categorical exclusions for projects designed to remove pinyon pine and western juniper trees that threaten sagebrush habitat,<sup>100</sup> and projects harvesting dead or dying trees, increasing the maximum acreage from 250 to 3,000 acres of BLM land.<sup>101</sup> Another rule finalized in December 2020 by the Department of Energy (DOE) expanded categorical exclusions under NEPA to include the construction and operation of liquefied natural gas (LNG) export facilities, arguing that the agency lacks the authority to approve those activities.<sup>102</sup>

The Trump-appointed Republican-majority of the Federal Energy Regulatory Commission (FERC) went one step further, transforming the NEPA analysis itself to exclude certain impacts from agency review. In May 2018, FERC issued a 3-2 decision to not consider the climate change impacts of natural gas production (“upstream” emissions) and consumption (“downstream” emissions) during NEPA review for proposed natural gas pipelines.<sup>103</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>104</sup> This interpretation not only blinds 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. Ignoring upstream and downstream emissions may also result in FERC issuing a Finding of No Significant Impact (FONSI), or determination that an EIS is not necessary for a proposed natural gas pipeline, fast-tracking projects that would otherwise be subject to enhanced review under NEPA.

Finally, 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

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[https://www.eenews.net/eenewspm/2020/12/09/stories/1063720307?utm\\_campaign=edition&utm\\_medium=email&utm\\_source=eenews%3Aeenewspm](https://www.eenews.net/eenewspm/2020/12/09/stories/1063720307?utm_campaign=edition&utm_medium=email&utm_source=eenews%3Aeenewspm) (will be published in Fed. Reg. on 12/11/20)

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[https://www.eenews.net/eenewspm/2020/12/09/stories/1063720307?utm\\_campaign=edition&utm\\_medium=email&utm\\_source=eenews%3Aeenewspm](https://www.eenews.net/eenewspm/2020/12/09/stories/1063720307?utm_campaign=edition&utm_medium=email&utm_source=eenews%3Aeenewspm) (will be published in Fed. Reg. on 12/11/20)

<sup>102</sup> National Environmental Policy Act Implementing Procedures, 85 Fed. Reg. 78,197, 78,198 (Dec. 4, 2020).

<sup>103</sup> *NEPA – Federal Energy Regulatory Commission*, EELP (Aug. 15, 2018),

<https://eelplaw.harvard.edu/2018/08/NEPA-federal-energy-regulatory-commission/>.

<sup>104</sup> See *Dominion Transmission Inc.*, 163 FERC ¶ 61,128 at PP 20-21 (May 18, 20108) (“*New Market Rehearing Order*”). [link here: <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 has 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.

omitted, under NEPA.<sup>105</sup> One way the rule achieves this is by redefining key terms, including “major Federal action,” “effects, and “reasonable alternatives.”<sup>106</sup> These new definitions eliminate crucial elements of the NEPA analysis, stripping safeguards for affected communities while undermining the essential purpose of NEPA, that is to force agencies to take a “hard look” at the impacts of proposed projects on human health and the environment.<sup>107</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>108</sup> limits the geographic scope of review;<sup>109</sup> makes it easier for agencies to ignore evidence relevant to foreseeable significant adverse impacts;<sup>110</sup> and allows applicants (i.e. project proponents) to prepare their own environmental analyses, deleting previous conflict-of-interest protections.<sup>111</sup>

Finally, the rule undermines the very purpose of NEPA—to force agencies to “look before you leap”<sup>112</sup>—by allowing applicants to take actions, including acquiring land, before the NEPA review process is complete.<sup>113</sup> The rule also curtails agencies’ consideration of alternatives.<sup>114</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 as much investment in the project as possible prior to NEPA review, stripping agencies of the power to halt projects before they’ve commenced. In issuing this final rule, the Trump administration has succeeded in reducing NEPA to nothing more than a checkbox on the way to project approval.

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<sup>105</sup> Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 43,326, 43,343.

<sup>108</sup> *Id.* at 43,375.

<sup>109</sup> *Id.* at 43,360.

<sup>110</sup> 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.” The new rule significantly lowers this standard from “not exorbitant” to “not unreasonable.” *Id.* at 43,366–67.

<sup>111</sup> *Id.* at 43,371.

<sup>112</sup> *NEPA Environmental Review Requirements*, EELP (Aug. 15, 2018), <https://eelp.law.harvard.edu/2018/08/NEPA-environmental-review-requirements/>.

<sup>113</sup> 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.”)

