United States Senate
WASHINGTON, DC 20510

March 10, 2020

**Attention:** **Docket ID No. CEQ-2019-0003 "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act"**

**Re:** **Comments on the White House Council on Environmental Quality's proposed update to the regulations implementing the procedural provisions National Environmental Policy Act**

## I. Introduction

On January 10, 2020, the White House Council on Environmental Quality (CEQ) proposed an update of the regulations implementing the procedural provisions of the National Environmental Policy Act (NEPA).[1]

The proposed update would dramatically change many aspects of the current NEPA implementing regulations. This comment focuses on proposed changes to how agencies are supposed to evaluate the effects or impacts of a project. The current NEPA implementing regulations provide for the consideration of the "cumulative impact" and "indirect effects" of a project.[2] The proposed update deletes consideration of cumulative impact and indirect effects, and indeed specifically states that "analysis of cumulative effects is not required" and "[e]ffects should not be considered significant if they are remote in time, geographically remote, or the product of a lengthy causal chain."[3]

The proposed update is yet another example of the regulatory capture of the Trump administration by the fossil fuel industry. By removing the consideration of a project's cumulative impact and indirect effects, the Trump administration would prevent agencies from evaluating how a project would contribute to climate change, thereby making it easier for fossil fuel industry projects to move forward.

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[1] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 FR 1684, *available at* https://www.govinfo.gov/content/pkg/FR-2020-01-10/pdf/2019-28106.pdf

[2] 40 CFR Sections 1508.7 – 8. "Cumulative impact" as defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." "Indirect effects" are defined as those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems."

[3] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 FR 1684, 1729, *available at* https://www.govinfo.gov/content/pkg/FR-2020-01-10/pdf/2019-28106.pdf

Climate change is caused by the combustion of fossil fuels at thousands of power plants, industrial facilities, and other point sources, as well as by hundreds of millions of cars, trucks, planes, and other mobile sources. No one source produces enough greenhouse gases (GHGs) to be individually responsible for climate change; climate change is by definition the cumulative effect of a great many different sources of carbon pollution. It therefore makes sense to consider climate consequences in a rule of broad application.

Moreover, the wisdom of ignoring a project's contribution to climate change must be judged against the mounting evidence that climate change poses severe economic risks to the American economy.

This comment summarizes the evidence underpinning the economic risks of climate change and documents the deep and broad ties between the Trump administration and the fossil fuel industry and the industry's support for this proposal. Measured against these facts, the proposed update is arbitrary and capricious in that it is not the product of reasoned decision-making. In addition, the proposed updated regulations are the product of agency capture by the fossil fuel industry; the facts never had a chance. For both of these reasons, it should be withdrawn.

## II. Facts

### A. There is overwhelming evidence that continued carbon pollution will result in massive economic losses

In the past few years, economists, central bankers, asset managers, investors, insurance analysts, credit rating analysts, investment bankers, real estate professionals, and scientists have produced an enormous volume of research suggesting that climate change and the failure to plan for an orderly transition to a low-carbon economy are capable of producing staggeringly large economic losses. Generally, these warnings deal with three main types of losses: losses associated with a collapse in coastal real estate values prompted by sea level rise; losses associated with stranded fossil fuel assets; and generalized losses associated with the myriad economic and societal disruptions caused by climate change.

Warnings about a collapse in coastal property values have been issued by organizations as disparate as Freddie Mac,[4] the industry publication *Risk & Insurance*,[5] and the Union of Concerned Scientists.[6] Freddie Mac warns:

[4] "Life's a Beach," Freddie Mac (April 25, 2016), http://www.freddiemac.com/research/insight/20160426_lifes_a_beach.html
[5] Dan Reynolds, "Coastal Mortgage Value Collapse," *Risk & Insurance* (April 7, 2017), http://riskandinsurance.com/coastal-mortgage-value-collapse/
[6] Dahl, et al., "Underwater: Rising Seas, Chronic Floods, and the Implications for US Coastal Real Estate," Union of Concerned Scientists (June 18, 2018), https://www.ucsusa.org/sites/default/files/attach/2018/06/underwater-analysis-full-report.pdf

While technical solutions may stave off some of the worst effects of climate change, rising sea levels and spreading flood plains nonetheless appear likely to destroy billions of dollars in property and to displace millions of people. The economic losses and social disruptions may happen gradually, but they are likely to be greater in total than those experienced in the housing crisis and the Great Recession.[7]

The First Street Foundation has already documented that coastal properties are not appreciating as quickly as similarly situated properties less exposed to flood risk. It has calculated that coastal properties from Texas to Maine have already lost almost $16 billion in value since 2005.[8] Peer-reviewed research focusing on real estate values in Miami-Dade County, Florida has confirmed that a spread is now emerging between the growth in inland and coastal property values.[9] This sort of growing spread between coastal and inland real estate prices is precisely what one would expect to see prior to an eventual crash.

With respect to the risk of stranded fossil fuel assets, one recent economic paper reports that "economic literature combined with industry practices suggest the presence of persistent market inefficiencies for fossil fuel reserves, so these assets are likely to be stranded and mispriced, i.e. a carbon bubble exists ...."[10] Another economic paper finds that "the magnitude of ... stranded assets of fossil fuel companies (in a 2 degrees C economy) has been estimated to be around 82% of global coal reserves, 49% of global gas reserves, and 33% of global oil reserves."[11] In other words, even if we are able to keep global warming to under two degrees Celsius, 82% of existing global coal reserves will be wiped off the balance sheets as having no value; 49% of global gas reserves, gone; and 33% of global oil reserves gone. The market value of fossil fuel reserves that can't be burned is "around $20 trillion," according to the World Bank.[12] A study done by the European think tank CEPS predicts that "fossil fuel companies altogether would see their market value fall by half."[13]

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[7] "Life's a Beach," Freddie Mac (April 25, 2016), http://www.freddiemac.com/research/insight/20160426_lifes_a_beach.html

