SHUTTERED GOVERNMENT

Robert L. Glicksman*

Among the key characteristics of democratic governance are opportunities for meaningful public participation, transparency, and adherence to the rule of law, including reasoned and substantiated decision-making. These characteristics are particularly important in decision-making by administrative agencies, which, unlike legislative bodies that formulate public policy and adopt laws, are not directly accountable to the electorate. Under the Trump Administration, the processes by which agencies with environmental protection responsibilities manage the information that is relevant to the exercise of delegated policy discretion and the implementation of their statutory responsibilities reflect none of the three characteristics of democratic governance. These agencies are instead practicing shuttered government. They are doing so by pursuing three distinct but overlapping strategies.

First, they are blocking (or proposing to block) input from outside the agencies. They achieve this through three mechanisms: disqualifying significant swaths of important scientific and technical information from consideration, curtailing opportunities for public participation in the administrative process, and excluding the input of neutral policy and technical experts by stacking advisory boards and panels with those sympathetic to the Administration's environmental policy agenda.

Second, the agencies are blocking public access to information in their possession that may conflict with their preferred policies or undercut the explanations they devise to support their actions. This strategy is also being pursued through three techniques: removing information from the public domain, such as by shutting down agency websites that previously provided information about matters such as climate change; censoring their own officials to prevent them from providing information that the agencies do not want publicized; and refusing to disclose information requested by the public under the Freedom of Information Act and otherwise.

Third, during the Trump Administration, environmental agencies are simply not producing or sharing with each other information that was previously regarded as critical to informed decision-making. The tools these agencies have wielded to implement this strategy include draining themselves of policy and technical

---

* J.B. & Maurice C. Shapiro Professor of Environmental Law, The George Washington University Law School. I would like to thank David Adelman, James Goodwin, Alex Klass, Alan Morrison, Justin Pidot, Dick Pierce, Sid Shapiro, and Jon Wiener for enormously helpful comments on earlier drafts.

expertise, allowing agencies to shut fellow agency officials with greater environmental expertise out of the decision-making process, blocking oversight of the environmental compliance status of regulated entities, and preparing superficial administrative records in contexts such as planning and environmental consultation and assessment.

This Article identifies three counterweights to the Administration's operation of shuttered government in the environmental law and policy domain. In some cases, policy and technical experts are pushing back on information deficiencies and distortions; current and former agency officials, acting as whistleblowers, are revealing information that the agencies have suppressed or mischaracterized; and courts are invalidating agency actions that reflect information management that is inconsistent with good governance norms and statutory and regulatory requirements. Although there are encouraging signs, the degree to which these counterweights will succeed in cracking open the shutters remains to be seen.

INTRODUCTION 575

I. KEEPING EXTERNAL INPUT OUT 579
A. Secret Science 579
B. Participation in Agency Decision-making 584
1. Rulemaking 584
2. National Environmental Policy Act Evaluation 590
C. Exclusion of External Expert Input 596

II. KEEPING INTERNAL OUTPUT IN 600
A. Disappearing Websites 601
B. Internal Censorship 602
C. Recalcitrant Information Disclosure 604

III. LIMITING INTERNAL INPUT AND OUTPUT 606
A. Loss of Experience and Expertise 607
B. Exclusion of Internal Expert Input 611
1. The Endangered Species Act's Consultation Process 611
2. Sidelining EPA Input on Fuel Efficiency Standards 614
C. Reduced Enforcement Oversight 617
D. Superficial Environmental Evaluation 620
E. The Unquenchable Thirst for Information on Economic Impacts 624

IV. RESISTANCE TO SHUTTERED GOVERNMENT 625
A. Pushback from Government Scientific Experts 626
B. Whistleblowers 629
C. Judicial Review 630

CONCLUSION 631

INTRODUCTION

A key characteristic of democratic governance is accountability of public officials.[1] Accountable governance is particularly important when public policy decisions are made by administrative agencies composed of appointed, rather than elected, officials.[2] The accountability of administrative agencies to the public has been called "a hallmark of modern democratic governance,"[3] and that accountability has been linked to regulatory public participation,[4] transparency,[5] and adherence by government officials with the rule of law.[6]

---

1. Stephen Joseph Powell & Ludmila Mendonça Lopes Ribeiro, *Managing the Rule of Law in the Americas: An Empirical Portrait of the Effects of 15 Years of WTO, MERCOSUL, and NAFTA Dispute Resolution on Civil Society in Latin America*, 42 U. MIAMI INTER-AM. L. REV. 197, 250 (2011) (referring to accountability as a key element of democratic governance that promotes the rule of law); Fizza Batool, Note, *Exile and Election: The Case for Barring Exiled Leaders from Contesting in National Elections*, 16 WASH. U. GLOB. STUD. L. REV. 173, 179 (2017) (citing G.A. Res. 59/201 (Dec. 20, 2004)); *see also* Urs Gasser, *Recoding Privacy Law: Reflections on the Future Relationship Among Law, Technology, and Privacy*, 130 HARV. L. REV. F. 61, 70 (2016) (arguing that accountability and legitimacy "allow democratic governance to flourish").

2. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1671 (1975) (referring to recurrent anxiety over the "exercise of power over private interests by officials not otherwise formally accountable"); *cf.* Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2073 (2005) (taking issue with "the idea that elected officials—legislators and the chief executive—are accountable to the people, while officials who obtained their position by appointment or examination are not").

3. Jennifer Shkabatur, *Transparency With(Out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 82 (2012) (quoting Mark Bovens, *Public Accountability*, *in* THE OXFORD HANDBOOK OF PUBLIC MANAGEMENT 182, 182 (Ewan Ferlie, Laurence E. Lynn & Christopher Pollitt eds., 2007)).

4. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 27 (1997) (contending that "participation in regulatory problem solving by interested and affected parties has an independent, democratic value," over and above its contribution to effective governance); *cf.* Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1419 (2017) (arguing that "wider participation legitimates agency action").

5. Shkabatur, *supra* note 3, at 83.

6. *See* Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 578 (2003) ("Accountability also increases with the rule of law: the extent to which agency discretion can be measured against determinate, publicly announced, and enforceable criteria . . . . [T]o the extent an agency's power is constrained by the rule of law, rather than being an arbitrary exercise of discretion, the electorate may perceive the agency's actions as more legitimate."). For a different conception of legitimacy, see Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 350 (2019) (urging movement toward "a positive vision of the administrative state—one in which its legitimacy is measured not by the stringency of the [procedural] constraints under which it labors, but by how well it advances our collective goals"); *id.* at 386–87 ("[W]e've now run a half-century experiment into whether stringent procedural rules will yield an administrative state that its opponents view as fundamentally legitimate. That experiment has failed.").

The value of public participation in agency decision-making processes is multifaceted. It contributes to oversight of agency action and combats regulatory capture, provides the agency with information that can enhance the quality of agency decisions, and "instills a sense of legitimacy in the public regarding the agency's decisions."[7] Some administrative law scholars regard public participation as a way to promote pluralistic conceptions of democracy, while others view it as "an integral part of a process that requires agencies to consider all relevant interests before acting and to publicly justify their actions with reasoned explanations."[8]

The value of transparency in governance, particularly administrative governance, is reflected in Justice Brandeis's comment that "[s]unlight is said to be

---

The Trump Administration's aversion to accountability for alleged failures to adhere to the rule of law is reflected in the President's serial removal of agency inspectors general, who serve as internal watchdogs. *See* Christopher Yukins & Jessica Tillipman, *Trump's Attacks on the Inspectors General: An In-Depth Assessment*, PUB. PROCUREMENT INT'L, https://publicprocurementinternational.com/trump-igs-in-depth-assessment/ (last visited June 4, 2020); Andrew Bakaj et al., Opinion, *Trump's Purge of Inspectors General Is a Crisis. Alarm Bells Should Be Going Off Everywhere.*, WASH. POST (Apr. 14, 2020), https://www.washingtonpost.com/opinions/2020/04/14/trump-is-waging-war-our-inspectors-general-congress-needs-choose-side/; Benjamin Wittes, *Why Is Trump's Inspector General Purge Not a National Scandal?*, LAWFARE (Apr. 8, 2020), https://www.lawfareblog.com/why-trumps-inspector-general-purge-not-national-scandal. *See generally* Jed Handelsman Shugerman, *Professionals, Politicos, and Crony Attorneys General: A Historical Sketch of the U.S. Attorney General as a Case for Structural Independence*, 87 FORDHAM L. REV. 1965, 1993 (2019).

Yet another tactic for escaping accountability is the persistent reliance by the Trump Administration on acting agency heads who are not subject to Senate confirmation. *See generally* Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613 (2020). Interior Secretary David Bernhardt, for example, repeatedly reappointed William Perry Pendley as acting director of the BLM so that, well into the fourth year of the Trump presidency, that position had not been filled with a permanent appointee. *See* Dennis Webb, *Pendley Appointment Extended Despite Legal Threat*, DAILY SENTINEL (May 6, 2020), https://www.gjsentinel.com/news/western_colorado/pendley-appointment-extended-despite-legal-threat/article_1983ce0e-8ecf-11ea-a786-8fcd5c83c61d.html. President Trump eventually nominated Pendley to be the permanent Director of the BLM. PRES. NOMINATION 2076, 116th Cong. (2020), https://www.congress.gov/nomination/116th-congress/2076. But the White House withdrew the nomination after it became a political liability. *See* Steven Mufson, *White House Withdraws Nomination of William Pendley to Head the Bureau of Land Management*, WASH. POST (Aug. 15, 2020), https://www.washingtonpost.com/climate-environment/2020/08/15/white-house-withdraws-nomination-william-pendley-head-bureau-land-management/.

7. Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 703 (2007); *see also* Yvette M. Barksdale, *The Presidency and Administrative Value Selection*, 42 AM. U. L. REV. 273, 319 (1993) ("[N]o one seriously argues that public participation is not important to governmental decisionmaking in general and administrative policymaking in particular."). Professor Barksdale argues that "[p]ublic participation is even more important to agency value selection than it is to administrative policymaking." *Id.*

8. Sidney Shapiro & Richard Murphy, *Public Participation Without a Public: The Challenge for Administrative Policymaking*, 78 MO. L. REV. 489, 491 (2013); *id.* at 493 (stating that "[p]ublic participation is commonly said to legitimize government either because it creates a pluralistic interest group process or because it results in deliberative democracy," and noting a preference for the second model).

the best of disinfectants."[9] Transparency helps remove information asymmetries,[10] provides guidance to the public on the laws and policies that may apply to or benefit them,[11] increases trust in government,[12] and combats corruption.[13] Conversely, "the more successful the government is at non-transparent behavior, the less likely we will learn of . . . activity" that may not conform to norms of good government or that otherwise conflicts with legal requirements or public values.[14] According to some, "Transparency is not an end in itself; rather, it is simply a means to an end, and that end is accountability."[15]

Administrative law expert Kevin Stack has posited that "[t]he rule of law retains a place at the center of our political morality; it is an ideal, like democracy, that sits among a small cluster of our most basic commitments."[16] Like public participation, the rule of law is multifaceted. Professor Stack identifies "several underlying values common to most accounts of the rule of law."[17] These include constraining public officials, allowing people to know the legal consequences of their actions and to plan accordingly, and providing a mechanism for fair dispute resolution.[18] The first of these values is of particular salience in the administrative law context.[19] Other aspects of adherence to the rule of law include the necessity of justifying government action in nonarbitrary fashion, which some describe as "reason-giving,"[20] and consistency and predictability.[21] As Gillian Metzger and

---

9. Shkabatur, *supra* note 3, at 83 (quoting LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (Thoemmes Press 2003) (1914)).

10. Jerry Brito & Drew Perraut, *Transparency and Performance in Government*, 11 N.C. J.L. & TECH. 161, 168 (2010).

11. Louis J. Virelli III & Ellen S. Podgor, *Secret Policies*, 2019 U. ILL. L. REV. 463, 467 (2019).

12. *Id.* at 499; *see also* Claire Gianotti, *Ethics in the Executive Branch: Enforcing the Emoluments Clause*, 32 GEO. J. LEGAL ETHICS 615, 616 (2019) ("In the dark, government decision-making processes lose legitimacy. Walter Shaub, the former head of the Office of Government Ethics, warned that uncertainty about the motivations of our policy makers 'undermines the faith in government decision-making and puts a cloud over everything the government does.'").

13. *See* George Papandreou, *Confronting the Meta-Problems of Democracy*, 82 DEF. COUNS. J. 243, 253 (2015).

14. Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 940 (2010).

15. Brito & Perraut, *supra* note 10, at 166.

16. Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1990 (2015).

17. *Id.*

18. *Id.*

19. *Id.* at 1991.

20. *Id.* at 1992–93. *See generally* Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387 (1987).

21. Todd S. Aagaard, *Agencies, Courts, First Principles, and the Rule of Law*, 70 ADMIN. L. REV. 771, 773 (2018) ("The Rule of Law is ultimately multifaceted and inclusive of both predictability, consistency, and efficiency on the one hand and accountability to core values on the other hand."); Anil Kalhan, *Deferred Action, Supervised Enforcement*

Kevin Stack have argued, "[I]n a culture that prizes the rule of law as ours does, it is difficult to ground an account of administrative legitimacy without an account of how well administrative agencies embody rule-of-law values."[22]

In its implementation of the nation's environmental protection laws, the Trump Administration has deviated sharply from each of these norms of democratic governance. This Article focuses on how the Administration has done so through its management of information about the potentially adverse environmental consequences of its decisions.[23] The Administration is operating a shuttered government that consistently limits the information on which environmental regulatory decisions are based.[24] This shuttered environmental governance is the product of three distinct but overlapping information management strategies: keeping external input out, which constrains public participation; keeping internal output in, which impairs transparency; and limiting internal input and output, which hinders the government's capacity to serve as an objective source of the information critical to informed governance decisions and undermines the rule of law.[25] The examples of each strategy provided in this Article are illustrative rather than exhaustive. Although these examples all relate to the Administration's environmental decision-making processes, they may be indicative of a broader effort by the Administration to short-circuit public participation, limit public access to

---

Discretion, and the Rule of Law Basis for Executive Action on Immigration, 63 UCLA L. REV. DISCOURSE 58, 85 (2015); Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361, 377 (2018) ("The goal of the rule of law is to create restraints on government in order to provide security and predictability so that individuals and firms can plan their pursuits and do so without fear. Its basic conception is opposition to the arbitrary exercise of power."). The boundaries of the three characteristics of democratic administrative governance discussed here are not necessarily clear, and they may overlap. *See, e.g.*, Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1687 n.197 (2019) ("Among the values that scholars have gathered under the umbrella of the 'rule of law' are equality of application, certainty, predictability, and *participatory deliberation*." (emphasis added)); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1248 (2017) (describing "traditional rule-of-law values of consistency, certainty, *transparency*, and reason giving" (emphasis added)).

22. Metzger & Stack, *supra* note 21, at 1262.

23. As Justin Pidot has noted, "Information is the lifeblood of environmental law;" among other things, it "informs political debate and inspires the public to demand change." Justin R. Pidot, *Environmental Nihilism*, 10 ARIZ. J. ENVTL. L. & POL'Y 106, 107 (2019).