<sup>114</sup> The previous rule required agencies to “rigorously explore and evaluate” “all reasonable alternatives” to the proposed action. The new rule merely requires agencies to “evaluate reasonable alternatives to the proposed action.” *Id.* at 43,365. These changes are largely consistent with the proposed rule. See Sharon Buccino, *Proposed NEPA Rule Changes*, NRDC (March 9, 2020), <https://www.nrdc.org/experts/sharon-buccino/proposed-NEPA-rule-changes>.

*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 regulation, and then weaponizing it 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 strategic changes to cost-benefit analysis, the Trump EPA willfully limits its view of the full range of benefits of reducing harmful pollutants. The result is a false analysis that justifies the Trump administration’s deregulatory environmental agenda by ignoring the very real and debilitating harms of that pollution on public health and the environment.<sup>115</sup>

A. Elevate the importance of cost-benefit analyses as 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. The first order, “Reducing Regulation and Controlling Regulatory Costs” – also known as the “2 for 1” order<sup>116</sup> – instructs the Office of Management and Budget (OMB) to set “regulatory budgets” for each agency. These budgets do not limit the public funds agencies have available to them, but rather the private expenditures agencies can impose on industry and other regulated bodies. These budgets only take into account the costs that regulations impose on regulated entities, not the benefits to public health and the environment created by increased regulation of pollution sources.<sup>117</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>118</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>119</sup> The order represents the absurd proposition that the value

<sup>115</sup> Goffman, *supra* note 3 at 46.

<sup>116</sup> The rule requires 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 regulation will only 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 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*, OMB 3 (April 5, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>.

<sup>117</sup> Lisa Heinzerling, *SPEECH: Cost-Nothing Analysis: Environmental Economics in the Age of Trump*, 30 COLO. NAT. RES. ENERGY & ENVTL. L. REV. 287, 301 (2019).

<sup>118</sup> *Id.*

<sup>119</sup> Exec. Order No. 13777, 82 Fed. Reg. 12,285, 12,286 (Mar. 1, 2017).

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 can 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.

B. 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 the Trump administration’s repeal of the Obama-era Clean Power Plan.<sup>120</sup> The Clean Power Plan, published in October 2015, set carbon pollution limits on existing power generators,<sup>121</sup> which were projected to reduce emissions from the power sector 32% from 2005 levels by 2030.<sup>122</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>123</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>124</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>125</sup> Third, EPA ignored the value of pollution-reduction benefits if those benefits would occur in areas already satisfying ambient air quality standards.<sup>126</sup> This strategy embodies 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>127</sup> Fourth, the rule re-classified energy efficiency gains as benefits

<sup>120</sup> *Changing How EPA Calculates Regulatory Benefits*, EELP (June 26, 2018), <https://eelp.law.harvard.edu/2018/06/denying-the-health-benefits-pollution-reduction/>.

<sup>121</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015).

<sup>122</sup> *Clean Power Plan/Carbon Pollution Emission Guidelines*, EELP (Sep. 26, 2017), <https://eelp.law.harvard.edu/2017/09/clean-power-plan-carbon-pollution-emission-guidelines/>.

<sup>123</sup> *See Changing How EPA Calculates Regulatory Benefits*, EELP (June 26, 2018), <https://eelp.law.harvard.edu/2018/06/denying-the-health-benefits-pollution-reduction/>.

<sup>124</sup> 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, 32,564 (July 8, 2019).

<sup>125</sup> *Id.* at 32,562.

<sup>126</sup> *Id.*

<sup>127</sup> This assumption is especially galling in 2020 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*, EELP (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/>.

instead of avoided costs, increasing the total cost associated with the Plan.<sup>128</sup>

Fifth and finally, EPA used a high discount rate (7%) for its social cost of carbon analysis.<sup>129</sup> The discount rate is a representation of the value 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.

Selecting a high discount rate gives away the Trump administration's deregulatory game, and the callous system of values it serves. The question of whether to mitigate the effects of climate change begs the question: what does the current generation owe the future? With a 7% percent discount rate, the Trump EPA's answer is: not much. The use of a high discount rate crystallizes, along with the other four tactics, the thoroughness of the administration's commitment to deregulation at the expense of jeopardizing the wellbeing of present and future generations.