[8] Texas to Maine: Rising Seas Erode $15.9 Billion in Relative Home Values, First Street Foundation, *available at* https://firststreet.org/

[9] *See, e.g.*, Jesse M. Keenan, et al., "Climate gentrification: from theory to empiricism in Miami-Dade County, Florida," 2018 *Environ. Res. Lett.* 13 054001, http://iopscience.iop.org/article/10.1088/1748-9326/aabb32/pdf

[10] Thomas Lee, "Fossil Fuel Stranded Assets: Efficient Market or Carbon Bubble." Penn Wharton Public Policy Initiative (April 12, 2017), https://publicpolicy.wharton.upenn.edu/live/news/1807-fossil-fuel-stranded-assets-efficient-market-or

[11] Battiston, et al., "A climate stress-test of the financial system," *Nature Climate Change* (March 27, 2017), https://www.nature.com/articles/nclimate3255

[12] Vladimir Stenek, "Carbon Bubbles & Stranded Assets," The World Bank (June 3, 2014), http://blogs.worldbank.org/climatechange/carbon-bubbles-stranded-assets

[13] Jorge Núñez Ferrer and Pavel Kiparisov, Can the Carbon Bubble become a serious Financial Bubble," CEPS Energy Climate House, http://ceps-ech.eu/sites/default/files/Carbon%20Bubble%20background%20briefing%20paper.pdf

The Bank of England in an official statement has warned, "investments in fossil fuels and related technologies . . . may take a huge hit."[14] And a recent report from 34 central bank presidents warned that "estimates of losses […] are large and range from $1 trillion to $4 trillion when considering the energy sector alone, or up to $20 trillion when looking at the economy more broadly."[15] This makes the risk of a carbon bubble not just a risk to fossil fuel investors, but a systemic risk that could result in trillions of losses to the broader economy. A stress test of European financial institutions revealed that some were alarmingly exposed to fossil fuel assets and could be at risk should these assets plunge in value.[16] Indeed, the Bank of England has become so concerned about systemic risk associated with stranded fossil fuel assets that it recently ordered the life insurers it regulates to perform stress tests including a stranded fossil fuel asset scenario.[17]

The Bank of England's concern about climate-related systemic risks is echoed in a recent report on climate risk by the Bank of International Settlements. This report states that "[c]limate change could … be the cause of the next systemic financial crisis," and that "climate catastrophes are even more serious than most systemic financial crises."[18] Management consultancy McKinsey recently made similar warnings in a comprehensive report on the physical risks of climate change. The report notes that climate change could "make long-duration borrowing unavailable, impact insurance cost and availability, and reduce terminal values." It could "trigger capital reallocation and asset repricing."[19]

Economists studying stranded assets warn that high-cost producer regions like the U.S. could "lose almost their entire oil and gas industry."[20] And because the risk is systemic, the consequences would extend well beyond the fossil fuel industry, including a greater than five percent decline in U.S. GDP and millions of lost jobs.[21] Critically, the economic consequences

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[14] Paul Fisher, "Confronting the challenges of tomorrow's world," Bank of England (March 3, 2015), https://www.bankofengland.co.uk/-/media/boe/files/speech/2015/confronting-the-challenges-of-tomorrows-world.pdf?la=en&hash=DA7050DCC625A7127875DA88665B67094914CB2B

[15] "A call for action: Climate change as a source of financial risk," Network for Greening the Financial System (April 2019), *available at* https://www.banque-france.fr/sites/default/files/media/2019/04/17/ngfs_first_comprehensive_report_-_17042019_0.pdf

[16] Battiston, et al., "A climate stress-test of the financial system," *Nature Climate Change* (March 27, 2017), https://www.nature.com/articles/nclimate3255

[17] "Life Insurance Stress Test 2019," Bank of England Prudential Regulation Authority, (June 18, 2019), https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/letter/2019/life-insurance-stress-test-2019-scenario-specification-guidelines-and-instructions.pdf

[18] Patrick Bolton, *et al.*, "The green swan: Central banking and financial stability in the age of climate change," Bank of International Settlements (Jan. 2020), pgs. 1 – 3, https://www.bis.org/publ/othp31.pdf

[19] Woetzel, *et al.*, "Climate risk and response: Physical hazards and socioeconomic impacts," McKinsey Global Institute (Jan. 2020), https://www.mckinsey.com/~/media/mckinsey/business%20functions/sustainability/our%20insights/climate%20risk%20and%20response%20physical%20hazards%20and%20socioeconomic%20impacts/mgi-climate-risk-and-response-vf.ashx

[20] Mercure, *et al.*, "Macroeconomic impact of stranded fossil fuel assets," *Nature Climate Change* (June 4, 2018), https://www.nature.com/articles/s41558-018-0182-1

[21] *Id.*

to the American economy are predicted to be worse "if it continues to promote fossil fuel production and consumption [rather] than if it moves away from them."[22]

In addition to the specific risks of a coastal property values collapse and a stranded fossil fuel asset-fueled carbon bubble, there have been numerous more general warnings about the serious damage unchecked climate change will do to the global economy.