24. Professor Pidot has described "a new, subversive approach to controlling environmental law," which he calls "environmental nihilism." *Id.* at 109. Those engaged in this approach "seek[] to manipulate substantive environmental law by suppressing or manipulating information." *Id.*; *see also id.* at 119 (describing environmental nihilism as "a worldview seeking to control substantive environmental law without engaging in the forthright dialogue and political debate necessary to amend it"). Although Pidot points out that "environmental nihilism need not be inherently ideological," *id*. at 121, the examples provided in this Article reflect the Trump Administration's efforts to manipulate information that is relevant to the implementation of the nation's environmental laws to achieve decidedly deregulatory ends.

25. *See infra* Parts I–III.

information that forms the foundation for key administrative governance initiatives, and undermine adherence to the rule of law.[26]

The Trump Administration does not seem interested in learning from those outside government whose information and analysis may not conform to its version of reality or whose policy views may diverge from its own. As a result, it has made concerted efforts to exclude such information from the environmental policymaking process. Part I discusses some of those efforts, including the remarkable attempt by the Environmental Protection Agency ("EPA") to exclude anyone likely to support stringent regulation from the supposedly politically neutral scientific bodies that advise EPA on air pollution controls. The Administration also seems determined to ensure information generated within government that does not support its vision of regulatory policy never sees the light of day. Accordingly, it has disabled avenues of communication that threaten to undercut its regulatory agenda through public disclosure, as Part II explores. Part III examines how the Administration has halted or slowed the generation or sharing of information within government that would foster more informed decisions by agencies with environmental responsibilities. Part IV provides a brief discussion of three mechanisms capable of providing counterweights to the kind of environmental information mismanagement that has characterized the Trump Administration. The Article concludes by tying the exercise of shuttered government to anti-democratic governance and providing preliminary thoughts about the need for reinvigorated oversight of what has been, at least in the realm of environmental law, substantially unchecked executive abuse of delegated statutory authority.

I. KEEPING EXTERNAL INPUT OUT

The President and the officials appointed by his Administration to head the agencies responsible for implementing the nation's environmental laws have relied on several strategies to exclude inconvenient information from administrative records, instead preferring to make their regulatory and resource management decisions in reliance on handcrafted and cherry-picked records. These include barring agencies from considering certain scientific evidence, short-circuiting the notice-and-comment rulemaking process, limiting public participation in the government's analysis of the potential environmental effects of proposed projects, and stacking government advisory boards and panels with individuals unlikely to contest the Administration's environmental agenda.

A. Secret Science

Shortly after taking office, President Trump issued an executive order directing each agency to establish a Regulatory Reform Task Force.[27] The order also directed each agency's Task Force to identify regulations that, among other things, "rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for

---

26. *Cf.* Pidot, *supra* note 24, at 130 (describing environmental nihilism "as antithetical to basic democratic principles and the rule of law").

27. Exec. Order No. 13,777, Enforcing the Regulatory Reform Agenda, 82 Fed. Reg. 12,285 (Mar. 1, 2017).

reproducibility."[28] Later that month, the President issued another executive order that enunciated a policy of issuing environmental regulations that "are developed through transparent processes that employ the best available peer-reviewed science and economics."[29]

A little more than a year later, EPA issued a proposed rule, sometimes referred to as the "secret science rule,"[30] that purported to be based on an effort to make the agency's use of science more transparent.[31] In the regulatory preamble, EPA committed itself to relying on "the best available science" as the foundation of its regulatory actions.[32] It asserted:

> Enhancing the transparency and validity of the scientific information relied upon by EPA strengthens the integrity of EPA's regulatory actions and its obligation to ensure the Agency is not arbitrary in its conclusions. By better informing the public, the Agency is enhancing the public's ability to understand and meaningfully participate in the regulatory process.[33]

The proposal's core provision stated that "[w]hen promulgating significant regulatory actions, the Agency shall ensure that dose response data and models underlying pivotal regulatory science are publicly available in a manner sufficient for independent validation."[34] Information would be considered "publicly available in a manner sufficient for independent validation" if "it includes the information necessary for the public to understand, assess, and replicate findings."[35]

On its face, EPA's proposal is designed to promote two key aspects of open government and democratic accountability: transparency and public participation. Its effect, however, would be to inhibit, rather than foster, informed regulatory decision-making by precluding EPA from relying on the kinds of scientific studies

---

28. *Id.* at 12,286.

29. Exec. Order No. 13,783, Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093, 16,093 (Mar. 31, 2017).

30. *See, e.g.*, Albert C. Lin, *President Trump's War on Regulatory Science*, 43 HARV. ENVTL. L. REV. 247, 255–56 (2019).

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

32. *Id.* at 18,769 ("The best available science must serve as the foundation of EPA's regulatory actions.").

33. *Id.*

34. *Id.* at 18,773 (to be codified at 40 C.F.R. § 30.5); *see also id.* at 18,770 (stating that the proposed rule would "provide a mechanism to increase access to dose response data and models underlying pivotal regulatory science . . . to ensure that, over time, more of the data and models underlying the science that informs regulatory decisions . . . is available to the public for validation").

35. *Id.* at 18,873–74 (to be codified at 40 C.F.R. § 30.5). An attorney for R.J. Reynolds Tobacco Company devised a similar scheme in 1996 as a way to limit the government's ability to link secondhand smoke to public health problems. Sharon Lerner, *The War on the War on Cancer*, INTERCEPT (Jan. 20, 2020), https://theintercept.com/2020/01/12/cancer-trump-administration-epa-carcinogens-regulations/. The Republican-controlled House of Representatives passed a bill that anticipated EPA's Strengthening Transparency proposal in 2015. Secret Science Reform Act of 2015, H.R. 1030, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-bill/1030/text.

that have long provided the underpinning of regulations that protect the public health.[36] According to some observers, the proposal's purported goal of promoting transparency "is mere pretext."[37]

Under a previous administration, EPA itself explained why a public disclosure requirement of the kind it has since proposed is problematic:

> If EPA and other governmental agencies could not rely on published studies without conducting an independent analysis of the enormous volume of raw data underlying them, then much plainly relevant scientific information would become unavailable to EPA for use in setting standards to protect public health and the environment . . . . [S]uch data are often the property of scientific investigators and are often not readily available because of . . . proprietary interests . . . or because of [confidentiality] arrangements [with study participants].[38]

The D.C. Circuit quoted that analysis in rejecting a challenge to EPA's promulgation of national ambient air quality standards under the Clean Air Act ("CAA") that was based on the agency's deprivation of "'public essential procedural rights' by failing to obtain and make public the data underlying certain 'key studies.'"[39] The court "agree[d] with EPA that requiring agencies to obtain and publicize the data underlying all studies on which they rely 'would be impractical and unnecessary.'"[40]

---

36. *See* Daniel A. Farber, *Regulatory Review in Anti-Regulatory Times*, 94 CHI.-KENT L. REV. 383, 412 (2019) ("EPA seems determined to adopt an exclusionary rule for probative scientific evidence in pursuit of its 'transparency' goal."); Lin, *supra* note 30, at 256 (noting that EPA's proposal "would likely exclude—and appears to be aimed at—influential long-term studies that use private health data to link air pollution with serious health effects. Excluding such studies presumably would result in the issuance of weaker health and environmental standards").

The proposal would not completely shut the doors on scientific input into agency decisions. It invites private parties to create alternative risk assessment models and requires that EPA consider those alternatives. Professors McGarity and Wagner charge that "[b]y inundating the agency with dozens of models" and forcing it to evaluate the many assumptions and algorithms on which they are based, "private parties can slow the staff's progress to a crawl. Whatever signals might have been produced by several high quality, rigorously vetted agency models are at risk of being lost in the cacophonous noise of unlimited, unrestricted industry-created models." Thomas O. McGarity & Wendy E. Wagner, *Deregulation Using Stealth "Science" Strategies*, 68 DUKE L.J. 1719, 1733 (2019).

37. Nathan Cortez, *Information Mischief Under the Trump Administration*, 94 CHI.-KENT L. REV. 315, 336 (2019).

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

39. *Id.*

40. *Id.* (quoting National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38,689).

A former head of the Federal Occupational Safety and Health Administration had a harsher take on a similar legislative effort,[41] characterizing it as a:

> dishonest . . . attempt . . . to override scientific judgment and dictate narrow standards by which science is deemed valuable for policy. It imposes burdens that will detract from scientists' ability to do research and to have it influence decision-making, all aimed at bringing the process to a standstill, minimizing the role of science, and limiting regulations.[42]

Others have leveled similar charges against the proposal.[43] Professor Lisa Heinzerling, for example, regards the proposal as an effort to censor the cost-benefit

---

41. The Honest and Open EPA Science Treatment [HONEST] Act of 2017, H.R. 1430, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/house-bill/1430/text. H.R. 1430 has been compared to "a vampire coming back again." Sarah Munger, *Science and Technology*, 2018 A.B.A. SEC. ENV'T, ENERGY & RES. YEAR REV. 370, 371.

42. David Michaels & Thomas Burke, *The Dishonest HONEST Act*, 356 SCIENCE 989, 989 (2017), https://science.sciencemag.org/content/356/6342/989. Michaels is now a professor of environmental and occupational health. *Directory*, GEORGE WASH. UNIV. MILKEN INST. SCH. PUB. HEALTH, https://publichealth.gwu.edu/departments/environmental-and-occupational-health/david-michaels-phd (last visited July 31, 2020). Burke is a professor of health policy and management. *Faculty Directory*, JOHNS HOPKINS UNIV. BLOOMBERG SCH. PUB. HEALTH, https://www.jhsph.edu/faculty/directory/profile/109/thomas-a-burke (last visited July 31, 2020).

The legislation critiqued by Michaels and Burke would have allowed agencies to redact sensitive information, such as medical records, from any data sets made publicly available. According to Michaels and Burke, however, budgetary limitations may make such costly redactions impractical. *See* Michaels & Burke, *supra*, at 389. The same practical constraints presumably would apply to efforts to redact information that would identify health-related information about individuals who participated in epidemiological studies whose data sets would have to be publicly released under EPA's proposed rule. The HONEST Act passed the House of Representatives, but it never emerged from Senate committee consideration. Jori Reilly-Diakun, *Addressing Blurred Lines: Institutional Design Solutions to Transgressions Across the Science-Policy Boundary*, 49 TEX. ENVTL. L.J. 199, 204 n.26 (2019).

43. *See* Maurissa J. Rushton & Thomas J. Grever, *EPA's Controversial Proposed "Secret Science" Rule*, NAT. RES. & ENV'T, Winter 2019, at 54, 54 (2019) ("The proposed rule prompted an uproar from scientists, environmentalists, and other critics who are concerned that the rule may undermine EPA's ability to protect public health. Opponents argue that much of the data used in research cannot be released without breaching the privacy of the people involved. They argue that independent validation of research could be legally complicated or outright unethical. The rule also could block regulators from citing critical, relevant research into the health effects of pollution because the raw data cannot be released due to privacy concerns. Restrictions on data could prevent EPA from considering potentially crucial research including epidemiological data, exposure studies, and other scientific research papers, thus making it harder to promulgate effective environmental regulations. Opponents also are concerned about the rule's potential retroactive application and believe that it could overturn critical scientific reports such as the Harvard Six Cities Study of 1993, a study that heavily influenced federal air pollution standards when it revealed an association between air pollution and mortality."); *see also* Irma S. Russell, *The Art and Science of the*

profiles that are used to inform the creation of air pollution laws by targeting the nonpublic studies that support those benefits. "One way to make benefits disappear is simply to declare that the evidence showing benefits is inadmissible."[44] The editors-in-chief of leading scientific journals, which include *Science*, *Nature*, and *Proceedings of the National Academy of Sciences*, in commenting on the proposed rule, remarked that "[i]t does not strengthen policies based on scientific evidence to limit the scientific evidence that can inform them."[45]

In the face of this criticism, the Trump Administration doubled down. First, it published a supplemental proposed rule that would expand the reach of EPA's secret science rule beyond significant regulatory decisions.[46] Second, EPA proposed to extend the restrictions in its original proposal to data and models and the assumptions that drive a model's analytical results, not just dose response data and models used in agency rulemakings.[47] Third, EPA considered applying the new policy retroactively to bar previously conducted studies, such as the Six Cities Study that assessed the association between particulate matter pollution and mortality in six U.S. cities[48] that EPA relied on in adopting regulations under statutes such as the CAA.[49] Fourth, the Interior Department moved toward the adoption of similar constraints on the science that would be eligible for use in its decisions.[50]

(Survival) Deal: The Role of Administrative Agencies in Protecting the Public Against Unreasonable Risks, 87 UMKC L. REV. 733, 746 (2019) ("Opponents of the new policy argue that it will limit the use of scientific research because studies concerned with public health generally promise anonymity to the participants and the reservation of agency power in the policy could operate to favor industries.").

44. Lisa Heinzerling, *Cost-Nothing Analysis: Environmental Economics in the Age of Trump*, 30 COLO. NAT. RES., ENERGY & ENVTL. L. REV. 287, 303 (2019); *see also* Sid Shapiro, *EPA 'Transparency' Rule Confuses Science and Regulatory Science*, HILL (May 15, 2018), https://thehill.com/opinion/energy-environment/387831-epa-transparency-rule-epa-confuses-science-and-regulatory-science ("[I]n a particularly Orwellian twist, it turns out [EPA] is using a claim of 'transparency' as a way to obscure [its] ideological opposition to environmental protection.").

45. Jeremy Berg et al., Letter, *Joint Statement on EPA Proposed Rule and Public Availability of Data*, SCIENCE (May 4, 2018), https://science.sciencemag.org/content/360/6388/eaau0116.

46. Strengthening Transparency in Regulatory Science, 85 Fed. Reg. 15,396, 15,397 (proposed Mar. 18, 2020) (to be codified at 40 C.F.R. pt. 30).

47. *Id.* at 15,398; *see also* Kelsey Brugger, *Trump Admin Expands Reach of Secret Science Proposal*, GREENWIRE (Mar. 4, 2020), https://www.eenews.net/greenwire/stories/1062516587.

48. *See* Rushton & Grever, *supra* note 43. *See generally* Douglas W. Dockery et al., *An Association Between Air Pollution and Mortality in Six U.S. Cities*, 329 NEW ENG. J. MED. 1753 (1993), https://www.nejm.org/doi/full/10.1056/NEJM199312093292401 (assessing contribution of air pollution to mortality).

49. *See* Lisa Friedman, *E.P.A. to Limit Science Used to Write Public Health Rules*, N.Y. TIMES (Nov. 11, 2019), https://www.nytimes.com/2019/11/11/climate/epa-science-trump.html (discussing leaked version of the supplemental proposal).

50. *See* U.S. Dep't of the Interior, Order No. 3369 on Promoting Open Science (Sept. 28, 2018), https://www.doi.gov/sites/doi.gov/files/elips/documents/so_3369_promoting_open_science.pdf; Rebecca Beitsch, *New Interior Rule Would Limit Which*

B. Participation in Agency Decision-making

During the Trump Administration, agencies with environmental protection responsibilities have used various techniques to limit public participation in their decision-making processes. These include processes for adopting legislative regulations and those for evaluating the environmental effects of other agency actions.