### C. Reinterpret statutes to exclude co-benefits from cost-benefit analyses.

Another crucial tool in the Trump administration's deregulatory toolbox has been to diminish or ignore the value of co-benefits of environmental regulation. The Trump EPA used this tool to determine that the Obama-era Mercury and Air Toxics Standards (MATS) rule, which imposed limits on hazardous air pollutants (HAPs) emitted by power plants was not "appropriate and necessary." Under the CAA, EPA may set pollution-control standards for power plant HAP emissions if the agency finds it "appropriate and necessary" to do so based on an assessment of the hazards to public health posed by power plant HAP emissions.<sup>130</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>131</sup> In addition to minimizing or excluding co-benefits, EPA also underestimated the

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<sup>128</sup> See *Changing How EPA Calculates Regulatory Benefits*, EELP (June 26, 2018), <https://eelp.law.harvard.edu/2018/06/denying-the-health-benefits-pollution-reduction/>.

<sup>129</sup> 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*, EELP (last visited Nov. 28, 2020), <http://eelp.law.harvard.edu/wp-content/uploads/EELP-Car-Rules-Backgrounder-Final-Updated.pdf>.

<sup>130</sup> CAA § 112(n)(1)(A). See also Joseph Goffman & Laura Bloomer, *Disempowering EPA: How Statutory Interpretation of the Clean Air Act Serves the Trump Administration's Deregulatory Agenda*, 70 CASE W. RES. L. REV. 929, 958 (2020).

<sup>131</sup> 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,

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. These choices not only facilitate EPA’s dangerous deregulation of toxic air pollutants, but also contradict EPA’s mandate to account for advances in science.<sup>132</sup>

Following the MATS repeal, Administrator Wheeler warned that “[the repeal] foreshadows our approach for cost-benefit regulation, where we focus on the targeted pollutants.” “Co-benefits should never be the driver of regulation.”<sup>133</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*—isolates co-benefits in the agency’s now mandated assessment of the cost effectiveness of “significant” proposed air pollution regulations.<sup>134</sup> Specifically, the rule limits the agency’s assessment of human health benefits to those benefits for which there is “a clear causal or likely causal relationship between pollutant exposure and effect . . . based upon human data when available.”<sup>135</sup> The final rule also requires EPA to include in the preamble of all future rules under the CAA a summary of the monetizable benefits “targeted by the relevant statutory provision.”<sup>136</sup> Although the reversal of the MATS “appropriate and necessary” finding relied on an interpretation of a statutory provision unique to EPA’s authority to regulate HAP emissions from power plants, this regulation applies the separation of “targeted” and collateral benefits to all significant future EPA regulations issued under the CAA. The new rule thus requires the agency, any time it issues a significant regulation under the CAA, to focus only on those pollutants regulated under a particular statutory provision, minimizing consideration of the very real and potentially significant reductions in other pollutants simply because they are not “targeted.” This bifurcated analysis complicates EPA’s regulatory task where, even if the level of cumulative pollution poses significant health risks, the emissions of individual pollutants may not be sufficient to justify regulation.

The final CAA cost-benefit rule thus complicates EPA’s task in issuing protective air

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31,286 (May 22, 2020); *see also* Goffman & Bloomer, *supra* note 130 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. *Id.* at 961. *See also* Reconsideration of Supplemental Finding, 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”] determination, however, is not governed independent from statutory requirements, by preexisting OMB or EPA guidelines, nor could it be.”).

<sup>132</sup> Goffman & Bloomer, *supra* note 130, at 962.

<sup>133</sup> *Mercury Rule ‘Foreshadows’ Future Air Policy Approach: Wheeler*, BLOOMBERGLAW (April 17, 2020), [https://www.bloomberglaw.com/document/XBOM3U80000000?bna\\_news\\_filter=environment-and-energy&jcsearch=BNA%2520000001718812d911a9fdaa7259500001#jcite](https://www.bloomberglaw.com/document/XBOM3U80000000?bna_news_filter=environment-and-energy&jcsearch=BNA%2520000001718812d911a9fdaa7259500001#jcite).

<sup>134</sup> *See Changing How EPA Calculates Regulatory Benefits*, EELP (June 26, 2018), <https://eelp.law.harvard.edu/2018/06/denying-the-health-benefits-pollution-reduction/>; *Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process*, 85 Fed. Reg. 84,130 (Dec. 23, 2020).

<sup>135</sup> *Id.* at 84,136. These criteria will be even more difficult to satisfy now that EPA has finalized its *Strengthening Transparency* rule. *See supra* Section II.

<sup>136</sup> *Id.* at 84,156.

pollution regulations by adding an implicit extra-legal requirement at odds with the primacy of EPA’s CAA obligations. As stated by a coalition of nonprofits and scientific associations in response to the rule, “distinguishing between benefits targeted by the statutory provision versus other welfare effects can be a complex, controversial, and ultimately fruitless endeavor.”<sup>137</sup> It also obscures reality. EPA’s rule would seek to exclude, for example, the reductions in particulate matter that occur when regulating mercury and other toxic pollutants, simply because the two pollutants are regulated under different statutory provisions.<sup>138</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 would inevitably minimize key public health benefits of environmental regulation. This is exactly what EPA’s rule does. By muting consideration of the co-benefits of regulating air pollution sources, EPA can put its hand on the scale of cost-benefit analysis and provide the agency with the results needed to justify inaction on dangerous pollution.