- The Fourth National Climate Assessment, a compendium of the best, most up to date knowledge on climate change, produced by 13 federal agencies, states that "with continued growth in emissions at historic rates, annual losses in some economic sectors are projected to reach hundreds of billions of dollars by the end of the century—more than the current gross domestic product (GDP) of many U.S. states."[23]
- Standard & Poor's warns "global warming of 3 degrees Celsius is likely to cost us 2% of global output....[W]e might even be underestimating the costs of climate change.... [T]he higher the temperature, the more damaging climate change will be – and in a nonlinear way."[24]
- The 34 central bank presidents who comprise the Network for Greening the Financial System write, "Estimates suggest that absent action to reduce emissions, the physical impact of climate change on the global economy in the second half of the century will be substantial. The more sophisticated studies suggest average global incomes may be reduced by up to a quarter by the end of the century."[25]
- Blackrock warns "some 58% of U.S. metro areas would see likely [annual] GDP losses of up to 1% or more, with less than 1% set to enjoy gains of similar magnitude. Florida tops the danger zones, with Naples, Panama City and Key West seeing likely annual GDP losses of up to 15% or more.[26]
- Citigroup estimates that cumulative losses from climate change will be up to 2.5 percent of global GDP or $72 trillion through 2060 for a temperature increase of 2.5 degrees Celsius. Losses may balloon to 5 percent of GDP if carbon emissions continue to increase after 2060.[27]
- Peer-reviewed economic research suggests that "the approximate global potential loss is estimated to be US$ 9,593.71 billion or roughly 3% of the 2100 world GDP for 3°C

[22] *Id.*
[23] Fourth National Climate Assessment, *available at* https://nca2018.globalchange.gov/downloads/
[24] "Why it May Make Economic Sense to Tackle Global Warming," Standard & Poor's (Dec. 5, 2018), https://www.spglobal.com/en/research-insights/articles/why-it-may-make-economic-sense-to-tackle-global-warming
[25] "A call for action: Climate change as a source of financial risk," Network for Greening the Financial System (April 2019), *available at* https://www.banque-france.fr/sites/default/files/media/2019/04/17/ngfs_first_comprehensive_report_-_17042019_0.pdf
[26] "Getting physical: assessing climate risks," BlackRock (April 4, 2019), https://www.blackrock.com/us/individual/insights/blackrock-investment-institute/physical-climate-risks#electric-utilities
[27] "Energy Darwinism II: Why a Low Carbon Future Doesn't Have to Cost the Earth," Citigroup (Aug. 2015), https://ir.citi.com/hsq32Jl1m4aIzicMqH8sBkPnbsqfnwy4Jgb1J2kIPYWIw5eM8yD3FY9VbGpK%2Baax

global warming. At 4°C, losses from global warming increase significantly to US$ 23,149.18 billion."[28]

- A report from the director of the Corporations and Society Initiative at the Stanford Graduate School of Business notes that "the financial risks from climate change are systemic" and "singular in nature," and "[g]lobal economic losses from climate change could reach $23 trillion – three or four times the scale of the 2008 financial crisis."[29]
- The United States Department of Agriculture Economic Research Service found that if GHG are not abated, production of U.S. corn and soybeans could decline as much as 80% in the next 60 years. This decline in production, would increase crop insurance $7.6 billion a year for corn and $3.3 billion for soybeans.[30]

Together, these reports and papers paint a grim picture of massive economic losses from unchecked climate change that would harm the global economy that the proposed update ignores.

### B. The Trump administration has been captured by the fossil fuel industry

Donald Trump's 2016 campaign was richly funded by the fossil fuel industry. Individuals associated with coal company Murray Energy were his largest source of donations; coal company Alliance Resource Partners was his fifth largest source of donations.[31]

Once Trump was elected, the money began to pour in, and Trump raised a record amount for his inauguration, nearly doubling the previous record.[32] Murray Energy contributed $300,000, and Hess, Chevron, BP, Citgo, ExxonMobil, Consol Energy, Anadarko Petroleum, Cheniere Energy, Continental Resources, and Valero all made six or seven figure donations.[33] In fact, companies and individuals in the oil & gas and mining sectors were the second largest source of donations after the financial services sector, providing a total of more than $10.4 million to Trump's inaugural committee.[34]

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[28] Kompass, et al., "The Effects of Climate Change on GDP by Country and the Global Economic Gains From Complying With the Paris Climate Accord," Earth's Future (July 13, 2018), https://agupubs.onlinelibrary.wiley.com/doi/full/10.1029/2018EF000922

[29] Graham Steele, "A Regulatory Green Light: How Dodd-Frank Can Address Wall Street's Role in the Climate Crisis," The Great Democracy Initiative (Jan. 2020), https://greatdemocracyinitiative.org/wp-content/uploads/2020/01/Final_Greenlight_Steele.pdf

[30] Crane-Droesch et al., "Climate Change and Agricultural Risk Management into the 21st Century," United States Department of Agriculture (July 2019), https://www.ers.usda.gov/webdocs/publications/93547/err266_summary.pdf?v=9932.1&mod=article_inline

[31] Top contributors, federal election data for Donald Trump 2016 cycle, The Center For Responsive Politics, https://www.opensecrets.org/pres16/contributors?cycle=2016&id=N00023864&src=c&type=f (viewed on Aug. 9, 2019)

[32] Trump 2017 Inauguration Donors, The Center For Responsive Politics, https://www.opensecrets.org/trump/inauguration-donors (viewed on Aug. 9, 2019)

[33] *Id.*

[34] *Id.*

As the 2020 election ramps up, fossil fuel companies have continued to be among the largest donors to outside political spending groups supporting Trump's reelection. Bob Murray, the CEO of the now-bankrupt Murray Energy hosted a fundraising dinner for Trump in July 2019 that brought in an estimated $2.5 million for Trump's reelection efforts.[35]

Saulsbury Industries ($866,972), an energy services firm, Energy Transfer Partners ($721,200), a pipeline company, Jennmar Corp. ($450,000), a coal mining services company, and Midland Energy ($422,275), an oil and gas company are among the largest sources of donations to the Trump Victory political action committee (PAC).[36] The oil & gas and mining industries are the third largest source of donations to the Trump Victory PAC, accounting for more than $6.4 million in donations.[37] Individual fossil fuel industry executives are also some of the largest donors to the Trump Victory PAC, including Kelcy Warren of Energy Transfer Partners ($360,000), Harold Hamm of Continental Resources ($50,000), and Forrest Lucas of Lucas Oil ($37,800).[38]

These donations likely represent only the tip of the iceberg of fossil fuel industry financial support for Trump's reelection. Politically active 501(c)(4) organizations are allowed to accept unlimited donations with no disclosure. "Super" political actions committees (Super PACs) are allowed to accept unlimited donations from the opaque 501(c)(4)s and from limited liability corporations whose actual owner may never be known to the public. Under current laws, the public will never know how much money fossil fuel companies and their executives have donated to outside spending groups supporting Trump's reelection.