1. Rulemaking

The vast majority of regulations EPA adopts under the federal pollution control laws are the product of notice-and-comment (or informal) rulemaking that is conducted in accordance with the Administrative Procedure Act ("APA").[51] The APA requires that an agency publish a notice of proposed rulemaking in the Federal Register and solicit public comment on its proposal.[52] These requirements serve three purposes: improving the quality of agency regulations by "test[ing them] by exposure to diverse public comment;" affording fair treatment by providing regulated entities and beneficiaries with an opportunity to respond to regulatory proposals that may affect them; and enhancing the quality of judicial review by expanding the information base contained in the administrative record.[53] The Trump agencies have undercut all of these purposes by attempting to avoid APA notice-and-comment procedures entirely or minimize opportunities for meaningful public input when it cannot.

During the first year of the Trump Administration, its environmental agencies often sought to block regulations adopted during the Obama Administration without undergoing notice-and-comment rulemaking.[54] The APA allows agencies to stay the implementation of rules that have not yet gone into effect pending judicial review if "justice so requires."[55] But the Bureau of Land Management ("BLM") and the Department of Energy both stayed the compliance date of rules that had already gone into effect. Courts invalidated these attempts as improper circumventing of APA procedural requirements.[56]

Scientific Studies Agency Can Consider, HILL (Feb. 26, 2020), https://thehill.com/policy/energy-environment/484747-new-interior-rule-would-limit-which-scientific-studies-agency-can.

51. 5 U.S.C. § 553 (2018).

52. *Id.* § 553(b)–(c).

53. Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1987) (quoting BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 641 (1st Cir. 1979)); *see also* Nat. Res. Def. Council, Inc. v. EPA, 822 F.2d 104, 121 (D.C. Cir. 1987) (stating that the function of the notice requirement is to ensure public participation to "minimize the dangers of arbitrariness and inadequate information").

54. *See, e.g.*, Glicksman & Hammond, *supra* note 21, at 1674–78 (discussing some of those lawsuits).

55. 5 U.S.C. § 705.

56. Nat. Res. Def. Council v. U.S. Dep't of Energy, 362 F. Supp. 3d 126, 151–53 (S.D.N.Y. 2019); California v. Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1120 (N.D. Cal. 2017).

The APA provides exemptions from notice-and-comment procedures for nonlegislative regulations such as interpretive rules and policy statements.[57] Trump environmental agencies have sought to avoid notice-and-comment procedures by mischaracterizing legislative rules as nonlegislative rules that are exempt from those procedures.[58] The APA also exempts rules which the agency for "good cause, finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[59] Trump agencies have relied on the good cause exception from notice-and-comment procedures to accelerate adoption of regulations that weaken environmental protection.[60] Because that effort involves bypassing or short-circuiting notice-and-comment procedures, it also minimizes opportunities for the public input into the policymaking process that the notice-and-comment process was designed to assure.[61] For example, the Second Circuit invalidated the National Highway Traffic Safety Administration's reliance on the good cause exception to suspend an increase in the civil penalties that may be assessed against auto manufacturers who violate corporate average fuel economy standards adopted under the Energy Policy and Conservation Act ("EPCA").[62] According to the court, "That a regulated entity might prefer different regulations

---

57. These kinds of nonlegislative rules are not binding on the public. *See, e.g.*, Iowa League of Cities v. EPA, 711 F.3d 844, 874 (8th Cir. 2013) ("The hallmark of an interpretive rule or policy statement is that they cannot be independently legally enforced.").

58. *See, e.g.*, W. Watersheds Project v. Zinke, 441 F. Supp. 3d 1042, 1067–68 (D. Idaho 2020); Watersheds Project v. Zinke, 336 F. Supp. 3d 1204, 1233–35 (D. Idaho 2018). This line of argument is by no means confined to the Trump Administration, see, for example, Sierra Club v. EPA, 699 F.3d 530, 535 (D.C. Cir. 2012), and such mischaracterizations may be made in good faith given the notoriously amorphous dividing line between legislative and nonlegislative rules. *See, e.g.*, Noel v. Chapman, 508 F.2d 1023, 1030 (2d Cir. 1975) (referring to the distinction as "enshrouded in considerable smog"). Nonetheless, the agencies have sought to use nonlegislative rules to advance their environmental policies in the face of an executive order issued by President Trump which sought to limit the use of nonbinding agency guidance documents with the professed goal of promoting "an open and fair regulatory process." Exec. Order No. 13,891, Promoting the Rule of Law Through Improved Agency Guidance Documents, 84 Fed. Reg. 55,235, 55,235 (Oct. 9, 2019).

59. 5 U.S.C. § 553(b)(B).

60. For a comprehensive account of the administration's efforts to "dismantle[]" environmental regulatory protections, see Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *The Trump Administration Is Reversing Nearly 100 Environmental Rules. Here's the Full List.*, N.Y. TIMES (May 6, 2020), https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks.html.

61. *See, e.g.*, Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 831 (2002) (noting that various kinds of nonlegislative rules "lack any requirement of public input before promulgation"); Dean Smith, *Lawmaking on Federal Lands: Criminal Liability and the Public Property Exception of the Administrative Procedure Act*, 23 J. LAND RES. & ENVTL. L. 313, 318 (2003) ("[T]hese exemptions are exceptions to the APA's general policy of providing an opportunity for public participation in rulemaking.").

62. Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin., 894 F.3d 95, 113–15 (2d Cir. 2018).

that are easier or less costly to comply with does not justify dispensing with notice and comment."[63] Trump's EPA has also invoked the exception improperly.[64]

Even when agencies have engaged in notice-and-comment procedures, they have, at times, done so in ways that preclude meaningful public participation and undercut the purposes of those procedures. The APA does not specify a minimum time period for public comment. Courts have insisted, however, that the opportunity to comment be "meaningful."[65] One federal district court in California recently noted that "[w]hile there is no bright-line test for the minimum amount of time allotted for the comment period," there is judicial precedent for the proposition that "90 days is the 'usual' amount of time allotted for a comment period."[66] Further, when agencies have repealed regulations, "courts have considered the length of the comment period utilized in the prior rulemaking process as well as the number of comments received during that time-period."[67] The California district court held that the Interior Department provided an improperly truncated comment period on its proposal to repeal a rule recently promulgated during the Obama Administration for valuing royalties on minerals extracted from federal lands.[68] Among other things, the Department took years to adopt its valuation rule, while the Trump agency's repeal effort "took place in a matter of months."[69] Further, the comment period on the Obama proposal was four times as long as the opportunity provided to comment on the repeal.[70] The court invalidated the repeal rule as arbitrary and capricious, determining that the inadequate comment period indicated that the agency had failed to consider an important aspect of the problem.[71]

EPA has provided similarly curtailed comment periods for significant regulatory overhauls concerning revisions to the Affordable Clean Energy Rule (which replaced the Obama EPA's Clean Power Plan),[72] the Clean Water Act's

---

63. *Id.* at 115.

64. Pineros y Campesinos Unidos del Noroeste v. Pruitt, 293 F. Supp. 3d 1062, 1066–67 (N.D. Cal. 2018). Nonenvironmental agencies have also relied improperly on the good cause exception. *See, e.g.*, California v. Azar, 911 F.3d 558, 575–78 (9th Cir. 2018), *cert. denied sub nom.* Little Sisters of the Poor Jeanne Jugan Residence v. California, 139 S. Ct. 2716 (2019) (Departments of Health and Human Services, Labor, and Treasury); Nat'l Venture Capital Ass'n v. Duke, 291 F. Supp. 3d 5, 17–20 (D.D.C. 2017) (Department of Homeland Security).

65. *See, e.g.*, California *ex rel.* Becerra v. U.S. Dep't of the Interior, 381 F. Supp. 3d 1153, 1174 (N.D. Cal. 2019).

66. *Id.* at 1176.

67. *Id.* at 1177.

68. *Id.* at 1176–78.

69. *Id.* at 1177.

70. *Id.*

71. *Id.* at 1177–78; *cf.* Ctr. for Biological Diversity v. Everson, 435 F. Supp. 3d 69, 87 (D.D.C.) (finding that agency did not provide a meaningful opportunity to comment because the record suggested the agency had made its decision before it solicited comments), *appeal dismissed sub nom.* Ctr. for Biological Diversity v. Skipwith, No. 20-5075, 2020 WL 4106889 (D.C. Cir. 2020).

72. Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations;

("CWA") jurisdictional reach,[73] and the 42-year-old Council on Environmental Quality ("CEQ") rules governing implementation of the National Environmental Policy Act ("NEPA").[74] It has imposed similar constraints in connection with efforts to accelerate fossil fuel production on public lands.[75]

Trump environmental agencies have also undercut the purposes of notice-and-comment procedures by excluding important issues from the issues on which they solicit (and are willing to consider) public comment. The Interior Department's royalty valuation rule repeal is again illustrative.[76] The district court reviewing the repeal stated that, to comply with APA informal rulemaking procedures, "it is not enough that an agency merely identif[ies] some of the problems it believes may justify a repeal."[77] The agency must "include sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment."[78] The Interior Department's conclusory notice did not suffice.[79] It lacked both evidentiary support and an explanation of the reasons "why the identified generalized areas of concern merited reconsideration, much less why they justified repealing the Valuation Rule in its entirety and reimplementing a regulatory framework which [the agency] itself had . . . acknowledged was deficient."[80]

Likewise, the proposal's solicitation of comments failed to pass muster. The State of California, which challenged the repeal, claimed that the agency improperly sought comments only on the repeal itself, while excluding consideration of any comments concerning the merits of either the rule it proposed to repeal or the previous rule that would be reinstated upon repeal. The agency decided to publish two proposed rules simultaneously—the proposed repeal of the

---

Revisions to New Source Review Program, 83 Fed. Reg. 44,746, 44,746 (proposed Aug. 31, 2018) (to be codified at 40 C.F.R. pt. 51, 52, 60) (60 days).

73. Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154, 4154 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pt. 110, 112, 116–17, 122, 230, 232, 300, 302, 401) (60 days); *see What Is EPA Afraid Of? 60 Days Is an Unacceptably Short Public Comment Period for the Most Aggressive Attack on the Clean Water Act Since 1972*, CLEAN WATER ACTION (Feb. 14, 2019), https://www.cleanwateraction.org/releases/what-epa-afraid-60-days-unacceptably-short-public-comment-period-most-aggressive-attack.

74. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684, 1684 (proposed Jan. 10, 2020) (to be codified at 40 C.F.R. pt. 1500–08) (60 days).

75. *See, e.g.*, W. Watersheds Project v. Zinke, 441 F. Supp. 3d 1042, 1071–72 (D. Idaho 2020) (finding that the BLM's imposition of a 10–day deadline for filing adversarial protests to proposed oil and gas lease sales "neutraliz[ed] and diminish[ed] the substantive and practical value of such upfront input").

76. *See supra* notes 65–71 and accompanying text.

77. California *ex rel.* Becerra v. U.S. Dep't of the Interior, 381 F. Supp. 3d 1153, 1173 (N.D. Cal. 2019).

78. *Id.* (internal quotations omitted) (quoting Am. Med. Ass'n v. Reno, 57 F.3d 1229, 1132 (D.C. Cir. 1995)).

79. *Id.* at 1168–70.

80. *Id.* at 1173.

Obama rule and a separate advance notice of proposed rulemaking ("ANPRM")[81] seeking comments on whether a new rulemaking would be warranted in the event of repeal or, if the Obama rule were retained, whether changes would be needed.[82] The court agreed with California's criticism. It concluded that even though the proposed rule "did not impose an express content restriction, it effectuated a *de facto* one by deferring consideration of substantive comments regarding the regulations at issue to the ANPRM."[83] The court found that the problems identified in the proposed repeal raised relevant and significant issues that obligated Interior to consider and address comments concerning the merits of the Obama rule and its predecessor.[84] It therefore held that, "because of the [agency's] artificial segregation of the comments between the Proposed Repeal and ANPRM, the ONRR [Office of Natural Resources Revenue] failed to provide a meaningful opportunity to comment substantively on Proposed Repeal."[85]

This kind of cordoning off of issues to be excluded from public comment also doomed other Trump environmental agency rulemakings.[86] Other rules adopted by EPA may be vulnerable as well, as EPA pursued the dual-track repeal followed by replacement approach in adopting its Affordable Clean Energy Rule and its Navigable Waters Protection Rule.[87]

---

81. "The Advanced Notice of Proposed Rulemaking (ANPR) is a voluntary agency publication in the Federal Register which announces the agency's general ideas and approaches on a topic, and opens a period of informal public comments. The solicitation is usually for ideas and suggestions on a topic, and the ANPR is never a direct yes/no vote on specific regulatory language." JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING § 5:6 (2020 ed.)

82. *Becerra*, 381 F. Supp. 3d at 1175.

83. *Id.* at 1176.

84. *Id.* at 1175–78.

85. *Id.* at 1176.

86. *See, e.g.*, Puget Soundkeeper All. v. Wheeler, No. C15-1342-JCC, 2018 WL 6169196, at *15 (W.D. Wash. Nov. 26, 2018) (finding that EPA and the U.S. Army Corps of Engineers "excluded comments that were relevant and important, and which could not be deferred until a later rule making").

87. *See* Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250, 22,250 (Apr. 21, 2020) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pt. 110, 112, 116–17, 120, 122, 230, 232, 300, 302, 401) (redefining the scope of the CWA's regulatory provisions); Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626, 56,626 (Oct. 22, 2019) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pt. 110, 112, 116–17, 120, 122, 230, 232, 300, 302, 401) (repealing Obama EPA rule defining that scope); *see also* Juan Carlos Rodriguez, *3 Takeaways From The New, Narrower Clean Water Act Rule*, LAW360 (Jan. 24, 2020), https://www.law360.com /articles/1237317/3-takeaways-from-the-new-narrower-clean-water-act-rule (describing environmental group's criticism of the effort by EPA and the Corps of Engineers to "artificially cabin[] what comments they were willing to look at and consider" by limiting input on different phases of replacing regulations governing the definition of "waters of the United States" and not allowing comments on previous steps). EPA and the National Highway Traffic Safety Administration also bifurcated their weakening of the Obama Administration's fuel efficiency standards for greenhouse gas emissions and their effort to repeal California's authority to adopt more stringent standards than the federal government's standards. *See* The

Trump environmental agencies have tried other tactics to create obstacles to informed public comment. They have run afoul of informal rulemaking procedures, for example, by failing to provide timely notice of technical studies or other critical factual materials they relied on in adopting final rules.[88] EPA has also been criticized for relying on "virtual hearings," conducted as webinars even before the onset of the COVID-19 pandemic, rather than holding in-person hearings at which interested persons could make oral presentations.[89] Critics say virtual hearings may create obstacles for participation among vulnerable or rural populations, who may not have broadband or other internet access, or by elderly persons who are not comfortable using computer technology.[90]

In defective rulemaking proceedings such as these, the promulgating agencies' principal objective, of course, is to make substantive, weakening changes to environmental regulatory protections. Blocking public input helps facilitate that objective in two ways. First, it speeds up the process of rule adoption. Second, it excludes information that may undercut the agency's rationale for the action it has taken from the administrative record on which any judicial challenges will be resolved, and therefore decreases the chances of judicial reversal.[91]

Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174, 24,174 (Apr. 30, 2020) (to be codified at 40 C.F.R. pt. 86, 600, 49 C.F.R. pt. 523, 531, 533, 536, 537); The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310, 51,310 (Sept. 27, 2019) (to be codified at 40 C.F.R. pt. 85, 86, 49 C.F.R. pt. 531, 533).