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. Rather, the order instructs agencies to “assess all costs and benefits of available regulatory alternatives,”<sup>139</sup> and specifically to assess the rule’s anticipated benefits to “health and safety, [and] the protection of the natural environment”<sup>140</sup> and “any adverse effects on . . . healthy, safety, and the natural environment.”<sup>141</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>142</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>143</sup> EPA provides a paltry justification for circumventing these requirements, arguing without evidence that “disaggregating

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<sup>137</sup> *Comments on Notice of Proposed Rulemaking*, INSTITUTE FOR POLICY INTEGRITY (Aug. 3, 2020), [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).

<sup>138</sup> 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 rule 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. Talk about playing Three Card Monte with air quality and public health. *See National Ambient Air Quality Standards for PM and Ozone*, EELP (July 15, 2020), <https://eelp.law.harvard.edu/2020/07/national-ambient-air-quality-standards-for-pm-and-ozone/>; Joe Goffman & Laura Bloomer, *EPA’s Benefit-Cost Proposal in the Context of PM Pollution Regulation*, EELP (July 14, 2020), <https://eelp.law.harvard.edu/2020/07/epas-benefit-cost-proposal-in-the-context-of-pm-pollution-regulation/>.

<sup>139</sup> Executive Order 12,866 § 1(a).

<sup>140</sup> *Id.* at § 6(a)(3)(C)(i).

<sup>141</sup> *Id.* at § 6(a)(3)(C)(ii).

<sup>142</sup> *Id.* at § 1(a) (emphasis added).

<sup>143</sup> *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4 (2003).



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>144</sup>

The rule is 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 benefits and associated costs, as well as ancillary (or co-) benefits and costs.”<sup>145</sup> Even where benefits and costs cannot be monetized, the guidance states that such variables should still be quantified and presented, such as the “expected number of adverse health effects avoided” by a regulation.<sup>146</sup> The rule goes far beyond EPA’s stated purpose of merely “codify[ing] the practice of preparing [benefit cost analyses]” in developing CAA regulations. 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.

The final rule also requires 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>147</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 mandates to the contrary. This assumption flies in the face of basic economics, where market failures are most likely to exist in the environmental sector where there are consolidated or monopolized economic actors (utilities, power companies, and large-scale agriculture) involved in the production of an essential good or service (electricity, drinking water, or food) resulting in a negative externality not captured by pricing mechanisms (air and water pollution), or if the good or service is itself a “public good” (clean air, clean water, grazing lands, and forests).<sup>148</sup> In the case of air pollution regulation under the CAA, the rule forces 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 can agencies show a “compelling need” that merits governmental intervention.

#### D. 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. The NSR rules help protect communities from increases in pollution when a new facility is

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<sup>144</sup> 85 Fed. Reg. at 35,621.

<sup>145</sup> GUIDELINES FOR PREPARING ECONOMIC ANALYSES, EPA 11-2 (Dec. 17, 2010), <https://www.epa.gov/sites/production/files/2017-08/documents/ee-0568-50.pdf>.

<sup>146</sup> *Id.*

<sup>147</sup> 85 Fed. Reg. at 84,155.

<sup>148</sup> *Id.*

built or an existing facility is modified.<sup>149</sup> When determining whether building a new facility or changing<sup>150</sup> an existing source requires a permit, the agency conducts a two-step analysis. At Step 1, EPA asks whether the modification alone would result in a significant emissions increase, regardless of other contemporaneous decreases. If yes, EPA proceeds to Step 2 and asks whether the modification will result in a significant *net* emissions increase, given other contemporaneous increases and decreases at the facility. In October 2020, EPA issued a final rule changing this two-step process,<sup>151</sup> 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 will likely 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>152</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 National Ambient Air Quality Standards (NAAQS). Similar to EPA's changes to the NSR program, this memo injects variables earlier in the regulatory analysis in order to reduce regulation-triggering events. Previously, in order 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 prioritizes setting health-based standards, and the second addresses 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 standards.<sup>153</sup> The Pruitt memo collapses this two-step process into one so that the CASAC and EPA will be compelled to review science, cost, technology, and implementation all at the same time.<sup>154</sup> While Administrator Pruitt asserted this

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<sup>149</sup> See *New Source Review*, EELP (Dec. 11, 2018), <https://eelp.law.harvard.edu/2018/12/new-source-review/>.