The fossil fuel industry wasn't just a major source of donations for Trump; it also provided him with many of his closest advisors. During his campaign, when most publicly traded companies didn't want to be associated with a candidate famous for making offensive and controversial statements, oil and gas billionaire Harold Hamm created the Trump Leadership Council, a group of business leaders from mostly privately held companies, to advise the president.[39] The energy industry was the industrial sector most represented on the Trump Leadership Council, with the heads of Alliance Resource Partners, Baker Hughes (an oil services company), Murray Energy, and Devon Energy all serving on the Council.[40] In addition, the head of the National Association

[35] Peter Stone, "'Swampy symbiosis': fossil fuel industry has more clout than ever under Trump," *The Guardian* (Sept. 27, 2019), https://www.theguardian.com/environment/2019/sep/27/fossil-fuel-industry-clout-trump-era

[36] Trump Victory Top Donors 2020, Center for Responsive Politics, *available at* https://www.opensecrets.org/jfc/donors.php?id=C00618389&cycle=2020 (viewed on Feb. 22, 2020)

[37] Trump Victory Top Industries 2020, Center for Responsive Politics, *available at* https://www.opensecrets.org/jfc/industries.php?id=C00618389&cycle=2020 (viewed on Feb. 22, 2020)

[38] Timothy Cama and Kelsey Brugger, "Energy dollars fueling presidential contest," *E&E News* (July 19, 2019), https://www.eenews.net/stories/1060758685

[39] Andy Kroll, "The Shadow Cabinet: How a Group of Powerful Business Leaders Drove Trump's Agenda," *RollingStone* (June 19, 2019), https://www.rollingstone.com/politics/politics-features/trump-leadership-council-members-full-list-848274/

[40] *Id.*

of Manufacturers, a trade association whose membership includes many fossil fuel companies, was also a member of the Council.[41] The Council's influence on Trump was clear, as Trump adopted the fossil fuel industry's talking points about slashing regulations and achieving "complete American energy independence."[42]

### C. Payback came quickly to the fossil fuel industry

Once Trump took office, the fossil fuel industry continued to mold energy and environmental policy. In March of 2017, Murray Energy CEO Bob Murray shopped an "action plan" around to various administration officials. Murray met with Energy Secretary Rick Perry to discuss his deregulatory wish list, and also provided copies of it to Vice President Mike Pence and Environmental Protection Agency (EPA) Administrator Scott Pruitt.[43] Notably, Murray's "action plan" called for repealing the Clean Power Plan and withdrawing from the Paris Agreement,[44] both of which the Trump administration is in the process of doing.

Trump and his administration almost immediately began delivering for his fossil fuel donors. Less than a month after Murray presented administration officials with his wish list, Trump issued an executive order entitled "Promoting Energy Independence and Economic Growth" revoking numerous presidential actions relating to GHG emissions and ordering the review of numerous rules relating to GHG emissions.[45] This executive order served as the foundation for the administration's unprecedented efforts to cater to the interests of the fossil fuel industry. If there was any doubt about whom this executive order was intended to benefit, that doubt was dispelled at the signing ceremony, to which coal company executives, industry association representatives, and coal miners were all invited.[46]

This executive order resulted in two NEPA-related rulemakings by CEQ, both of which would be of significant benefit to the fossil fuel industry. In June 2019, CEQ issued proposed NEPA GHG guidance to replace previous NEPA GHG guidance revoked by President Trump's

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[41] *Id.*

[42] *Id.*

[43] Lisa Friedman, "How a Coal Baron's Wish List Became President Trump's To-Do List," *The New York Times* (Jan. 9, 2018), https://www.nytimes.com/2018/01/09/climate/coal-murray-trump-memo.html

[44] "Action Plan for the Administration of President Donald J. Trump," Murray Energy (March 1, 2017), *available at* https://www.nytimes.com/interactive/2018/01/09/climate/document-Murray-Energy-Action-Plan.html

[45] Executive Order 13783, 82 FR 16093, *available at* https://www.govinfo.gov/content/pkg/FR-2017-03-31/pdf/2017-06576.pdf

[46] Valerie Volcovici and Jeff Mason, "Trump signs order dismantling Obama-era climate policies," *Reuters* (March 28, 2017), https://www.reuters.com/article/us-usa-trump-energy/trump-signs-order-dismantling-obama-era-climate-policies-idUSKBN16Z1L6

executive order.[47] And then in January 2020, CEQ put forth the instant proposal to update NEPA's implementing regulations.

The 2019 CEQ proposal would weaken analysis of project-related GHG emissions and alternative mitigation measures by, among other things, dropping the recommendation that agencies quantify a project's direct and indirect GHG emissions, recommending against a cumulative analysis of GHG emissions, eliminating a recommendation that agencies consider alternatives to mitigate project-related GHG emissions, and stating that agencies should not attempt to monetize the costs associated with project-related GHG emissions and should not use the social cost of carbon in any sort of cost-benefit analysis.[48]

The Trump administration's pro-fossil fuels, anti-climate agenda extends far beyond CEQ, however. In the first 23 months of the Trump administration, executive agencies took at least 92 actions to weaken policies to limit GHG emissions or promote fossil fuels.[49] These include proposals to rescind and replace the Clean Power Plan, freeze fuel economy standards for cars and light duty trucks, weaken methane leak testing and repair rules for oil and gas facilities, and weaken emissions rules for new coal-fired power plants.[50]