88. *See, e.g.*, Texas v. EPA, 389 F. Supp. 3d 497, 505–06 (S.D. Tex. 2019); S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959, 963, 965 (D.S.C. 2018) ("[W]hen an agency refuses to consider comments on a rule's substance and merits in issuing a suspension rule that reinstates an earlier regulation, the content restriction is 'so severe in scope' that 'by preventing any discussion of the "substance or merits" of either set of regulations' the opportunity for comment 'cannot be said to have been a "a meaningful opportunity."'" (quoting N.C. Growers' Ass'n v. United Farm Workers, 702 F.3d 755, 770 (4th Cir. 2012))).

89. In at least one instance after the onset of the pandemic, an interested person who sought to participate in these virtual hearings had complained that the agency conducting the hearing (the BLM) muted her and refused to unmute her so that she could provide further input. Heather Richards, *'They Would Not Unmute Me.' Inside BLM's Virtual Meetings*, E&E NEWS: ENERGYWIRE (May 7, 2020), https://www.eenews.net/energywire/2020/05/07/stories/1063068097.

90. Ariel Wittenberg, *'Virtual Hearings' on Rule Rollbacks Spark Protests*, E&E NEWS: GREENWIRE (Jan. 10, 2020), https://www.eenews.net/stories/1062036035. EPA, however, insists that it is able to reach more people through virtual hearings. *Id.*

91. Courts have declared in APA cases that "[a]n agency may not . . . 'skew the record by excluding unfavorable information' that was before it when it made its decision." Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, 91 N.Y.U. L. REV. 1183, 1256 (2016) (quoting Sears, Roebuck & Co. v. U.S. Postal Serv., 118 F. Supp. 3d 244, 246 (D.D.C. 2015)). One way for an agency to avoid reversal for failure to consider unfavorable information in the record is to prevent the information from being introduced into the record in the first place by curtailing opportunities for participation by those likely to oppose the rule.

2. National Environmental Policy Act Evaluation

The Trump Administration's efforts to restrict public input into its environmental decision-making processes extend to the NEPA process as well. NEPA requires an agency proposing to pursue major federal actions significantly affecting the quality of the environment to prepare a detailed environmental impact statement ("EIS") that compares the potential environmental effects of the proposed action and available alternatives to it.[92] This mandate serves two purposes: first, ensuring that the agency "will have available, and will carefully consider, detailed information concerning significant environmental impacts"; and second, guaranteeing "that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision."[93] These are often referred to as the "stop-and-think" and public disclosure, or "sunshine," functions of NEPA.[94]

In early 2020, the CEQ, which is charged with supervising other federal agencies' compliance with NEPA,[95] issued proposed regulations that would overhaul its existing NEPA regulations.[96] CEQ finalized those regulations several months later.[97] The regulations, which depart significantly from the regulations they replace, curtail opportunities for public participation and input into agency decision-making processes. The prior CEQ regulations, adopted in 1978, allowed agencies to avoid preparing an EIS by applying a categorical exclusion ("CE"). The 1978 regulations defined a CE as "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect . . . and for which, therefore, neither an environmental assessment nor an [EIS] is required."[98] The regulations did not require public involvement in an agency's decision to apply a CE.[99] Agencies could not apply a CE if "extraordinary circumstances" existed such that "a normally excluded action [might] have a significant environmental effect."[100] CEQ's final 2020 revisions to its NEPA regulations facilitate the application of CEs by providing

92. 42 U.S.C. § 4332(2)(C) (2018).

93. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

94. *See, e.g.*, STEVEN FERRY, ENVIRONMENTAL LAW 94 (8th ed. 2019) (referring to NEPA as a "stop and think" statute); ROBERT L. GLICKSMAN, MODERN PUBLIC LAND LAW IN A NUTSHELL 121 (5th ed. 2019) (referring to NEPA as "an environmental full disclosure law").

95. *See* 40 C.F.R. § 1500.3(a) (2019) (stating that "[t]his subchapter is applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969").

96. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (proposed Jan. 10, 2020) (to be codified at 40 C.F.R. pt. 1500–08).

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

98. 40 C.F.R. § 1508.4 (amended 2020).

99. DANIEL R. MANDELKER ET AL., NEPA LAW AND LITIGATION § 7:15 (2d ed. 2020). Public participation is required when an agency adopts a CE, which it must do through notice-and-comment rulemaking, subject to CEQ approval. *See* Wildlaw v. U.S. Forest Serv., 471 F. Supp. 2d 1221, 1243, 1248 (M.D. Ala. 2007).

100. 40 C.F.R. § 1508.4.

that, even if extraordinary circumstances exist, "circumstances that lessen the impacts or other conditions sufficient to avoid significant effects" require no further NEPA analysis.[101] Thus, by expanding the range of agency actions for which CEs are appropriate, the revised regulations limit the actions for which agencies would be required to solicit and consider public input.

Perhaps even more significantly, the 1978 regulations defined a CE as "a category of actions which do not individually *or cumulatively* have a significant effect on the human environment."[102] The 2020 revisions redefine CEs simply as "categories of actions that normally do not have a significant effect on the human environment," thus ignoring cumulative effects.[103] Analysis of cumulative effects is a critical part of any effort to determine the impact of a proposed action,[104] as it counters agency efforts to minimize the aggregated effects by instead considering the effects of each individual action in isolation.[105] Without analysis of cumulative impact, agencies may be able to avoid meaningful NEPA analysis by minimizing the appearance of adverse environmental impacts.[106]

---

101. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43,360 (to be codified at 40 C.F.R. § 1501.4(b)(1)).

102. 40 C.F.R. § 1508.4 (emphasis added).

103. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43,360 (to be codified at 40 C.F.R. § 1501.4(a)).

104. *See, e.g.*, Ron Deverman et al., *Environmental Assessments: Guidance on Best Practice Principles*, 45 ENVTL. L. REP. 10142, 10142 (2015) (identifying cumulative effects analysis as one of the "most important [best practice principles] in advancing the effective and efficient development of quality" environmental assessments).

105. *See* Courtney A. Schultz, *History of the Cumulative Effects Analysis Requirement Under NEPA and Its Interpretation in U.S. Forest Service Case Law*, 27 J. ENVTL. L. & LITIG. 125, 132 (2012) ("[T]he legislative history of NEPA indicates Congress's desire to improve upon the mistakes of the past by looking beyond incremental decision-making by independent government agencies to consider long-term and cumulative effects."); *id.* at 133 ("[T]he cumulative effects requirement represents some of the core goals of NEPA: to consider long-term environmental effects, to look beyond incremental decision-making, and to consider the effects of the actions of multiple actors.").

106. *See* Colony Fed. Sav. & Loan Ass'n v. Harris, 482 F. Supp. 296, 302 (W.D. Pa. 1980). CEQ's revisions also expand the scope of other exemptions that foreclose the need for NEPA compliance altogether. The functional equivalence exception, which allows agencies to forgo NEPA compliance if their organic statutes already require functionally equivalent analyses, see Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 384–85 (D.C. Cir. 1973), has been limited to EPA. The revised regulations significantly expand the scope of that exemption. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 1707 (to be codified at 40 C.F.R. pt. 1507) ("CEQ proposes that the concept of functional equivalency be extended to other agencies that conduct analyses to examine environmental issues."); Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43,374 (to be codified at 40 C.F.R. § 1507.3(d)(6)) (providing that NEPA does not apply to "[a]ctions where the agency has determined that another statute's requirements serve the function of agency compliance with [NEPA]").

Even when a categorical exclusion does not apply, the 1978 regulations allowed agencies to avoid preparing an EIS by preparing an environmental assessment ("EA") that included a finding of no significant impact.[107] Both the documentation required to support an EA and the procedural requirements for preparing one are less rigorous than the requirements for an EIS.[108] For example, the CEQ regulations did not require agencies to prepare a draft EA and make it available for public comment, which they had to do in preparing an EIS.[109] The broader the circumstances in which agencies may prepare an EA instead of an EIS, the more circumscribed public participation in NEPA document preparation will become.[110] Some have expressed concern "that the lack of public participation required in EAs tempts agencies to cut secret deals with project proponents."[111]

The revised CEQ revisions would significantly expand agency authority to prepare EAs instead of EISs.[112] The new regulations eliminate the requirement to consider cumulative effects altogether.[113] They also curtail the obligation to consider

---

It remains to be seen how much deference a court would afford an agency's determination that its action qualifies for this functional equivalence exception. *Cf.* Catron Cnty. Bd. of Comm'rs v. U.S. Fish & Wildlife Serv., 75 F.3d 1429, 1439 (10th Cir. 1996) (refusing to extend the exception to the designation of critical habitat under the Endangered Species Act). The 2020 regulations also authorize agencies to adopt procedures for identifying other kinds of actions "that are not subject to NEPA" at all, including: (1) actions "expressly exempt from NEPA under another statute;" (2) actions for which "compliance with NEPA would . . . conflict with . . . another statute;" (3) actions for which NEPA compliance "would be inconsistent with [c]ongressional intent;" (4) "non-major [f]ederal actions;" and (5) actions "that are non-discretionary." Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43,373–74 (to be codified at 40 C.F.R. § 1507.3(d)(1)–(5)).

107. 40 C.F.R. § 1501.4(e)(1).

108. Myron L. Scott, *Defining NEPA Out of Existence: Reflection on the Forest Service Experiment with "Case-by-Case" Categorical Exclusion*, 21 ENVTL. L. 807, 811 (1991).

109. *See* All. to Protect Nantucket Sound, Inc. v. U.S. Dep't of Army, 398 F.3d 105, 114–16 (1st Cir. 2005) (but citing contrary authority); MANDELKER ET AL., *supra* note 99, §§ 7:19, 7:21.

110. In case there is any doubt about the procedural requirements that apply to preparation of EAs, the preamble to the CEQ's 2020 regulatory revisions states that "[c]onsistent with the 1978 regulations, the final rule does not specifically require publication of a draft EA for public review and comment," although agencies would have to "reasonably involve the public prior to completion of the EA, so that they may provide meaningful input . . . that the agency must consider in preparing the EA." Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43,323.

111. GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 263 (7th ed. 2014).

112. CEQ insists, however, that its revisions would "increase public participation in the process." Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43,313. The analysis in this Section of the Article belies that contention.

113. *Id.* at 43,344 (stating that "cumulative impact, defined in 40 CFR 1508.7 (1978), is repealed"). CEQ explained that "[c]umulative effects analysis has been interpreted

an action's indirect effects.[114] The revisions further narrow the reach of NEPA's EIS requirement by flatly excluding agency inaction from the definition of an action.[115] The 1978 regulations defined a "major federal action" to include a failure to act if it was "reviewable by courts or administrative tribunals under the [APA][116] or other applicable law as agency action."[117] Courts have held that inaction qualifies as agency action if it violates a mandatory statutory duty to act.[118]

The CEQ's 2020 revisions also limit public participation opportunities more directly. The regulations require agencies to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures" and "[s]olicit appropriate information from the public."[119] But they also impose arbitrary time limits on preparation of one and two years for preparation of EAs and EISs, respectively.[120] A recent Congressional Research Service report debunks the contention that environmental reviews have been responsible for costly and

---

so expansively as to undermine informed decision making, and led agencies to conduct analyses to include effects that are not reasonably foreseeable or do not have a reasonably close causal relationship to the proposed action or alternatives." *Id.*

114. *See id.* at 43,343 ("CEQ intends the revisions to simplify the definition to focus agencies on consideration of effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action. In practice, agencies have devoted substantial resources to categorizing effects as direct, indirect, or cumulative, which, as noted above, are not terms referenced in the NEPA statute. CEQ eliminates these references in the final rule.").

The 1978 regulations defined indirect effects as those "which are caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b) (amended 2020). For an illustration of how consideration of indirect effects might affect evaluation of projects that generate greenhouse gas emissions that contribute to climate change, see generally Michael Burger & Jessica Wentz, *Downstream and Upstream Greenhouse Gas Emissions: The Proper Scope of NEPA Review*, 41 HARV. ENVTL. L. REV. 109, 147–68 (2017); Seth Jaffe & Aaron Lang, *Trump's NEPA Reform Is No 'Nixon in China' Moment*, LAW360 (Jan. 29, 2020), https://www.law360.com/energy/articles/1238518/trump-s-nepa-reform-is-no-nixon-in-china-moment ("The [A]dministration doesn't even have the grace to admit that [by eliminating the duty to consider cumulative and indirect effects] it is trying to leave climate change out of NEPA.").

115. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43,347 (explaining that the regulations "omit[] the reference to a failure to act from the definition of 'major Federal action.'").

116. The APA explicitly defines "agency action" to include a "failure to act." 5 U.S.C. § 551(13) (2018).

117. 40 C.F.R. § 1508.18.

118. *See, e.g.*, Ramsey v. Kantor, 96 F.3d 434, 445 (9th Cir. 1996) (stating that "[i]t is clear from federal regulations that federal inaction can count as federal action for purposes of triggering the EIS requirement under NEPA," and concluding that an agency official's mandatory statutory obligation to review state fishery management plans "suffices to make his failure to disapprove major federal action").

119. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43,371 (to be codified at 40 C.F.R. § 1506.6(a), (d)).

120. *Id.* at 43,362–63 (to be codified at 40 C.F.R. § 1501.10(b)). The 1978 regulations stated that CEQ "has decided that prescribed universal time limits for the entire NEPA process are too inflexible." 40 C.F.R. § 1501.8.

avoidable delay in implementing infrastructure projects.[121] An even more recent study by John Ruple and Heather Tanana concludes that "NEPA review does not appear to delay federal decision-making, and that the NEPA process may create a vehicle for coordinating other permitting decisions to improve overall permitting efficiency."[122] Time limits may address a nonexistent problem, but they threaten to artificially short-circuit the NEPA process, thereby limiting public input. Further, as Ruple and Tanana note, "streamlining" through mandatory preparation time limits has the potential to backfire by "increas[ing] the volume of litigation and the rate at which NEPA decisions are struck down in court," resulting in delayed federal decisions.[123]

The 2020 regulations also increase agency authority to authorize private project applicants to play a larger role in NEPA document preparation. The regulations allow applicants to prepare both EAs and EISs, although the agency retains the responsibility to independently evaluate the results.[124] As scholars have noted, "basic rules of public law to constrain the government in the name of such public values as transparency, public participation, due process for affected individuals, and public rationality" do not apply to private contractors performing government functions.[125] "Contracting out," these scholars argue, "is thus all too

---

121. *See* CONG. RSCH. SERV., MEMORANDUM ON QUESTIONS REGARDING THE REPORT *TWO YEARS NOT TEN YEARS*: *REDESIGNING INFRASTRUCTURE APPROVALS* 6–7 (June 7, 2017), https://transportation.house.gov/imo/media/doc/wysiwyg_uploaded/MEMO%20to%20House%20T%20and%20I.docx.pdf.