<sup>150</sup> The change can be either a physical change to the facility or a change in the method of operation. *Id.*

<sup>151</sup> EPA published the final rule in the Federal Register in November, 2020. Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting, 85 Fed. Reg. 74,890 (Nov. 24, 2020). The rule codifies a 2018 guidance memorandum from Administrator Pruitt. [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)

<sup>152</sup> 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 states that EPA will not scrutinize the accuracy of emissions projections, or the performance of new projects. This choice abdicates EPA's authority to double-check emissions estimates, a power that was recently affirmed by the Sixth Circuit. The policy also eliminates any assurance that EPA will use the NSR program to deliver the pollution control and cleaner air it is intended to provide. See *New Source Review Enforcement Memo*, EELP (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 (6th Cir. 2017).

<sup>153</sup> 531 U.S. 457 (2001). Similarly, the D.C. Circuit held that “[a]ttainability and technological feasibility are not relevant considerations in the promulgation of national ambient air quality standards.” *American Petroleum Institute v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981).

<sup>154</sup> Goffman, *supra* note 3 at 44.

was necessary to speed up the process, the reality is that this change will likely inject cost considerations into the NAAQS setting process – precisely what the Supreme Court forbid in *Whitman*. Since releasing the Back-to-Basics memo, EPA has issued two NAAQS rules, declining to increase air quality standards for both PM and ground level-ozone.<sup>155</sup> In the final PM NAAQS rule, EPA asserts it has not crossed the *Whitman* line, yet offers in a footnote a novel interpretation of the Court’s decision suggesting the straightforward holding in *Whitman* is in fact much more nuanced.<sup>156</sup>

E. Arbitrarily disaggregate sources of pollution to prevent regulation on the basis of cumulative emissions.

The Trump EPA also altered how the agency assesses both air pollutants and pollution sources in order to make it easier for the agency to find that further evaluation or regulation is unwarranted.<sup>157</sup> For example, EPA issued novel, if unfounded, interpretations of the CAA to make it more difficult for the agency to regulate methane emissions from stationary sources. Under section 111(b) of the CAA, EPA must establish New Source Performance Standards (NSPS) for listed categories of new or modified stationary pollution sources.<sup>158</sup> In order to list a source category under section 111(b), 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>159</sup> called a significant contribution finding. The plain text of the CAA thus frames EPA’s regulatory authority under section 111(d) around the *category* of sources, permitting EPA to regulate air pollution from those categories if the agency finds that 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(b), 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 New Source Performance Standards for methane and

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<sup>155</sup> EPA published the PM NAAQS rule in the federal register on December 18, 2020. Review of the National Ambient Air Quality Standards for Particulate Matter, 85 Fed. Reg. 82,684 (Dec. 18, 2020). As of this writing, by the Office of Management and Budget (OMB) has completed its review of EPA’s rule for the ozone NAAQS, but EPA has not yet published the final rule.

<sup>156</sup> *Id.* at 82,687, n.4 (“Were 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).

<sup>157</sup> EPA also used this process to extend or delay the regulatory process itself. *See Goffman & Bloomer, supra* note 130, at 950.

<sup>158</sup> 42 U.S.C. § 7411(b)(1)(B).

<sup>159</sup> *Id.* at § 7411(b)(1)(A).

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>160</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>161</sup> This “piecemeal approach” ignores 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>162</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>163</sup> This stark departure from the statute’s plain text, combined with an arbitrary justification, reveal EPA’s implacable determination to hamstring the agency’s own regulatory capacities under section 111.

EPA offered an equally maddening interpretation of section 111 in the methane Review Rule. In the rule, EPA argues that the CAA requires the agency to make a separate significant contribution finding for individual regulated *pollutants*, notwithstanding well-established findings that the source category contributes significant levels of pollution overall.<sup>164</sup> This could 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>165</sup> This new interpretation 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 provides an alternative justification for rescinding the methane NSPS, arguing that facilities’ compliance with the NSPS for VOCs will lead to reductions in methane, making the methane NSPS redundant.<sup>166</sup> This rationale not only belies EPA’s steadfast commitment to ignoring the co-benefits of air pollution regulation,<sup>167</sup> but also precludes future administrations from regulating

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<sup>160</sup> See Goffman & Bloomer, *supra* note 130 at 964.