In addition to specific regulatory changes to benefit the fossil fuel industry, the Trump administration has also significantly reduced its enforcement efforts against polluters, many of them from the fossil fuel industry, that violate the Clean Air and Clean Water Acts as well as other federal laws and regulations. An investigation by *The New York Times* found that enforcement actions by the Trump EPA declined precipitously both in number and penalty size when compared to enforcement actions under the George W. Bush and Obama EPAs.[51] What's more, the Trump EPA moved to centralize decision-making around enforcement actions, taking power away from career civil servants and giving it to political appointees.[52]

Under the Trump administration, anti-climate, pro-fossil fuels actions have not been limited to just a few agencies, but rather have been carried out by multiple agencies across the federal government. The White House, CEQ, EPA, Department of the Interior, Department of State, Department of Energy, Department of Transportation, Department of Agriculture, Department of

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[47] Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 84 FR 30097, *available at* https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13576.pdf

[48] *Id.*

[49] Senators Ed Markey and Sheldon Whitehouse, "The Most Anti-Climate Administration in History" (Dec. 2018), https://www.markey.senate.gov/imo/media/doc/ANTI-CLIMATE%20REPORT%20.pdf

[50] *Id.*

[51] Eric Lipton and Danielle Ivory, "Under Trump, E.P.A. Has Slowed Actions Against Polluters and Put Limits on Enforcement Officers," *The New York Times* (Dec. 10, 2017), https://www.nytimes.com/2017/12/10/us/politics/pollution-epa-regulations.html

[52] *Id.*

Justice, as well as other federal agencies have all taken anti-climate actions under the Trump administration.[53]

### D. Capture is complete

Some of us have previously documented the close political, financial, and business connections between political leadership at EPA, including EPA Administrators Scott Pruitt and Andrew Wheeler and EPA Air Office chief Bill Wehrum, in several comments on EPA proposals to weaken rules limiting GHG emissions or seeking to restrict the types of scientific studies that can be used in rulemaking.[54] These comments also document the ways in which the fossil fuel industry, often through the myriad trade associations and front groups that it funds, orchestrated and dictated the terms of these regulatory rollbacks.

More recently, Senators Carper and Whitehouse documented how former EPA Air Office chief Bill Wehrum and his deputy David Harlow used their position at EPA to benefit clients of their former law firm; many of these clients hail from the fossil fuel industry.[55]

Moreover, peer-reviewed scientific research has concluded that EPA is exhibiting warning signs of regulatory capture. A study published in the *American Journal of Public Health* found that EPA is exhibiting many signs of regulatory capture.[56] The authors of this article examined EPA actions from December 2016 through June 2017 and they interviewed 45 current and retired EPA employees. Among their findings pointing to regulatory capture:

- "Appointees have deep ties with industries."
- "Significant policy changes at the EPA favor businesses and industry, while probably incurring considerable health and environmental consequences."
- "Pruitt has regularly championed the interests of regulated industries, while rarely affirming environmental and health protections."

[53] Senator Edward J. Markey and Senator Sheldon Whitehouse, "The Most Anti-Climate Administration in History" (Dec. 2018), https://www.markey.senate.gov/imo/media/doc/ANTI-CLIMATE%20REPORT%20.pdf

[54] *See, e.g.*, Sheldon Whitehouse, *et al.*, "Comment on EPA Administrator Scott Pruitt's improper involvement in Clean Power Plan-related rulemaking," *available at* https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-17190; Sheldon Whitehouse, *et al.*, "Comments on EPA and NHTSA's Proposed Rule Freezing Fuel Economy and Greenhouse Gas Emissions Standards for Cars and Light Trucks," *available at* https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0283-5483; and Sheldon Whitehouse, *et al.*, "Comments of EPA's Proposed Rule Excluding Important Scientific Studies From EPA Rulemaking," *available at* https://www.regulations.gov/document?D=EPA-HQ-OA-2018-0259-6912

[55] Tom Carper and Sheldon Whitehouse, "Redefining Air: Industry's Pipeline to Power at EPA's Office of Air and Radiation" (July 2019), https://www.epw.senate.gov/public/_cache/files/2/d/2d7a4d97-5260-4be1-92bf-152ac5d7cd21/020F44F63FF7BAC62FBDC77C0C55D82F.epw-report-carper-whitehouse-redefining-air-wehrum-7-2019.pdf

[56] Lindsey Dillon, *et al.*, "The Environmental Protection Agency in the Early Trump Administration: Prelude to Regulatory Capture," *American Journal of Public Health* (April 2018)

- "Pruitt dismissed many members of the EPA's Science Advisory Board and its Board of Scientific Counselors, created a new rule preventing EPA-funded scientists from serving on those boards, and—for the first time in agency history—allowed lobbyists on scientific advisory boards."
- "Pruitt's own meetings and schedule… are almost exclusively with company and trade organizations and rarely with environmental, public health, or citizen groups."[57]

Unfortunately, the regulatory capture of the Trump administration by the fossil fuel industry is not limited to EPA. As discussed above, it extends all the way to the White House, from which the proposed update emanated. There is also abundant evidence that other federal agencies, most notably the Department of the Interior and the Department of Energy, take their marching orders from the fossil fuel industry. For example, David Bernhardt, the Secretary of the Interior, is a former lobbyist for the fossil fuel industry and has delivered on many of industry's priorities.[58] And former Secretary of Energy Rick Perry attempted to come up with a scheme to subsidize the coal industry after being directed to do so by President Trump.[59]

### E. CEQ's proposal is a gift to the oil and gas industry

The proposed rule would make it easier (i.e., more profitable) for fossil fuel companies to develop oil and gas reserves. It is payback to industry.