122. John Ruple & Heather Tanana, *Debunking the Myths Behind the NEPA Review Process*, 35 NAT. RES. & ENV'T 14, 15 (2020); *see also* Forrest Fleischman et al., *US Forest Service Implementation of the National Environmental Policy Act: Fast, Variable, Rarely Litigated, and Declining*, 118 J. FORESTRY 403, 404 (2020).

123. Ruple & Tanana, *supra* note 122, at 17; *see also id.* ("The benefits gained by expediting NEPA may, in short, be subsumed by even greater costs for NEPA litigation and document revision. As our fathers would say: do it right the first time."); Dominique Custos & John Reitz, *Public-Private Partnerships*, 58 AM. J. COMP. L. 555, 574 (2010) ("Critics argue that this streamlining reduces the deliberation over the environmental documentation and permits a rush to the start of construction, the point after which it is very hard to stop any project.").

124. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43,371 (to be codified at 40 C.F.R. § 1506.5(a)–(b)); *see also id.* at 43,337 (stating that under the approach reflected in the proposed rule, which was retained in the final rule, "applicants and contractors would be able to assume a greater role in contributing information and material to the preparation of environmental documents, subject to the supervision of the agency"). Typically, the agency itself or contractors hired by the agency prepare NEPA documents. *See* Susannah T. French, Comment, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CALIF. L. REV. 929, 960 n.198 (1993) ("The hiring of private contractors to prepare NEPA documents is common.").

125. Custos & Reitz, *supra* note 123, at 577.

susceptible to being abused as a way to evade the complex of public values imposed by public law."[126]

In perhaps their most blatant, if not outrageous, effort to limit public participation (and agency accountability by doing so), the 2020 regulations require the lead agency in the NEPA process to certify in the administrative record that it considered "all of the alternatives, information, and analyses submitted by States, Tribal, and local governments and other public commenters for consideration" by the agency.[127] These agency certifications trigger a rebuttable presumption that the agency has indeed considered these matters in preparing its final NEPA documentation.[128] According to the CEQ, this presumption may be rebutted "only by clear and convincing evidence that the agency has not properly discharged its duties under the statute."[129] This provision could incentivize agencies to skirt public participation mandates while certifying that they have complied with those mandates, either to ensure compliance with the regulations' time limits or simply to accelerate approval of desired agency projects or approvals. The effort to shield alleged agency noncompliance from judicial review is of a piece with provisions that authorize agencies to require that prospective litigants post bonds[130] or purportedly limit judicial authority to enjoin NEPA violations, specify violations that courts should treat as harmless error, and deny that the regulations create a cause of action for NEPA violations.[131] Regardless of whether these provisions accurately

---

126. *Id.*; *see also* MANDELKER ET AL., *supra* note 99, § 7:9 ("The delegation of impact statement preparation to private applicants for federal assistance, permits or other approvals can raise serious conflict of interest questions."); Jessica Owley, *The Increasing Privatization of Environmental Permitting*, 46 AKRON L. REV. 1091, 1120 (2013) ("Some of the factors that hinder public participation also affect accountability. Accountability concerns emerge when it appears that the private contractors are insulated from legislative, executive, and judicial oversight."); *cf.* Sarah Shik Lamdan, *Sunshine for Sale: Environmental Contractors and the Freedom of Information Act*, 15 VT. J. ENVTL. L. 227, 251–54 (2014) (urging the use of contractual requirements to enhance transparency and public participation in activities performed by private contractors performing government functions).

The Forest Service has engaged in similar delegations of authority to prepare biological assessments to determine whether private projects that require federal approval would violate the Endangered Species Act's mandate that agencies avoid jeopardizing endangered or threatened species. 16 U.S.C. § 1536(a)(2) (2018); *see also* Dylan Brown, *Dems Decry Decision on Idaho Gold Mining Project*, E&E NEWS: E&E DAILY (Jan. 28, 2020), https://www.eenews.net/eedaily/stories/1062196797 (indicating that the Forest Service staff's initial refusal to approve the delegation was reversed after mining company officials met with Trump Administration officials in Washington).

127. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43,358 (to be codified at 40 C.F.R. § 1500.3(b)(4)); *see also id*. at 43,369 (to be codified at 40 C.F.R. § 1505.2(b)).

128. *Id.* at 43,369 (to be codified at 40 C.F.R. § 1505.2(b)).

129. *Id.* at 43,315.

130. *Id.* at 43,358 (to be codified at 40 C.F.R. § 1500.3(c)).

131. *Id.* (to be codified at 40 C.F.R. § 1500.3(d)); *see also id.* at 43,318–19 (denying that a showing of a NEPA violation alone warrants injunctive relief, that a showing of irreparable harm entitles a litigant to an injunction, that the regulations create a cause of action, and that "minor, non-substantive errors" are appropriate grounds for invalidating an action).

reflect existing case law or whether the CEQ can dictate how courts address alleged NEPA violations, they are clearly designed to limit public participation during litigation as well as during agency implementation of NEPA.[132]

Finally, contravening more than 40 years of NEPA practice and precedent, the CEQ prohibits individual agencies from "impos[ing] additional procedures or requirements beyond those set forth in [the CEQ] regulations."[133] The regulations require every agency to revise regulatory provisions and procedures that are inconsistent with the CEQ regulations.[134] The provisions of the 1978 regulations governing agency procedures included no such prohibition or requirement.[135] If the CEQ wanted to enhance the information base on which environmental decisions are made through robust public participation in the NEPA process, it would not bar agencies from adopting procedures that expand opportunities for participation and might even encourage individual agencies to do so.

C. Exclusion of External Expert Input

A third Trump Administration strategy for excluding unfavorable information about its desired projects has been to diminish the role of scientists from outside the government in agency decision-making, particularly rulemaking. Albert Lin documented an array of measures the Administration has taken to block input from scientists likely to provide cautionary advice on some of its pet projects.[136] For example, President Trump delayed appointing a presidential science advisor, and EPA announced its intention to eliminate its Office of Science Advisor.[137] The National Academy of Sciences ("NAS") recommended the creation of that Office in 1992 "to ensure that EPA policy decisions are informed by a clear understanding of relevant science."[138] An NAS panel recommended that the science advisor play an important role in policy decisions, ensure that EPA considers the relevant science and uncertainties, and "reach out to the broader scientific community for information."[139] As of mid-2020, EPA's website still listed an Office of Science

---

132. For further discussion of how the CEQ regulatory revisions impair NEPA's capacity to foster informed deliberation, public participation, agency coordination, and judicial checks on agency action, see generally Robert L. Glicksman & Alejandro E. Camacho, *The Trump Card: Tarnishing Planning, Democracy, and the Environment*, 50 ENVTL. L. REP. 10281 (2020).

133. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43,373 (to be codified at 40 C.F.R. § 1507.3(b)).

134. *Id*.

135. 40 C.F.R. § 1507.3 (amended 2020); *see also* COGGINS ET AL., *supra* note 111, at 241 ("[N]early every federal land management agency has its own counterpart . . . regulations, adapting the CEQ framework to its own activities.").

136. *See* Lin, *supra* note 30 *passim*.

137. *Id.* at 261–62.

138. Michael Halpern, *The EPA Disbanded Its Office of Science Advisor. Here's Why That Matters*, UNION CONCERNED SCIENTISTS: BLOG (Oct. 2, 2018), https://blog.ucsusa.org/michael-halpern/the-epa-disbanded-its-office-of-science-advisor-heres-why-that-matters.

139. *Id.*

Advisor, Policy, and Engagement[140] within the Office of Research and Development,[141] but its role and fate remain uncertain. In addition, in a number of different agencies, the Administration appointed nonscientists to positions traditionally held by scientists and that require scientific expertise.[142]

Some of EPA's organic statutes, along with other legislation, created scientific advisory boards to provide expert information, analysis, and advice from experts outside the agency. For example, a provision of NEPA required EPA to establish a Scientific Advisory Board ("SAB") to provide scientific advice requested by EPA or congressional committees.[143] The statute requires that the SAB be comprised of members who are "qualified by education, training, and experience to evaluate scientific and technical information on matters referred to the Board."[144] The SAB must "make every effort, consistent with applicable law [including the Freedom of Information Act ("FOIA")] . . . to maximize public participation and transparency."[145] In addition, the CAA directed EPA to appoint an independent scientific review committee, known as the Clean Air Act Scientific Advisory Committee ("CASAC"), to provide recommendations on the establishment of national ambient air quality standards ("NAAQS") and to advise EPA on other air quality issues.[146] According to the D.C. Circuit, "Congress intended that CASAC's expert scientific analysis aid not only EPA in promulgating NAAQS but also the courts in reviewing EPA's decisions."[147]

The two EPA Administrators appointed by President Trump, Scott Pruitt and Andrew Wheeler, have "taken several steps to alter the composition of these committees or reduce their influence,"[148] by failing to renew the terms of existing members, ignoring their input,[149] formulating policy without their input,[150] failing to respond to questions posed by their members,[151] and eliminating advisory panels within the SAB or CASAC entirely or barring their input on subjects such as climate

---

140. *About the Office of Science Advisor, Policy, and Engagement (OSAPE)*, U.S. ENVTL. PROT. AGENCY (EPA), https://www.epa.gov/aboutepa/about-office-science-advisor-policy-and-engagement-osape (last visited May 5, 2020).

141. *Organization Chart for the Office of Research and Development (ORD)*, U.S. ENVTL. PROT. AGENCY (EPA), https://www.epa.gov/aboutepa/organization-chart-office-research-and-development-ord (last visited May 5, 2020).

142. Lin, *supra* note 30, at 262.

143. 42 U.S.C. § 4365(a) (2018).

144. *Id.* § 4365(b).

145. *Id.* § 4365(h).

146. *Id.* § 7409(d)(2).

147. Mississippi v. EPA, 744 F.3d 1334, 1355 (D.C. Cir. 2013).

148. Lin, *supra* note 30, at 263.

149. *See* Jennifer A. Dlouhy, *EPA's Own Science Advisers to Rebuke Agency Over Auto Rollback*, BLOOMBERG (May 29, 2018), https://www.bloomberg.com/news/articles/2018-05-29/epa-s-own-science-advisers-to-rebuke-agency-over-auto-rollback (repeal of the Obama EPA's Clean Power Plan).

150. *See* Genna Reed, *Three Times EPA Administrator Wheeler Failed His Science Advisors This Week*, UNION CONCERNED SCIENTISTS: BLOG (June 7, 2019), https://blog.ucsusa.org/genna-reed/three-times-wheeler-failed-science-advisors-this-week (concerning the "secret science rule").

151. *See id.*

regulation.[152] EPA repeatedly delayed a scheduled meeting at which the SAB was supposed to provide input on the proposed "secret science" rule discussed above.[153] In December 2019, Administrator Wheeler overhauled the process the SAB used to decide which EPA rules to review, displacing a system where individual members provided input on those questions with one in which the SAB's chair alone makes those determinations.[154] This change makes it easier for the Administration to control the nature and extent of the SAB's input.[155] It is likely to be easier to control a single, hand-picked individual than multiple committee members with diverse viewpoints.[156]

EPA also took steps to limit the participation of independent, university-affiliated researchers on its advisory committees. In 2017, Scott Pruitt issued a directive prohibiting anyone receiving EPA grants from serving on any EPA advisory committee.[157] As Professor Lin has explained, because academic researchers have traditionally received the lion's share of EPA grants, the directive has "sidelined academic experts in favor of expanded industry representation. Reliance on industry experts for advice can be problematic because such experts' employers often have a financial stake in resulting regulations."[158]

---

152. Lin, *supra* note 30, at 263–64; Maria Hegstad, *Wheeler Plans to Scale Back SAB's Process for Reviewing EPA Rules*, ENVTL. POL'Y ALERT (Dec. 18, 2019), https://insideepa.com/daily-news/wheeler-plans-scale-back-sab%E2%80%99s-process-reviewing-epa-rules.

153. Miranda Green & Rebecca Beitsch, *EPA Delays Advisers' Review of 'Secret Science' Rules*, HILL (Nov. 18, 2019), https://thehill.com/policy/energy-environment/470968-epa-delays-advisors-review-of-secret-science-rules; *see also supra* Part IA (discussing EPA's secret science rule).

154. Hegstad, *supra* note 152; Sean Reilly, *Wheeler Sets New Policy on Advisory Panel Decisionmaking*, E&E NEWS: E&E NEWS PM (Feb. 26, 2020), https://www.eenews.net/eenewspm/2020/02/26/stories/1062456481.

155. *Cf.* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020) ("The [Consumer Financial Protection Bureau's] single-Director structure contravenes [the Constitution's] carefully calibrated system [of divided powers] by vesting significant governmental power in the hands of a single individual accountable to no one.").

156. *See id.* at 2242 (Kagan J., concurring in the judgment with respect to severability and dissenting in part) ("[T]o make sense on the majority's own terms, the distinction between singular and plural agency heads must rest on a theory about why the former more easily 'slip' from the President's grasp. But the majority has nothing to offer. In fact, the opposite is more likely to be true: To the extent that such matters are measurable, individuals are easier than groups to supervise.").

157. E. Scott Pruitt, U.S. Envtl. Prot. Agency, Directive on Strengthening and Improving Membership on EPA Federal Advisory Committees (Oct. 31, 2017), https://www.epa.gov/sites/production/files/2017-10/documents/final_draft_fac_directive-10.31.2017.pdf.

158. Lin, *supra* note 30, at 264–65; *see generally id.* at 265 ("[R]ecent appointees to the SAB include leading proponents of deregulation, climate change skeptics, and recipients of industry funding who have attacked mainstream climate science and questioned widely recognized pollution problems.").

Lin reports that "[m]easures to stack, alter, or sideline scientific advisory boards" have extended to other agencies, including the Departments of Commerce, Energy,

Litigants have challenged some of these practices, which have not been limited to EPA.[159] In one case, environmental groups alleged violations by the Interior Department of the Federal Advisory Committee Act ("FACA").[160] The plaintiffs alleged the following: that EPA improperly established an advisory committee on wildlife conservation without making the required formal findings, failed to provide public access to either public or secret meetings, failed to provide a proper balance on committee membership, and failed to protect the committee's independence from inappropriate influence.[161] The court found that the plaintiff's allegations were sufficient to establish standing to pursue most of these claims and denied the government's motion to dismiss.[162] In another case, a district court dismissed as nonjusticiable claims that Pruitt's directive barring grant recipients from sitting on EPA advisory committees was arbitrary and capricious and violated FACA's mandate for balanced committee representation.[163] The First Circuit reversed, holding that both the FACA and APA claims were reviewable, ripe, and not moot.[164] In doing so, the court noted that "the EPA has admittedly changed a long-standing practice. And it has done so in a manner that the complaint plausibly describes as altering the balance and the role of special interest influence on EPA advisory committees."[165]

---

and Interior. *Id.*; *see generally* JACOB CARTER ET AL., CTR. FOR SCI. AND DEMOCRACY, SIDELINING SCIENCE SINCE DAY ONE: HOW THE TRUMP ADMINISTRATION HAS HARMED PUBLIC HEALTH AND SAFETY IN ITS FIRST SIX MONTHS (2017), https://www.ucsusa.org/sites/default/files/attach/2017/07/sidelining-science-report-ucs-7-20-2017.pdf. EPA justified the prohibition on committee membership for grant recipients on the ground that "[n]on-governmental . . . members in direct receipt of EPA grants while serving on an EPA [federal advisory committee] can create the appearance or reality of potential interference with their ability to independently and objectively serve as a [committee] member." Memorandum from E. Scott Pruitt, Adm'r, U.S. Envtl. Prot. Agency, to Assistant Adm'rs, Reg'l Adm'rs, and Off. of Gen. Couns., U.S. Envtl. Prot. Agency 2 (Oct. 31, 2017), https://www.epa.gov/sites/production/files/2017-10/documents/final_draft_fac_memo-10.30.2017.pdf (discussing directives aimed at strengthening and improving membership on EPA Federal Advisory Committees).