<sup>161</sup> Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, 85 Fed. Reg. 57,018, 57,028 (Sep. 14, 2020). EPA does not address the fact that the differences in composition are irrelevant to the regulatory question of whether the “ensemble of equipment the source category comprises contributes significantly to air pollution.” Goffman & Bloomer, *supra* note 130, at 965–66.

<sup>162</sup> Goffman & Bloomer, *supra* note 130, at 965–66.

<sup>163</sup> *Id.* at 966.

<sup>164</sup> Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, 85 Fed. Reg. 57,018 (Sep. 14, 2020).

<sup>165</sup> Vizcarra, *supra* note 5 at 6. This is especially true for new pollutants, for which there are less public health data available.

<sup>166</sup> 85 Fed. Reg. at 57,030.

<sup>167</sup> See *supra* Section III(2)(C).

methane emitted at much higher levels from existing sources.<sup>168</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 when the consequences of an action are potentially harmful. 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>169</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.

The Trump administration’s efforts to minimize regulation-triggering events undermine 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 that analysis, gives agencies a falsely narrow view of the true benefits of regulation, and conversely, the costs of inaction should the agency decide not to impose stricter limits on pollution, including greenhouse gases. The result is a warped, destructive interpretation of these bedrock statutes, where federal agencies willfully blind themselves to the true impacts of their actions, and only choose to regulate after irreversible harm has 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 contradict decades of prior agency practice and constitute a concerted and consistent effort by the Trump EPA to “dismantl[e] its very capacity to develop, implement, and enforce effective pollution reduction rules and programs.”<sup>170</sup> If these interpretations are upheld by federal courts, they have the potential to limit, or even preclude, future administrations from broadly interpreting their statutory mandates to regulate

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<sup>168</sup> 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, *supra* note 130 at 967.

<sup>169</sup> 42 U.S.C. § 7412(g)(2).

<sup>170</sup> Joe Goffman, *How Congress Can Curb the Dismantling of the Environmental Protection Agency: An Oversight Agenda*, EELP (Jan. 10, 2019), <https://eelp.law.harvard.edu/2019/01/how-congress-can-curb-the-dismantling-of-the-environmental-protection-agency-an-oversight-agenda/>.

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 purports 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 pollution controls for power plant emissions.<sup>171</sup> This interpretation precludes 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>172</sup>

EPA’s repeal of the CPP rests 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>173</sup> 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>174</sup> First, the court will determine whether the relevant statutory language is unambiguous, i.e. having only one clear meaning. If the court finds the language is unambiguous, then the agency must act according to that clear meaning. 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. 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 takes an unnecessary litigation risk in order to secure a binding judicial decision restricting the agency’s legal authority.<sup>175</sup> If the court agrees with EPA, the rule would not only repeal the CPP, but also block a future administration from interpreting the statute more broadly, imposing a lasting restriction on EPA’s power to regulate carbon dioxide emissions from coal-fired power plants.<sup>176</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

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<sup>171</sup> See Goffman & Bloomer, *supra* note 130 at 951; 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).

<sup>172</sup> Goffman & Bloomer, *supra* note 130 at 951.

<sup>173</sup> Repeal of the Clean Power Plan, 84 Fed. Reg. at 32,524 (emphasis in original).

<sup>174</sup> See Cole Jermyn & Laura Bloomer, *How to Undo Trump-Era Regulatory Rollbacks to Redo Environmental Protection*, EELP (Apr. 23, 2020), <https://eelp.law.harvard.edu/2020/04/how-to-undo-the-environmental-regulatory-rollbacks/>; *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842–43 (1984).

<sup>175</sup> See Goffman & Bloomer *supra* note 130 at 953.

<sup>176</sup> *Id.* at 953–54.

to regulate groundwater.<sup>177</sup> The statement addresses Section 301 of the CWA, which prohibits the unpermitted discharge of any pollutant into EPA’s jurisdictional waters.<sup>178</sup> In the statement, the agency concludes that “the best, if not the only, reading of the CWA” is that Section 301 “exclude[es] all releases of pollutants from a point source to groundwater from [the National Pollutant Discharge Elimination System (NPDES)] program coverage and liability . . . regardless of a hydrologic connection between the groundwater and a jurisdictional surface water.”<sup>179</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 clearly within EPA’s jurisdiction.<sup>180</sup> This interpretation unnecessarily constrains 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 recent Supreme Court precedent.<sup>181</sup>