At least two federal court decisions during the Trump administration show why. In March 2018, a federal judge ruled against the Trump administration's plan to open more than 15 million acres of public land to fossil fuel extraction, finding that the Department of Interior had failed to adequately consider under NEPA how such fossil fuel extraction would contribute to climate change.[60] Then in November 2018, a federal judge blocked work on the Keystone XL pipeline on the basis that the Trump administration did not properly evaluate under NEPA the effect that the pipeline would have on climate change.[61]

In June 2018, CEQ issued an advanced notice of proposed rulemaking (ANPRM) indicating its intent to review the current NEPA implementing regulations.[62] This notice indicated that CEQ

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[57] *Id.*

[58] Emily Holden, "Former fossil fuel lobbyist to head interior department as Zinke exits," *The Guardian* (Dec. 16, 2018), https://www.theguardian.com/us-news/2018/dec/16/david-bernhardt-ryan-zinke-lobbyist-interior-department

[59] Brad Plumer, "Trump Orders a Lifeline for Struggling Coal and Nuclear Plants," *The New York Times* (June 1, 2018), https://www.nytimes.com/2018/06/01/climate/trump-coal-nuclear-power.html

[60] *Western Organization of Resource Councils v. U.S. Bureau of Land Mgmt*, Case No. 4:16-cv-00021 (D. Mont. 2018)

[61] *Indigenous Environmental Network v. U.S. Dep't. of State*, Case No. 4:17-cv-00031 (D. Mont. 2018)

[62] Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 FR 28591, *available at* https://www.govinfo.gov/content/pkg/FR-2018-06-20/pdf/2018-13246.pdf

intended to review the definitions of effects and cumulative impact under the existing implementing regulations and sought comment on these subjects.[63]

The oil and gas industry seized on this opportunity to provide CEQ with its suggestions for changes to NEPA implementing regulations. The American Petroleum Institute (API), an oil and gas industry trade association, wrote a detailed comment to CEQ opposing consideration of cumulative impacts and indirect effects.[64] So important was this issue to API that the concluding line of its introduction reads, "[w]e encourage CEQ to promulgate workable final rules that return the implementation of NEPA to serving its core procedural and informational purposes, rather than dictating substantive outcomes, *as evidenced by expanding scopes of review, mitigation, and analyses of cumulative impacts and indirect effects*."[65] (emphasis added) API also wrote that emissions from fossil fuels "should not be considered part of 'indirect' effects" under NEPA and complained about recent litigation challenging the analysis of effects related to GHG emissions from projects.[66]

Individual oil companies and other oil industry trade associations also wrote to CEQ asking it to curtail analysis of cumulative impact and indirect effects. For example, Hess wrote in urging CEQ to limit analysis to those directly and proximately caused by a project and to circumscribe any analysis of cumulative impact[67] and BP wrote urging that cumulative impact analysis be circumscribed.[68] American Fuel and Petrochemical Manufacturers (AFPM) wrote urging that analysis of the indirect effects of GHG emissions be limited and that consideration of climate change be sharply curtailed under NEPA.[69]

In addition to the many fossil fuel industry comments submitted directly to CEQ in response to its ANPRM on this subject, in December 2019, the National Petroleum Council released a lengthy report examining obstacles to oil and gas development. This report stated that "[s]takeholders are increasingly raising climate change concerns and the need for governmental action to address GHG emissions in the siting and permitting processes for new energy infrastructure" and "those concerned with the climate impact of a federal action relating to an energy infrastructure project use the NEPA process… as [a] forum for addressing their climate concerns."[70] The report also noted that NEPA is "the most frequent statutory basis for litigation against natural gas and oil pipelines" and that "the most frequently claimed NEPA errors have

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[63] *Id.*
[64] API, *et al.* CEQ NEPA Comments 8-20-18 final, *available at* https://www.regulations.gov/document?D=CEQ-2018-0001-11794
[65] *Id.* at 1 – 2.
[66] *Id.* at 7 – 8.
[67] Hess CEQ-2018-0001 Comments on NEPA Update, *available at* https://www.regulations.gov/document?D=CEQ-2018-0001-11955
[68] BP CEQ NEPA Comment letter, *available at* https://www.regulations.gov/document?D=CEQ-2018-0001-12030
[69] AFPM NEPA Comments 8.20.18, *available at* https://www.regulations.gov/document?D=CEQ-2018-0001-12266
[70] Dynamic Delivery, America's Evolving Oil and Natural Gas Transportation Infrastructure, National Petroleum Council, Chapter 3, pg. 77, *available at* https://dynamicdelivery.npc.org/files/CH_3_PSSLO-12-12-2019.pdf

been insufficient analysis of direct and indirect effects and insufficient review of upstream GHGs, downstream GHGs, and cumulative impacts."[71] The report recommends that GHG analysis under NEPA be curtailed.[72] The National Petroleum Council is dominated by over 100 oil and gas companies.[73]

Still other industry groups immediately sprung into action to support the proposed update once it was published. The U.S. Chamber of Commerce unveiled a campaign entitled "Unlock American Investment" to support the proposal; the Chamber counts many oil and gas industry associations as partners in this campaign.[74] A Republican operative launched a parallel campaign called "Building a Better America" to generate public comments in support of the proposal; companies supporting this effort have not been disclosed.[75]

## III. Argument

### A. The proposed update is arbitrary and capricious

The Administrative Procedure Act[76] permits courts to set aside agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[77] In determining whether an agency action was "arbitrary and capricious, the courts look to several factors, whether: "(1) the agency 'relied on factors which Congress has not intended it to consider,' (2) the agency 'failed to consider an important aspect of the problem,' (3) the agency explained its decision in a way 'that runs counter to the evidence,' or (4) the action 'is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'"[78]

Courts have also held that an agency action is arbitrary and capricious if the agency did not "genuinely engage in reasoned decision making"[79] or if it did not "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[80]

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[71] *Id.* at 78.
[72] *Id.* At 82.
[73] National Petroleum Council, Members by Category, https://www.npc.org/
[74] About, Unlock American Investment, *available at* https://www.unlockamericaninvestment.com/about/
[75] Kelsey Brugger, Coalition forms to defend Trump NEPA overhaul," *E&E News* (Jan. 14, 2020), https://www.eenews.net/stories/1062080405/print
[76] 5 USC §500 *et seq.*
[77] 5 USC §706(2)(a)
[78] *Mendoza v. Secretary, Department of Homeland Security*, 851 F.3d 1348, 1353 (11th Cir. 2017) (quoting *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1264 (11th Cir. 2009))
[79] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970)
[80] *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 US 29, 43 (1983), quoting *Burlington Truck Lines, Inc. v. United States*, 371 U. S. 156, 168 (1962)

While judicial review of agency actions is usually "exceedingly deferential,"[81] when, given the totality of the circumstances, the agency appears not to have engaged in reasoned decision-making, an agency action should be invalidated.