159. *See, e.g.*, W. Org. of Res. Councils v. Bernhardt, CV 18-139-M-DWM, 2020 WL 248940, at *1 (D. Mont. Jan. 16, 2020) (challenge to establishment and operation of Interior Department's Royalty Policy Committee); Ctr. for Biological Diversity v. Tidwell, 239 F. Supp. 3d 213, 216 (D.D.C. 2017) (suit alleging Federal Advisory Committee Act procedural violations by the U.S. Forest Service).

160. Nat. Res. Def. Council v. Dep't of Interior, 410 F. Supp. 3d 582, 590–91 (S.D.N.Y. 2019); 5 U.S.C. app. §§ 1–15 (2018).

161. *Nat. Res. Def. Council*, 410 F. Supp. 3d at 590–91.

162. *Id.* at 607–08.

163. Union of Concerned Scientists v. Wheeler, 377 F. Supp. 3d 34 (D. Mass. 2019), *rev'd*, 954 F.3d 11 (1st Cir. 2020); *cf.* Nat. Res. Def. Council, Inc. v. Wheeler, 367 F. Supp. 3d 219 (S.D.N.Y. 2019) (holding that group lacked standing to challenge exclusion of academic and nonprofit scientists from advisory committees in favor of industry scientists).

164. Union of Concerned Scientists v. Wheeler, 954 F.3d 11, 20, 22–23 (1st Cir. 2020).

165. *Id.* at 20.

The D.C. Circuit subsequently issued a more definitive decision.[166] The court held that Pruitt's bar on grant recipients' participation in agency advisory committees did not violate the Ethics in Government Act[167] merely because it diverged from ethics standards issued by the U.S. Office of Government Ethics ("OGE").[168] It also held, however, that the prohibition represented an inadequately explained "major break from the agency's prior policy, under which grantees regularly served on advisory committees."[169] EPA had "previously concluded that grantees were capable of offering it independent advice; it now concludes they are not," without providing a reasoned explanation for the change or even acknowledging that the agency had made a change.[170] The court regarded EPA's failure as "especially glaring given that the prior regime existed, in part, for the very purpose of facilitating the critical role played by EPA's scientific advisory committees."[171] It also held that the directive contravened the procedures established by OGE regulations for agencies to adopt regulations that differed from OGE standards without OGE's prior approval.[172] Thus, EPA's exclusion of grant recipients from its advisory committees was both substantively and procedurally flawed.

Putting aside these legal deficiencies, EPA's actions in these instances reflected poorly conceived information management policy. Viewed in the context of the other measures described in this Part, it is reasonable to conclude that the Administration's management of advisory committee personnel and responsibilities aimed to thwart public participation and expert input.

II. KEEPING INTERNAL OUTPUT IN

As Part I indicates, the Trump Administration has attempted in many ways to limit public participation in agency decisions with environmental implications and otherwise limit the avenues those outside the agency have for providing input. But the Administration has also addressed the other end of the information pipeline by barring agencies from disseminating information that might jeopardize or undercut the viability of the Administration's policy agenda. The techniques used to block transparency have included shutting down agency websites and scrubbing agency documents to remove inconvenient references to matters that the Administration would prefer not be disclosed, such as climate change risks; censoring agency officials whose communications might threaten Administration initiatives; discrediting government officials whose public communications diverge

166. Physicians for Soc. Resp. v. Wheeler, 956 F.3d 634 (D.C. Cir. 2020).

167. 5 U.S.C. app. § 402(a) (2018).

168. *Physicians for Soc. Resp.*, 956 F.3d at 644.

169. *Id.* at 645.

170. *Id.* at 646–48 (noting that Pruitt's directive "nowhere even hints that EPA and OGE—the agency tasked with defining conflicts of interest—had previously reached exactly the opposite conclusion: that grantees could, in fact, ethically serve."); *see also* Nat. Res. Def. Council, Inc. v. EPA, 438 F. Supp. 3d 220, 227 (S.D.N.Y. 2020).

171. *Physicians for Soc. Resp.*, 956 F.3d at 647.

172. *Id.* at 648–50.

from the Administration's on matters such as the status of the coronavirus;[173] and limiting public disclosure of agency documents requested under FOIA. President Obama once stated that "[a] democracy requires accountability, and accountability requires transparency."[174] By that measure, the Trump Administration has significantly impaired the accountability of its officials.

A. Disappearing Websites

The Administration undertook a cross-governmental effort to remove or obscure websites containing information on climate change.[175] One watchdog group found that thousands of webpages with such information disappeared after President Trump took office.[176] The Administration removed information that had been posted by agencies including EPA and the Departments of Health and Human Services, Transportation, Interior, Energy, and State.[177] In addition, agencies such as the Occupational Safety and Health Administration, the Department of Agriculture, and EPA took down websites concerning the government's enforcement track record.[178] Similarly, the Administration temporarily shut down reporting by the Centers for Disease Control and Prevention on data relating to COVID-19 cases and deaths until a public outcry, spurred by fears that under-reporting would hamper efforts by state officials and hospitals to effectively manage the pandemic, forced the Administration to reverse course.[179]

---

173. *See, e.g.*, Josh Lederman & Kelly O'Donnell, *White House Seeks to Discredit Fauci amid Coronavirus Surge*, CNBC (July 12, 2020), https://www.cnbc.com/2020/07/12/white-house-seeks-to-discredit-dr-anthony-fauci-as-coronavirus-surges.html; Brett Samuels & Morgan Chalfant, *Trump Criticizes Birx over Pelosi, COVID-19 Remarks: 'Pathetic,'* HILL (Aug. 3, 2020), https://thehill.com/homenews/administration/510246-trump-criticizes-birx-over-pelosi-covid-19-remarks-pathetic.

174. Freedom of Information Act: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683, 4683 (Jan. 21, 2009).

175. *See* LEONARD DOWNIE JR., COMM. TO PROTECT JOURNALISTS, THE TRUMP ADMINISTRATION AND THE MEDIA: ATTACKS ON PRESS CREDIBILITY ENDANGER US DEMOCRACY AND GLOBAL PRESS FREEDOM 16–17 (2020), https://cpj.org/wp-content/uploads/2020/04/cpj_usa_2020.pdf (also describing the scrubbing of agency websites to erase information concerning other subjects, such as the Affordable Care Act, domestic violence, and women's health). *See generally* MICHAEL LEWIS, THE FIFTH RISK (2018) (discussing how the Trump Administration ignored information about environmental and other risks by, among other things, eliminating or scrubbing agency websites and hiring officials with no relevant experience or expertise in their areas of responsibility).

176. Scott Waldman, *Climate Web Pages Erased and Obscured Under Trump*, SCI. AM.: E&E NEWS (Jan. 20, 2018), https://www.scientificamerican.com/article/climate-web-pages-erased-and-obscured-under-trump/; *see also* Chris Baynes, *Trump Administration Removes Quarter of All Climate Change References from Government Websites*, INDEPENDENT (July 25, 2019), https://www.independent.co.uk/news/world/americas/us-politics/trump-climate-change-government-websites-global-warming-a9020461.html.

177. *See, e.g.*, Lin, *supra* note 30, at 267 (EPA).

178. Cortez, *supra* note 37, at 326–29.

179. *See* Lena Sun & Amy Goldstein, *Disappearance of Covid-19 Data from CDC Website Spurs Outcry*, WASH. POST (July 16, 2020), https://www.washingtonpost.com/health/2020/07/16/coronavirus-hospitalization-data-outcry/; Jim

B. Internal Censorship

The Trump Administration has also barred agency officials, including scientists, from publishing their work,[180] presenting at conferences[181] or in congressional hearings,[182] and otherwise disseminating information that the Administration prefers never be publicly accessible.[183] It has "sanitized" the work product of agency officials before public release by stripping out words or discussion that does not conform to the Administration's version of the facts or to its preferred environmental policies.[184] It directed agency staff members to ignore

---

Acosta & Devan Cole, *Coronavirus Hospital Data Will Now Be Sent to Trump Administration Instead of CDC*, CNN (July 15, 2020), https://www.cnn.com/2020/07/14/politics/trump-administration-coronavirus-hospital-data-cdc/index.html.

180. *See, e.g.*, Helena Bottemiller Evich, *Agriculture Department Buries Studies Showing Dangers of Climate Change*, POLITICO (June 23, 2019), https://www.politico.com/story/2019/06/23/agriculture-department-climate-change-1376413 (reporting that the Trump Administration refused to publicize government-funded studies "to limit the circulation of evidence of climate change and avoid press coverage that may raise questions about the administration's stance on the issue"). The American Federation of Government Employees filed a petition in 2020 with EPA complaining about agency efforts to stymie scientific research on climate change and otherwise interfere with scientific integrity. *See* Joe Davidson, *Why EPA Employees in the Trump Era Say They Need a Workers' Bill of Rights*, WASH. POST (Feb. 24, 2020), https://www.washingtonpost.com/politics/why-epa-employees-in-the-trump-era-say-they-need-a-workers-bill-of-rights/2020/02/22/50f2410a-542c-11ea-87b2-101dc5477dd7_story.html.

EPA's own Inspector General issued a report finding that, while 56% of the respondents were satisfied with the overall implementation of the agency's scientific integrity policy, between 55% and 59% of respondents expressed concern with the agency's culture concerning scientific integrity, its release of scientific information to the public, and its management of federal advisory committees. More than half of respondents also expressed concern about the transparency of the scientific (or nonscientific) bases for senior leader policy decisions. OFF. OF INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, IMPROVING RESEARCH PROGRAMS: FURTHER EFFORTS NEEDED TO UPHOLD SCIENTIFIC INTEGRITY POLICY AT EPA, Rep. No. 20-P-0173, at 9 (2020), https://www.epa.gov/sites/production/files/2020-05/documents/_epaoig_20200520-20-p-0173.pdf.

181. *E.g.*, Lin, *supra* note 30, at 266–67 (describing how EPA blocked a research ecologist from delivering a keynote address on climate change).

182. *See, e.g.*, Juliet Eilperin, *Intelligence Aide*, *Blocked from Submitting Written Testimony on Climate Change, Resigns from State Department*, WASH. POST (July 10, 2019), https://www.washingtonpost.com/climate-environment/2019/07/10/intelligence-aide-blocked-submitting-written-testimony-climate-change-resigns-state-department/; *cf. NIAID Director Prevented from Testifying Before Congress*, SABIN CTR. FOR CLIMATE CHANGE L., https://climate.law.columbia.edu/content/niaid-director-prevented-testifying-congress (last visited May 5, 2020) (describing White House mandate blocking the Director of the National Institute of Allergy and Infectious Diseases, Dr. Anthony Fauci (a prominent member of the Trump Administration's COVID-19 pandemic response management task force), from testifying before the House of Representatives).

183. *See, e.g.*, Peter Dockrill, *Report: US Officials Are Actively Censoring Press Statements on Climate Change*, SCI. ALERT (July 9, 2019), https://www.sciencealert.com/report-trump-officials-are-actively-censoring-what-you-read-about-climate-change.

184. *See, e.g.*, Hiroko Tabuchi, *A Trump Insider Embeds Climate Denial in Scientific Research*, N.Y. TIMES (Mar. 20, 2020), https://www.nytimes.com/2020/

03/02/climate/goks-uncertainty-language-interior.html (describing "a campaign" by an Interior Department official to insert misleading language about climate change into the agency's scientific reports); Scott Waldman, *Trump Officials Deleting Mentions of 'Climate Change' from U.S. Geological Survey Press Releases*, E&E NEWS: CLIMATEWIRE (July 8, 2019), https://www.sciencemag.org/news/2019/07/trump-officials-deleting-mentions-climate-change-us-geological-survey-press-releases; Marc Heller & Heather Richards, *Forest Service Accused of Climate Censorship*, E&E NEWS: GREENWIRE (Jan. 15, 2020), https://www.eenews.net/stories/1062089151 (describing how a deputy in the Forest Service's headquarters ordered field staff in Texas to remove references to climate change and greenhouse gases from a notice concerning a proposal to open national forests and grasslands in Texas to oil and gas drilling, and to republish the notice); Brakkton Booker, *Trump Administration Reportedly Instructs CDC On Its Own Version of 7 Dirty Words*, NPR (Dec. 16, 2017), https://www.npr.org/2017/12/16/571329234/trump-administration-reportedly-instructs-cdc-on-its-own-version-of-7-dirty-word; Ted Mann, *When Safety Rules on Oil Drilling Were Changed, Some Staff Objected. Those Notes Were Cut*, WALL ST. J. (Feb. 26, 2020), https://www.wsj.com/articles/when-safety-rules-on-oil-drilling-were-changed-some-staff-objected-those-notes-were-cut-11582731559.