Despite EPA’s suggestion that its interpretation represents “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>182</sup> The new interpretation also contradicts basic science.<sup>183</sup> In fact, EPA presents no scientific rationale supporting the interpretive statement. The agency instead purports to defer to Congressional intent, arguing that its new interpretation reflects “the Agency’s most comprehensive analysis of the CWA’s text, structure, legislative history, and judicial decisions,”<sup>184</sup> while simultaneously recognizing this position contradicts both prior agency practice and legal precedent.<sup>185</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 practice of including supplemental environmental projects (SEPs) in consent decrees and settlements.<sup>186</sup> SEPs have been included in these agreements for decades and are one

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<sup>177</sup> See Caitlin McCoy, *Closing the Door on EPA Jurisdiction over Groundwater*, EELP (Aug. 5, 2019), <https://eelp.law.harvard.edu/2019/08/closing-the-door-on-EPA-jurisdiction-over-groundwater/>.

<sup>178</sup> 33 U.S.C. § 1311(a).

<sup>179</sup> 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, 1,3 (April 12, 2019) [hereinafter Interpretive Statement].

<sup>180</sup> See McCoy, *supra* note 177 at 2.

<sup>181</sup> 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.”) (internal citations omitted, emphasis in original).

<sup>182</sup> [https://www.eenews.net/assets/2019/04/16/document\\_gw\\_07.pdf](https://www.eenews.net/assets/2019/04/16/document_gw_07.pdf)

<sup>183</sup> Interpretive Statement, *supra* note 179 at 5.

<sup>184</sup> *Id.* at 2.

<sup>185</sup> See *e.g.*, *id.* at 6, 15, 17, 18, 24, 30, 38–45.

<sup>186</sup> EPA defines a 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.” Cynthia Giles, Issuance of the 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy, EPA

of the only enforcement tools available to ENRD that directly addresses the harm done to local communities when facilities violate environmental laws.<sup>187</sup>

Despite having relied on SEPs for decades, in the 2020 memorandum, ENRD asserts a novel interpretation of the Miscellaneous Receipts Act (MRA), arguing that SEPs violate the Act and also are “in serious tension with important aspects of our constitutional tradition.”<sup>188</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>189</sup> AAG Clark argues that SEPs “divert” money from the Treasury to third parties in violation of the MRA.<sup>190</sup> AAG Clark also argues that SEPs unconstitutionally intrude on Congress’ “power of the purse” under the Taxing and Spending Clause.<sup>191</sup> However, EPA’s 2015 Update to EPA SEP 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>192</sup> AAG Clark’s retort rests not on the text of the MRA nor the Constitution, but rather his own legal 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 monetary payments.”<sup>193</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>194</sup>

If the Trump EPA truly believed it lacks the authority to regulate discharges to

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(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*, EELP (Aug. 6, 2020), <https://eelp.law.harvard.edu/2020/08/doj-phases-out-supplemental-environmental-projects-in-environmental-enforcement/>.

<sup>187</sup> 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; and 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. *Id. See also* THE UNITED STATES REACHES AGREEMENT WITH DOW SILICONES CORPORATION TO RESOLVE ENVIRONMENTAL VIOLATIONS AT MIDLAND MICHIGAN CHEMICAL MANUFACTURING FACILITY, DEP’T OF JUSTICE (June 25, 2019), <https://www.justice.gov/opa/pr/united-states-reaches-agreement-dow-silicones-corporation-resolve-environmental-violations>.

<sup>188</sup> Jeffrey Bossert Clark, Supplemental Environmental Projects (“SEPs”) in Civil Settlements with Private Defendants, ENRD 1 (March 12, 2020) <https://www.justice.gov/enrd/page/file/1257901/download> [hereinafter SEPs Memo]

<sup>189</sup> 31 U.S.C. § 3302(b).

<sup>190</sup> SEPs Memo, *supra* note 188 at 1.

<sup>191</sup> SEPs Memo, *supra* note 188 at 3.

<sup>192</sup> Giles, *supra* note 186 at 34.

<sup>193</sup> SEPs Memo, *supra* note 188 at 14.

<sup>194</sup> *Id.* at 4, n. 6.



groundwater, it could simply choose to not exercise that authority. Similarly, if ENRD believes it lacks the authority to include SEPs in consent decrees and settlement agreements, it can simply decline to do so. Issuing a formal statement on these matters exposes the administration to public critique and, in the case of the SEPs policy, litigation. If these agencies seek to provide consistency and predictability, they can offer their interpretations of the statute without asserting that these interpretations represent the *only* reasonable interpretation. In making these arguments, the agencies reveal a broader strategic goal: to diminish the capacity of future administrations to broadly interpret their statutory mandate to regulate sources of pollution and hold accountable those who violate environmental laws.<sup>195</sup>

EPA also used this strategy to withdraw California's waiver to issue its own automotive emissions standards under the CAA. 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 national emission standards for motor vehicles, permitting California to set more stringent vehicle emissions standards.<sup>196</sup> Other states may then adopt California's standards approved under the waiver provision.<sup>197</sup> In revoking California's existing waiver, EPA not only stripped California of its authority to issue more stringent vehicle emission standards, but also sought to strip EPA of the authority to grant the waiver in the first place.