> "The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[82]

This heightened level of scrutiny calls on a court to "intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making."[83] These concerns are epidemic for the proposed update.

Additionally, courts have found that it is appropriate to more closely scrutinize regulatory decisions that constitute an abrupt change in course. If an agency makes such a regulatory U-turn, it must "provide a more detailed justification than would suffice for a new policy [...] when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy. [...] It would be arbitrary and capricious to ignore such matters."[84] "An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past."[85]

### 1. CEQ has put forth no facts to justify eliminating the analysis of cumulative impact and indirect effects

The Trump administration's proposed update is based on the premise that environmental concerns such as climate change that are cumulative in nature are just not important enough to address under NEPA. That is the opposite position taken by previous administrations, which

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[81] *See, e.g., Fund for Animals v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996)

[82] *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 US 29, 43 (1983), quoting *Burlington Truck Lines, Inc. v. United States*, 371 U. S. 156, 168 (1962) and *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., supra*, at 419 U. S. 285. *See also*, *Massachusetts v. EPA* (constraining EPA's discretion and subjecting the agency's deferral of a decision to hard look review)

[83] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 844-5 (D.C. Cir. 1970). In Greater Boston Television Corp., the biggest "danger signal" that caused the court to give an agency's actions a "hard look" was the fact that the chair of the Federal Communications Commission (FCC) had had potentially improper contacts with an executive at one of companies competing for a broadcast license to be attributed by the agency. Other "danger signals" that courts have held to trigger heightened scrutiny of agency actions include "abrupt shifts in policy" and "where the agency has demonstrated undue bias towards particular private interests."

[84] *FCC v. Fox Television Stations*, 566 U.S. 502, 515 – 16 (2009)

[85] *Id.* at 537 (Kennedy, J., concurring).

have relied on the same implementing regulations that were first promulgated in 1978. Without a factual basis to justify this 180-degree change in position, the proposed rule is unlikely to survive a court challenge.

The United States District Court for the District of Montana recently rejected a Trump administration regulatory U-turn for exactly these reasons.[86] In 2015, the Obama administration denied a permit for the construction of the Keystone XL pipeline. That decision detailed how the pipeline was not consistent with climate change-related foreign policy considerations, and explained why 2015 was a critical time for climate action given rising carbon emissions and international movement towards limiting emissions. The Trump administration reversed that decision in 2017 without addressing either of these issues. The Montana court held this was arbitrary and capricious, writing, "[t]he [State] Department's 2017 conclusory analysis that climate-related impacts from Keystone subsequently would prove inconsequential and its corresponding reliance on this conclusion as a centerpiece of its policy change required the Department to provide a 'reasoned explanation.' The Department instead simply discarded prior factual findings related to climate change to support its course reversal."[87]

The proposed update is yet another example of a regulatory U-turn that is entirely unsupported by factual determinations, differing from the previous NEPA implementing regulations in that it does not provide for the consideration of the cumulative impact or indirect effects of a project and expressly forbids an agency from considering effects remote in time or geographically remote.

The proposed update cites to no scientific, economic, technical, or other expertise to justify these changes. In fact, the entire proposal is virtually devoid of references to any sort of expertise whatsoever. It does recite fossil fuel industry talking points. For example, the proposal cites concerns about "excessive documentation" and "frequent litigation" as reasons for doing away with analysis of cumulative impact and indirect effects.[88] CEQ also claims that evaluating the cumulative impact and indirect effects of a project "can divert agencies from focusing their time and resources on the most significant effects" and suggests that cumulative impact analysis does not "focus on the most meaningful issues."[89]

Given the substantial evidence demonstrating that climate change will be immensely costly and have potentially catastrophic effects on the economy, it is hard to see how CEQ can credibly suggest that cumulative impact analysis does not "focus on the most meaningful issues." For projects with a large carbon footprint, their contribution to climate change will almost certainly be one of their most significant effects, and to prohibit an evaluating agency from considering the cumulative and indirect climate effects of such projects simply because they are remote in

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[86] *Indigenous Environmental Network v. U.S. Dep't. of State*, Case No. 4:17-cv-00031 (D. Mont. 2018)
[87] *Id.*
[88] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 FR 1684, 1707, *available at* https://www.govinfo.gov/content/pkg/FR-2020-01-10/pdf/2019-28106.pdf
[89] *Id.* at 1708.

time or place is nonsensical. Given the entirely unsupported basis for the changes to analysis of cumulative impact and indirect effects, the proposed update is arbitrary and capricious under both the *Fox Television Stations* and *Indigenous Environmental Network* decisions.

Courts have also held that while they "must defer to an agency's expertise, [they] must do so only to the extent that the agency utilizes, rather than ignores, the analysis of its experts."[90] In cases where agency expertise is ignored, the agency action will be found to be arbitrary and capricious. In the instant case, CEQ ignored the expertise of the 13 federal agencies that contributed to the Fourth National Climate Assessment, which the proposed update does not even mention. In addition to ignoring agency expertise, CEQ ignored the overwhelming economic and scientific expertise discussed in Part II A of this comment. Economic, financial, and scientific actors the world over are warning ever more urgently of the massive economic losses that will occur due to GHG emissions, and yet CEQ decided that there was no need for agencies to consider the cumulative impact and indirect effects of projects on climate change.