In 2020, a National Weather Service official admitted that it issued a "doctored" statement prepared at the request of Acting Chief of Staff Mick Mulvaney on a forecast for the impact of Hurricane Dorian on Birmingham, Alabama, following President Trump's claim that the hurricane would hit Alabama much harder than expected. Dino Grandoni, *The Energy 202: Big Businesses Face Pressure to Avoid Investing in Areas Trump Wants to Develop*, WASH. POST: POWERPOST (Feb. 3, 2020), https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2020/02/03/the-energy-202-big-businesses-face-pressure-to-avoid-investing-in-areas-trump-wants-to-develop/5e34b37488e0fa7f8254224f/ (discussing investigation into the statement). The Commerce Department's inspector general issued a report concluding that the process of issuing the statement "had significant flaws," that it was "not a best practice for Department lawyers who lack subject-matter expertise in meteorology or emergency communications to have such leading roles in the drafting and issuance of a NOAA statement," and that the agency's reliance on the need to correct inaccuracies in prior forecasts to justify issuance of the statement was "not credible." U.S. DEP'T OF COMMERCE, OFFICE OF THE INSPECTOR GEN., OIG-20-032-1, EVALUATION OF NOAA'S SEPTEMBER 6, 2019, STATEMENT ABOUT HURRICANE DORIAN FORECASTS 42–43, 46 (2020), https://www.oig.doc.gov/OIGPublications/OIG-20-032-I.pdf. The inspector general later rebuked the Trump Administration for failing to cooperate in preparation and public dissemination of the report. Courtney Bublé, *IG: Hurricane Dorian 'Sharpiegate' Report Was 'Delayed, Thwarted and Effectively Estopped,'* GOV'T EXEC. (July 2, 2020), https://www.govexec.com/oversight/2020/07/ig-hurricane-dorian-sharpiegate-report-was-delayed-thwarted-and-effectively-estopped/166626/ (noting that the inspector general concluded that "[t]he final publication of our evaluation has been delayed, thwarted and effectively estopped by the department's refusal to identify specific areas of privilege," and that "the department's all-encompassing and opaque assertion of privilege . . . effectively grant[ed] the department a pocket veto over the completion and issuance" of a final report (internal quotation marks omitted)); *see also* NAT'L ACAD. OF PUB. ADMIN., AN INDEPENDENT ASSESSMENT OF ALLEGATIONS OF SCIENTIFIC MISCONDUCT FILED UNDER THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION SCIENTIFIC INTEGRITY POLICY 3 (2020), https://nrc.noaa.gov/Portals/0/SIC/NOAA%20Final%20Report_scanned_061220.pdf?ver=2020-06-15-074029-673 (finding that Commerce Department officials involved in issuance of the statement "engaged in the misconduct intentionally, knowingly, or in reckless disregard of the Code of Scientific Conduct or Code of Ethics for Science Supervision and Management in NOAA's Scientific

scientific studies and recast their own evaluations of environmental risk.[185] The Administration has itself ignored the input and rejected the findings of agency scientists whose analyses supported more protective regulation than the agencies for whom they work were willing to take.[186] It has also reassigned some agency officials who had disclosed information the Administration did not want revealed to unappealing positions that did not correspond to their areas of expertise.[187]

C. Recalcitrant Information Disclosure

An important contribution to governmental transparency has been the adoption of the FOIA.[188] The Supreme Court has described the statute's goal as preventing agencies from developing and applying "secret law."[189] Its "'basic policy' is in favor of disclosure."[190] With certain exceptions, FOIA requires agencies

---

Integrity Policy"); Andrew Freeman & Jason Samenow, *Investigation Rebukes Commerce Department for Siding with Trump over Forecasters During Hurricane Dorian*, WASH. POST (July 9, 2020), https://www.washingtonpost.com/weather/2020/07/09/sharpiegate-inspector-general-final-report/.

185. *E.g.*, Elizabeth Shogren, *EPA Scientists Found a Toxic Chemical Damages Fetal Hearts. The Trump White House Rewrote Their Assessment*, REVEAL (Feb. 28, 2020), https://www.revealnews.org/article/epa-scientists-found-a-toxic-chemical-damages-fetal-hearts-the-trump-white-house-rewrote-their-assessment/ (detailing instructions by the Executive Office of the President to EPA scientists to reevaluate health risks of trichloroethylene).

186. *See, e.g.*, Coral Davenport, *Trump's Environmental Rollbacks Find Opposition Within: Staff Scientists*, N.Y. TIMES (Mar. 27, 2020), https://www.nytimes.com/2020/03/27/climate/trumps-environmental-rollbacks-staff-scientists.html (discussing EPA's rejection of staff findings about the health risks linked to exposure to fine particulate matter in an agency report supporting the retention of existing air quality standards); Stuart Parker, *EPA Plans to Retain PM NAAQS, Ignoring Staff Call For Stricter Standard*, INSIDEEPA.COM (Feb. 12, 2020), https://insideepa.com/daily-news/epa-plans-retain-pm-naaqs-ignoring-staff-call-stricter-standard.

187. *See, e.g.*, Lin, *supra* note 30, at 269 (describing efforts to sideline a top climate change official at the Interior Department and the director of EPA's Office of Children's Health Protection); *cf.* Paul Tonko & Brian Schatz, Opinion, *Trump Administration's 'Scientific Oppression' Threatens US Safety and Innovation*, USA TODAY (July 22, 2019), https://www.usatoday.com/story/opinion/2019/07/22/donald-trump-war-on-science-hurts-america-and-americans-column/1765301001/ (stating that agency scientists seeking to report on their work were met with "hostility, silencing, and retaliation"); Timothy Cama, *Zinke Reprimanded Park Head After Climate Tweets*, HILL (Dec. 15, 2017), https://thehill.com/policy/energy-environment/364994-zinke-reprimanded-park-head-after-climate-tweets (stating that Interior Secretary Ryan Zinke rebuked head of Joshua Tree National Park "for climate change-related tweets").

For a running account of the Trump Administration's efforts to censor or distort the views of its own officials on scientific matters, see generally *Silencing Science Tracker*, SABIN CTR. FOR CLIMATE CHANGE L., https://climate.law.columbia.edu/Silencing-Science-Tracker (last visited May 5, 2020).

188. 5 U.S.C. § 552 (2018).

189. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1975).

190. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 220 (1978) (quoting Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976)).

to "make . . . promptly available to any person" agency records that are reasonably described and timely requested.[191]

The Trump Administration has sought to slow the flow of information requested of agencies under FOIA.[192] In 2019, for example, EPA adopted a regulation specifying that only political appointees within the agency (including the Administrator, Deputy Administrator, assistant administrators, and regional administrators) have the authority to respond to FOIA requests and decide whether or not to release the requested records.[193] By revoking the authority of nonpolitical, career officials to respond to FOIA requests, EPA has centralized the authority to control what information gets publicly disclosed in the agency officials most likely to want to suppress information that is potentially inconsistent with the Administration's policy agenda or embarrassing to the officials spinning it.[194]

The Interior Department has also taken an aggressive posture in its response to FOIA requests.[195] In late 2019, it issued regulations in response to "an

---

191. 5 U.S.C. § 552(a)(3)(A).

192. In addition to the regulatory changes described in this Section, the Trump environmental agencies have denied individual FOIA requests. Some of those denials have been reversed in court. *See, e.g.*, Nat. Res. Def. Council v. EPA, 954 F.3d 150, 152 (2d Cir. 2020) (holding that computer program EPA used to forecast automakers' likely responses to proposed emission standards was not exempt from disclosure under the deliberative process privilege); Sierra Club, Inc. v. U.S. Fish & Wildlife Serv., 925 F.3d 1000, 1007 (9th Cir. 2019), *cert. granted*, 140 S. Ct. 1262 (2020) (upholding in part district court's reversal of the FWS's denial of request for records concerning biological opinion on EPA rulemaking under the CWA concerning cooling water intake structures); Humane Soc'y of U.S. v. Animal & Plant Health Inspection Serv., 386 F. Supp. 3d 34, 50 (D.D.C. 2019) (improper withholding of confidential business information); *see also* U.S. DEP'T OF THE INTERIOR, REP. NO. 20-0388, OFF. OF INSPECTOR GEN., ALLEGED INTERFERENCE IN FOIA LITIGATION PROCESS (2020), https://www.doioig.gov/sites/doioig.gov/files/WebRedacted_AllegedFOIAInterference.pdf (finding that the Counselor to the Interior Secretary directed staff from the Department's Office of the Solicitor and members of its FOIA staff to temporarily withhold documents relating to Interior Secretary nominee David Bernhardt from a court-ordered release of documents under FOIA until after the close of his confirmation hearings); *cf*. Morgan Conley, *Judge Scolds White House For Enviro Rule Records Delay*, LAW360 (Mar. 10, 2020), https://www.law360.com/articles/1251789/judge-scolds-white-house-for-enviro-rule-records-delay (stating that judge "ordered the [CEQ] to pick up the pace on" disclosing documents).

193. Freedom of Information Act Regulations Update, 84 Fed. Reg. 30,028, 30,031 (June 26, 2019) (to be codified at 40 C.F.R. pt. 2); *see also id.* at 30,033 (to be codified at 40 C.F.R. § 2.103(b)).

194. *See* Letter from Eric Schaeffer, Dir., Envtl. Integrity Project, to Andrew Wheeler, Adm'r, U.S. Envtl. Prot. Agency (July 9, 2019), https://www.biologicaldiversity.org/campaigns/open_government/pdfs/2019-07-09-Letter-from-Orgs-to-EPA-re-FOIA-Regulations-Update-Rule.pdf.

195. *See* Dino Grandoni & Juliet Eilperin, *Trump Environmental Officials Are Keeping Tight Rein Over Stampede of FOIA Requests*, WASH. POST (Dec. 15, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/12/15/trump-environmental-officials-are-keeping-tight-rein-over-stampede-of-foia-requests/.

exponential increase in the volume and complexity of incoming FOIA requests."[196] Among other things, the new regulations centralized authority to control FOIA responses in appointees who might be more inclined than the Office of the Solicitor to withhold documents that do not conform to the Administration's messaging.[197]

III. LIMITING INTERNAL INPUT AND OUTPUT

The third major prong of the Administration's quest to manipulate the information base for its environmental decisions is to generate as little information as possible that might reveal deficiencies in its truncated evaluation of the environmental consequences of its action. Among the techniques that fall into this category are: driving out government scientists and other officials who might provide unwanted input into (or criticism of) regulatory or management decisions; freezing government agencies or officials with relevant expertise out of the decision-making process; curtailing efforts to accumulate information about whether regulated entities are complying with regulatory requirements; and circumscribing environmental evaluation under NEPA, the ESA, and land management agency planning processes. One striking exception to these strategies for suppressing the flow of information to the Trump Administration's environmental agencies has been the Administration's insistence that information about the potential adverse *economic* effects of agency actions be fully fleshed out and considered, even when that information is not an appropriate statutory consideration.

The likely upshot of these developments is the loss of governing competence, as agency officials are deprived of information that would allow them to make decisions capable of achieving programmatic goals and promoting statutory purposes. The dearth of information that these strategies ensure also lessens

---

196. Freedom of Information Act Regulations, 84 Fed. Reg. 61,820, 61,820 (Nov. 14, 2019) (to be codified at 43 C.F.R. pt. 2). The public comment period on the agency's proposed regulations was 30 days. Freedom of Information Act Regulations, 83 Fed. Reg. 67175, 67175 (Dec. 28, 2018). During that entire period, however, the federal government was largely shut down as a result of congressional disagreements over appropriations legislation. As a result, the Interior Department posted none of those comments on its regulations.gov website, precluding interested persons from commenting on the submissions of others. *See* Rebecca Barho, *Shutdown Prompts Requests to Extend Comment Deadline for Proposed Changes to FOIA Regulations*, NOSSAMAN LLP: ENDANGERED SPECIES L. & POL'Y (Jan. 17, 2019), https://www.endangeredspecieslawandpolicy.com/shutdown-prompts-requests-to-extend-comment-deadline-for-proposed-changes-to-foia-regulations. More than 150 organizations sought an extension of the comment period by at least 120 days. Instead of responding to these requests, the agency extended the comment period by one day to address "a technical glitch" on regulations.gov. Freedom of Information Act Regulations, 84 Fed. Reg. 409, 410 (proposed Jan. 28, 2019); Rebecca Barho & Stephanie Clark, *Comment Deadline for Proposed Changes to FOIA Regulations Extended by One Day*, NOSSAMAN LLP: ENDANGERED SPECIES L. & POL'Y (Jan. 25, 2019), https://www.endangeredspecieslawandpolicy.com/comment-deadline-for-proposed-changes-to-foia-regulations-extended-by-one-day.

197. *But cf.* Freedom of Information Act Regulations, 84 Fed. Reg. at 61,821 (discussing concern that transferring responsibility from the Office of the Solicitor to the Deputy Chief FOIA Officer (DCFO) "would politicize access to information," asserting that the concerns were based on a misunderstanding of the position and role of the DCO, and refusing to change the approach reflected in the proposed rule).

accountability, both for agencies and the entities they regulate, and impairs the government's commitment to the rule of law. The less information the agency develops before making decisions with potentially adverse environmental effects, the less accountable agency officials will be to various watchdogs. The press may lack the information it needs to report to the public on agency deviations from their statutory duties or on decisions that unnecessarily or unwisely sacrifice environmental protection. Individuals and nongovernmental organizations may not have access to the information they need to pressure public officials to pursue less environmentally damaging actions or to bring lawsuits against both public officials and private entities alleged to have violated the law. In all of these ways, squelching the development of information conflicts with the ideals of democratic governance.

A. Loss of Experience and Expertise

A key goal of administrative law has long been to "marshal[] expertise to improve governance. Going back to Judge Landis and Justice Frankfurter, judges and scholars have argued that rational policy is best achieved through expert scrutiny of difficult problems."[198] As I have noted elsewhere:

> A central justification for using administrative agencies is their expertise. . . . Specialized agencies that administer a regulatory or benefit program can be staffed with knowledgeable personnel with the relevant expertise to evaluate complex scientific and technical issues. In addition, agencies and their staff develop experience over time that allows them to make more informed policy decisions.[199]

Career staff members thus often provide expert input that shorter-term political appointees cannot.[200]

The Trump Administration seems uninterested in taking advantage of the accumulated expertise of the career staff of its environmental and natural resource management agencies, and it instead appears to be actively seeking to suppress this expertise.[201] The Administration has embarked on a series of relocations of agencies or offices within agencies. In 2019, the BLM moved its headquarters from

---

198. Danielle Keats Citron, *Open Code Governance*, 2008 U. CHI. LEGAL F. 355, 358–59 (2008).

199. ROBERT L. GLICKSMAN & RICHARD E. LEVY, ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT 8 (3d ed. 2020).

200. *See* David Kaye, *The Legal Bureaucracy and the Law of War*, 38 GEO. WASH. INT'L L. REV. 589, 596 (2006) ("The government lawyer—particularly the career agency lawyer—often has a deeper sense of institutional history, of institutional memory, to contribute to a legal discussion than a political appointee may enjoy. Such memory should be seen as an asset to the government in a general sense, sought out rather than excluded from debate.").

201. The President's disdain for and willingness to ignore or disavow the advice of experts has been on full display in his public statements on the COVID-19 pandemic. *See, e.g.*, Michael Crowley, Katie Thomas & Maggie Haberman, *Ignoring Expert Opinion, Trump Again Promotes Use of Hydroxychloroquine*, N.Y. TIMES (Apr. 5, 2020), https://www.nytimes.com/2020/04/05/us/politics/trump-hydroxychloroquine-coronavirus.html.

Washington, D.C., to Grand Junction, Colorado.[202] This move followed the relocation of two Department of Agriculture agencies, the Economic Research Service and the National Institute of Food and Agriculture, to Kansas City.[203] Many employees of the affected agencies resisted, reluctant to uproot their families and their lives.[204]

Advocacy groups claimed that the Administration's motive was to dismantle the bureaucracy, knowing that many agency officials would give up their jobs rather than move. Administration officials denied that was the case,[205] but the President's own Acting Chief of Staff lent credence to the charge. Speaking before a friendly group of Republicans in South Carolina, Mick Mulvaney remarked that "[i]t's nearly impossible to fire a federal worker. I know that because a lot of them work for me, and I've tried and you can't do it." [206] He added that

> by simply saying to people, "you know what, we're going to take you outside the bubble, outside the Beltway, outside this liberal haven of Washington, D.C., and move you out into a real part of the country," and they quit. What a wonderful way to sort of streamline government and do what we haven't been able to do for a long time.[207]

Mulvaney then explained that "[i]t's really, really hard to drain the swamp, but we're working hard at it."[208] A related goal may be to replace career public servants with

---

202. *Headquarters Move West*, U.S. DEP'T OF THE INTERIOR BUREAU OF LAND MGMT., https://www.blm.gov/office/national-office/hq-move-west (last visited Aug. 4, 2020); Jon Banister, *Trump Administration Moving Another Federal Agency Out of D.C. Region*, BISNOW (July 16, 2019), https://www.bisnow.com/washington-dc/news/office/interior-department-to-relocate-agency-with-over-300-employees-out-of-dc-region-99900; Letter from Edward Shepard, President, Pub. Lands Found., to Richard Shelby et al., Senators, U.S. Senate (Sept. 25, 2019), https://publicland.org/wp-content/uploads/2019/09/PLF-Ltr-to-Senate-Approps-Comm-BLM-Reorg-09-25-2019.pdf [hereinafter Shepard Letter].