EPA offered two novel interpretations justifying the waiver retraction, both circumventing the plain text and intent of the CAA. In doing so, EPA ignored Congress' clear presumption in favor of granting California a waiver, and failed to make the requisite findings required under the law to justify the withdrawal.<sup>198</sup> First, EPA deferred to a finding by the National Highway Traffic Safety Administration (NHTSA) that the California standards were preempted by the Energy Policy and Conservation Act (EPCA), which governs fuel economy standards.<sup>199</sup> NHTSA had argued that because EPCA preempts state and local laws "related to fuel economy standards," this preemption necessarily includes California's tailpipe emissions standards, despite the explicit prerogative Congress afforded the state under the CAA.<sup>200</sup> In adopting this interpretation, EPA improperly relied on an executive interpretation as an independent basis upon which to ignore its statutory mandate under section 209.

Second, EPA offered an alternative justification for the withdrawal in which the agency

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<sup>195</sup> 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 implementing the policy, alleging it violates the APA. *Conservation Law Foundation v. Barr et al.*, No. 1:20-cv-11827 (D. Mass. Oct. 8, 2020).

<sup>196</sup> See Goffman & Bloomer, *supra* note 130 at 954.

<sup>197</sup> Clean Air Act § 177.

<sup>198</sup> § 209(b)(1) states that 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." Clean Air Act (2018).

<sup>199</sup> 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, 531, 533).

<sup>200</sup> Goffman & Bloomer, *supra* note 130 at 955.

narrowly interpreted section 209(b)(1)(B) of the CAA as only applying to criteria pollutants,<sup>201</sup> not greenhouse gases. This interpretation positions the agency to defend its conclusion that the CAA does not authorize California to regulate greenhouse gases.<sup>202</sup> EPA also imposes a heightened standard inconsistent with the CAA’s presumption in favor of granting California’s waiver, finding that “[i]n 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>203</sup> EPA roughly imposes this nexus requirement on top of the CAA’s far broader language of “compelling and extraordinary conditions” in order to preclude California from regulating greenhouse gases under its waiver, 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, if unfounded, statutory interpretations in order to permanently diminish agencies’ regulatory authority.<sup>204</sup> In adopting these static interpretations of statutory text, EPA not only abdicates its duty to protect public health and the environment, but also relegates future administrations to the same fate. This strategy also seeks to sabotage the very design of the administrative state, in which executive agencies are able to 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 foreseeably unforeseen opportunities, discoveries, and challenges. By permanently limiting the flexibility with which agencies may interpret these statutes, the Trump administration permanently weakens these agencies’ capacities to implement their Congressional mandates, and thus the power of the statutes themselves.

## V. CONCLUSION

President-Elect 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, figures to 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 has strategically, and often successfully, tried to gut longstanding environmental regulations while imposing novel statutory interpretations that, if accepted by federal courts, would permanently restrict agencies’ regulatory authority and flexibility. Political appointees have also 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 weak pollution standards that fail to

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<sup>201</sup> 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*, EPA (last updated Nov. 17, 2020), <https://www.epa.gov/criteria-air-pollutants>.

<sup>202</sup> See Goffman & Bloomer, *supra* note 130 at 956.

<sup>203</sup> Goffman & Bloomer, *supra* note 130 at 956–57; SAFE Vehicles Rule Part One, 84 Fed. Reg. at 51,348.

<sup>204</sup> See Goffman & Bloomer, *supra* note 130.

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 Forest opened to development for the first time. Cumulative increases in pollution have fallen most heavily on already overburdened communities, even if the Trump administration refused to account for those impacts. Compounded with the COVID-19 pandemic,<sup>205</sup> large swaths of the population have been pushed to a degree of vulnerability which may or may not be reversible.

I and my colleagues draw hope from the fact that, as candidates, President-elect Biden and Vice President-elect 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.

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<sup>205</sup> 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. Wu, X. et. al. *Fine Particulate Matter and COVID-19 Mortality in the United States: Strengths and Limitations of an Ecological Regression Analysis*, 6 SCIENCE ADVANCES 45 (2020). (link: <https://projects.iq.harvard.edu/covid-pm>)