### 2. CEQ's proposed update contradicts the Trump administration's use of cumulative impact analysis for renewable projects

Tellingly, when oil and gas projects are not under NEPA review, the Trump administration sings a different tune about cumulative impact analysis. In the case of renewable energy, a direct competitor to the Trump administration's fossil fuel benefactors, the administration is very much in favor of cumulative impact analysis, presumably as a way to delay or ultimately reject renewable energy projects that would reduce the market for fossil fuels.

In a recent letter to Senator Whitehouse, the Acting Director of the Department of the Interior's Bureau of Ocean Energy Management (BOEM) wrote with respect to BOEM's draft environmental impact statement (EIS) of an offshore wind project that "BOEM is currently developing a comprehensive and expanded cumulative environmental impact scenario which we will analyze in a supplement to the Draft EIS)."[91]

How can the administration reconcile BOEM's decision to engage in an *expanded* analysis of cumulative impacts on an offshore wind project with CEQ's proposed update abolishing cumulative impact analysis under NEPA? Concerns of "excessive documentation" and "frequent litigation" should be no different. And expenditure of agency time to review the results of an expanded analysis would still be a concern. The only possible explanation for such wildly divergent decisions is that both accrue to the benefit of the fossil fuel industry. CEQ's proposed update is designed to make it easier for fossil fuel projects to proceed while BOEM's expanded review of offshore wind is designed to impede the development a new resource that does not have the favor of the Trump administration.

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[90] *Defenders of Wildlife v. Babbitt*, 958 F.Supp. 670, 685 (D.C. Cir. 1997)

[91] *See*, Appendix I.

The obvious conclusion to all this is that CEQ did not care about facts or expertise. It cared about delivering the results that the oil and gas industry wanted: updated regulations that would make it impossible to consider the effects a project would have on climate change. Such updated regulations would limit litigation against oil and gas projects and reduce their chances of getting blocked by a reviewing agency or court. The factual record laid out in this comment details precisely the sort of "danger signals" the courts have found to warrant "hard look" review. "Abrupt shifts in policy,"[92] and "undue bias towards particular private interests"[93] are all present in this tawdry tale of industry capture. Based on this record, no court could plausibly conclude that CEQ "genuinely engaged in reasoned decision making"[94] nor conclude that CEQ could "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[95]

The proposed update is therefore arbitrary and capricious and should be withdrawn.

### B. The proposed update is an illegal delegation of agency authority to a regulated industry

Just as an agency action will be set aside if a court determines that it was arbitrary and capricious, an agency action should be invalidated if a court finds that the agency delegated its authority to one or more private interests, because Congress "cannot delegate regulatory authority to a private entity."[96] "Although objections to delegations are "typically presented in the context of a transfer of legislative authority from the Congress to agencies, [...] the difficulties sparked by such allocations are even more prevalent in the context of agency delegations to private individuals."[97]

While it is clear that an agency may not *explicitly* delegate its authority to private interests, an agency that *implicitly* delegates its authority to private interests raises the same concerns. An agency is effectively captured by the private interests it regulates when its "'regulation is . . . directed away from the public interest and toward the interest of the regulated industry' by 'intent and action' of industries and their allies."[98]

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[92] *United Church of Christ v. FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983)
[93] *NRDC v. SEC*, 606 F.2d 1031, 1050 (D.C. Cir. 1979)
[94] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970)
[95] *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 US 29, 43 (1983), quoting *Burlington Truck Lines, Inc. v. United States*, 371 U. S. 156, 168 (1962)
[96] *Ass'n of American Railroads v. USDOT*, 721 F.3d 666, 670 (D.C. Cir. 2013) rev'd on other grounds
[97] *Id.*, quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC,* 737 F.2d 1095, 1143 (DC Cir. 1984).
[98] Lindsey Dillon, *et al.*, "The Environmental Protection Agency in the Early Trump Administration: Prelude to Regulatory Capture," *American Journal of Public Health* (April 2018), https://ajph.aphapublications.org/doi/10.2105/AJPH.2018.304360, quoting, Daniel Carpenter, editor, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, pg. 73, Cambridge University Press (2014)

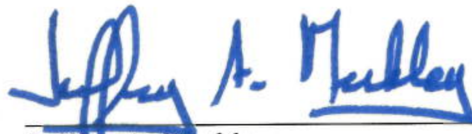
As described above, the proposed update was the product of an administration that has effectively delegated environmental and energy policy making to the fossil fuel industry. In addition to the fact that the proposed update comports with the fossil fuel industry's desire to eliminate consideration of climate impacts under NEPA and is even explicitly justified as a way to reduce the "frequent litigation" to abhorrent to industry, there is also abundant evidence that the Trump administration essentially takes direction from the fossil fuel industry. The fossil fuel industry has open access to the administration. Senior administration officials are closely tied to the fossil fuel industry and have been uniformly hostile towards rules designed to address climate change, particularly on behalf of industry donors who have been generous political patrons of President Trump or industry clients they represented as lawyers or lobbyists prior to joining the Trump administration.

The purpose and prize of the fossil fuel industry's well-documented regulatory capture of the Trump administration was that the administration effectively delegated its authority to the industry that captured it. There is no substantive difference between an agency explicitly telling a company or industry to write a regulation, and an agency (indeed, an entire administration) signaling to a company or industry that it will write whatever regulation the company or industry wants. The substance is all industry, and the public interest is ignored. That is not lawful under well-established principles of administrative law.

For the foregoing reasons, we respectfully urge CEQ to withdraw the proposed updated regulations.

Sincerely,

Sheldon Whitehouse
United States Senator



Jeffrey A. Merkley
United States Senator