203. Banister, *supra* note 202.

204. Acting BLM Director William Pendley notified agency employees who refused to move of their pending termination from government service unless they could find employment elsewhere within the government. Scott Streater, *BLM to Begin Removing Employees Who Reject Relocation*, E&E NEWS: E&E NEWS PM (Jan. 29, 2020), https://www.eenews.net/eenewspm/2020/01/29/stories/1062212399.

205. Stephanie Ebbs, *Is Trump Moving the Government Out of Washington? 5 Things to Know*, ABC NEWS (July 19, 2019), https://abcnews.go.com/Politics/trump-moving-government-washington-things/story?id=64428637.

206. Jessie Bur, *Official Says USDA Departures 'Wonderful' Way to Drain the Swamp*, FED. TIMES (Aug. 5, 2019), https://www.federaltimes.com/management/2019/08/05/official-calls-usda-departures-wonderful-to-drain-the-swamp/.

207. *Id.* Not for want of trying. *See generally* RENA STEINZOR & SIDNEY SHAPIRO, THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC 54–71 (2010) (describing long-standing efforts by conservative activists and politicians to "hollow" out government, particularly at the federal agencies responsible for protecting health, safety, and the environment).

208. Bur, *supra* note 206.

ideological bedfellows whom it may be hard for future administrations to dislodge.[209]

Regardless of the administration's motivations, these moves resulted in substantial loss of experience and expertise.[210] In the short term, the BLM and Agriculture Department relocations have disrupted and delayed work such as preparing research reports.[211] The longer-term impacts are likely to be more substantial. The BLM set a 30-day deadline for more than 300 employees to notify the agency whether they would accept transfers to Grand Junction or other western locations.[212] Those who refused would be let go. Very few chose to go,[213] and

---

209. *Cf*. Franklin Foer, *How Trump Radicalized ICE*, ATLANTIC (Sept. 2018), https://www.theatlantic.com/magazine/archive/2018/09/trump-ice/565772/ ("Where immigration is concerned, Trump has installed a group of committed ideologues with a deep understanding of the extensive law-enforcement machinery they now control.").

210. *See* BUREAU OF LAND MANAGEMENT, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-20-397R, BUREAU OF LAND MANAGEMENT: AGENCY'S REORGANIZATION EFFORTS DID NOT SUBSTANTIALLY ADDRESS KEY PRACTICES FOR EFFECTIVE REFORMS 5–6 (Mar. 6, 2020), https://www.gao.gov/assets/710/705175.pdf (noting stakeholders' concerns that the move of the BLM's headquarters outside of D.C. "could adversely affect BLM's ability to achieve its mission by, for example, limiting stakeholders' ability to access agency resources and expertise"); Philip McCausland, *Gutting of Two USDA Research Agencies Is Warning to All Federal Agencies, Ex-Employees Say*, NBC NEWS (Oct. 8, 2019), https://www.nbcnews.com /news/us-news/gutting-two-usda-research-agencies-warning-all-federal-agencies-ex-n1062726 (describing claim by current and former federally employed scientists, economists, and other experts that reorganization of USDA agencies was "illustrative of the administration's intentions: to remove or neuter evidence-based research").

Legislation introduced by Senators Josh Hawley and Marsha Blackburn would move the headquarters of ten federal agencies out of Washington. Emily Galik, *Federal Agencies' Westward Expansion*, REG. REV. (Jan. 30, 2020), https://www.theregreview.org/2020/01/30/galik-federal-agencies-westward-expansion/ (discussing Helping Infrastructure Restore the Economy Act, S. 2672, 116th Cong. (2019)).

211. *60 USDA Employees Relocate to Kansas City by Deadline, Agency Says*, 41 KSHB KAN. CITY (Oct. 2, 2019), https://www.kshb.com/news/local-news/60-usda-employees-relocate-to-kansas-city-by-deadline-agency-says; Brad Plumer & Coral Davenport, *Science Under Attack: How Trump Is Sidelining Researchers and Their Work*, N.Y. TIMES (Dec. 28, 2019), https://www.nytimes.com/2019/12/28/climate/trump-administration-war-on-science.html (reporting that "the hasty relocation [to Kansas City] of two agricultural agencies that fund crop science and study the economics of farming has led to an exodus of employees and delayed hundreds of millions of dollars in research").

212. Scott Streater, *BLM Staffers Face Looming Deadline to Relocate or Quit*, E&E NEWS: GREENWIRE (Nov. 6, 2019), https://www.eenews.net/stories/1061479289.

213. Scott Streater, *Internal Documents Show a Changing BLM Workforce*, E&E NEWS: GREENWIRE (Aug. 28, 2020), https://www.eenews.net/greenwire/2020/08/28 /stories/1063712751 (noting that by June 2020, only about 35% of BLM employees ordered to relocate had agreed to move, about half as many as Acting BLM Director William Pendley had predicted); Eric Katz, *Few BLM Employees Agree to Relocate as Interior Attempts to Ease Pain of Those It Will Fire*, GOV'T EXEC. (Dec. 13, 2019), https://www.govexec.com/workforce/2019/12/few-blm-employees-agree-relocate-interior-attempts-ease-pain-those-it-will-fire/161895/; *Dozens of BLM Workers Refuse to Leave DC for Colorado*, OK ENERGY TODAY (Mar. 7, 2020), http://www.okenergytoday.com /2020/03/dozens-of-blm-workers-refuse-to-leave-dc-for-colorado/ ("Rather than move from

dozens of employees responsible for conducting NEPA compliance, managing hazardous materials, and administering the oil and gas leasing process were, in effect, forced out.[214] One BLM staffer summarized the impact of the agency's ultimatum: "It's basically lopping the head off the animal . . . . There will be nobody in the D.C. office to help guide the process."[215] Others expressed concern about "a massive 'brain drain'" at the BLM.[216] The relocation of the two Agriculture Department agencies had similar consequences, as hundreds of affected employees quit, "leaving gaping holes in critical divisions."[217]

The loss of expertise has not been confined to employees at relocated agencies. Hundreds of agency scientists left the government because they were unwilling to continue to work for an administration that, they believed, did not value or rely on their expertise and experience and that interfered with their work.[218] In the first year and a half of the Trump Administration, EPA had an 8% drop in total staff because disenfranchised/unappreciated employees left their jobs and were not replaced.[219] A toxicologist, who had spent 40 years at EPA, bemoaned the loss of

---

Washington, D.C. to the new western Colorado headquarters of the Bureau of Land Management, more than half of those scheduled for the move have quit the federal agency.").

Some BLM employees charged that the agency made temporary reassignments to the Grand Junction office to "give the appearance that the office is occupied and busy" after many D.C.-based employees refused to move. Scott Streater, *BLM Staff 'Charade' Fills Empty Offices in New HQ*, E&E NEWS: GREENWIRE (Feb. 7, 2020), https://www.eenews.net/greenwire/stories/1062289841. The Government Accountability Office issued a report criticizing the BLM relocation, finding that "BLM minimally or did not address key practices for involving employees and key stakeholders in the process of developing the reforms" and relied on a flawed cost-benefit analysis in justifying the relocation. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 210, at 4–5. BLM officials thereafter refused to answer questions about the relocation at a congressional hearing. Scott Streater, *BLM Official Skirts Questions on Headquarters Move*, E&E NEWS: GREENWIRE (Mar. 10, 2020), https://www.eenews.net/greenwire/2020/03/10/stories/1062568473.

214. Scott Streater, *BLM to Suffer Major Staff Losses in Move West*, E&E NEWS: GREENWIRE (Dec. 3, 2019), https://www.eenews.net/stories/1061714579 [hereinafter Streater, *Brain Drain*]; Heather Hansman, *The Problem with the BLM Moving to the West*, OUTSIDE (Nov. 21, 2019), https://www.outsideonline.com/2405827/blm-move-grand-junction-colorado-problem.

215. Hansman, *supra* note 214; *see also* Shepard Letter, *supra* note 202 ("We fully believe this reorganization would functionally dismantle the BLM . . . .").

216. Streater, *Brain Drain*, *supra* note 214.

217. Frank Morris, *Critics Of Relocating USDA Research Agencies Point To Brain Drain*, NPR (Sept. 10, 2019), https://www.npr.org/2019/09/10/759053717/critics-of-relocating-usda-research-agencies-point-to-brain-drain ("But scores of highly skilled people with deep knowledge in arcane fields of study can be tough to replace."); Plumer & Davenport, *supra* note 211 (reporting that two-thirds of the nearly 600 Agriculture Department employees slated for relocation left their jobs).

218. *See* Plumer & Davenport, *supra* note 211.

219. *See* John Bowden, *EPA Lost More than 1,500 Workers in First 18 Months of Trump Administration: Report*, HILL (Sept. 8, 2018), https://thehill.com/policy/energy-environment/405736-epa-lost-more-than-1500-workers-in-first-18-months-of-trump.

experienced scientists at the agency, which he said erased years or decades of "institutional memory."[220]

B. Exclusion of Internal Expert Input

The Trump Administration has taken steps to neuter the unwanted input of the remaining agency experts on the health and environmental risks of its agencies' proposed actions. One example involves efforts to minimize the role of the agencies responsible for providing input on whether proposed agency actions would violate the Endangered Species Act ("ESA"). A second example concerns the sidelining of EPA in the adoption of automobile fuel efficiency standards.

1. The Endangered Species Act's Consultation Process

The ESA's so-called no-jeopardy provision requires all federal agencies to ensure that their actions neither jeopardize listed endangered or threatened species nor result in destruction or adverse modification of those species' critical habitats.[221] Agencies proposing to take actions that may jeopardize listed species or adversely modify their critical habitat (so-called action agencies) must implement that mandate "in consultation with and with the assistance of" either the Interior Department's U.S. Fish and Wildlife Service ("FWS") or the Commerce Department's National Marine Fisheries Service ("NMFS"), depending on the potentially affected species involved.[222] Under FWS regulations, the consulting agency must "provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat."[223] The FWS may request that the consulting agency obtain and supply additional data if the FWS determines that it "would provide a better information base" for carrying out its statutory consultation responsibilities.[224]

At the conclusion of the consultation process, the FWS must issue a biological opinion assessing whether or not the consulting agency's proposed action would be likely to violate the no-jeopardy provision.[225] If so, the FWS must suggest

---

220. Plumer & Davenport, *supra* note 211; *see also* Annie Gowen et al., *Science Ranks Grow Thin in Trump Administration*, WASH. POST (Jan. 23, 2020), https://www.washingtonpost.com/climate-environment/science-ranks-grow-thin-in-trump-administration/2020/01/23/5d22b522-3172-11ea-a053-dc6d944ba776_story.html (noting a former official's view that "the loss of expertise weakens the government's ability to make sound decisions"); Galik, *supra* note 210 (stating that "[t]alent drain occurs with major relocation efforts").

221. 16 U.S.C. § 1536(a)(2) (2018).

222. *Id*.; *see also, e.g.*, Sierra Club, Inc. v. U.S. Fish & Wildlife Serv., 925 F.3d 1000, 1006–07 (9th Cir. 2019), *cert. granted*, 140 S. Ct. 1262 (2020) (describing FWS consultation on EPA proposed CWA regulations).

The NMFS has jurisdiction over anadromous and ocean-based aquatic life, while the FWS's far more extensive jurisdiction covers freshwater and land-based species. David E. Adelman & Robert L. Glicksman, *Reevaluating Environmental Citizen Suits in Theory and Practice*, 91 U. COLO. L. REV. 385, 413 n.108 (2020). Henceforth, in this Article, the term FWS includes the NMFS.

223. 50 C.F.R. § 402.14(d) (2019).

224. *Id.* § 402.14(f).

225. *Id.* § 402.14(e).

"reasonable and prudent alternatives" ("RPAs") which would not violate the no-jeopardy provision.[226] Biological opinions and RPAs must be based on "the best scientific and commercial data available."[227] Although RPAs do not bind the consulting agency, the agency's failure to implement them increases the agency's risk that it will be found to have violated either the no-jeopardy provision or the ESA's prohibition on "taking" endangered species.[228]

The point of the ESA's consultation process is to expand the scientific information to which an action agency has access when making a decision with the potential to protect listed species or their critical habitats.[229] One court described the function of consultation as follows:

> [T]he Service Agencies [the FWS and the NMFS] play a unique role vis-a-vis the Action Agencies. Most critically they are independent from the Action Agencies. The job of the Action Agencies is, naturally enough, to get their projects accomplished. They cannot help but put their major efforts into completion of their statutory mission. The Service Agencies on the other hand approach the ESA issues with an independent, impartial, and objective eye.[230]

By narrowing the range of agency actions that trigger consultation requirements, the government would limit the capacity of the FWS, including career staff members with scientific expertise, to provide information to action agencies on whether their initiatives might harm listed species or habitat and, if so, how to avoid those results.[231] That is exactly what the Trump Administration has done.

As noted above, the ESA's consultation requirement is triggered by actions that may result in species jeopardy or adverse habitat modification.[232] In 2016, in

---

226. 16 U.S.C. § 1536(b)(3)(A) (2018); 50 C.F.R. § 402.14(g)(5)–(6), (h)(2).

227. 50 C.F.R. § 402.14(g)(8).

228. 16 U.S.C. § 1538(a)(1)(B); Bennett v. Spear, 520 U.S. 154, 169–70 (1997); Tribal Vill. of Akutan v. Hodel, 869 F.2d 1185, 1193 (9th Cir. 1988).

The ESA defines "take" of a listed species member as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

229. *See* Defs. of Wildlife v. Hodel, 851 F.2d 1035, 1037 (8th Cir. 1988) ("The purpose of the consultation process is to supply advice and information, identifying actions that may harm listed species or their habitats.").

230. Defs. of Wildlife v. Salazar, 842 F. Supp. 2d 181, 188 (D.D.C. 2012).

231. Agencies ignore the input of their own experts at their peril. *See* N. Spotted Owl v. Hodel, 716 F. Supp. 479, 482–83 (W.D. Wash. 1988) (invalidating decision that listing of species under the ESA was not warranted where FWS "disregarded all the expert opinion"); *cf*. Pub. Emps. for Envtl. Resp. v. Hopper, 827 F.3d 1077, 1083–84 (D.C. Cir. 2016) (vacating and remanding EIS prepared under NEPA on offshore wind energy project due to agency's inadequate analysis of geophysical data); W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 491–95 (9th Cir. 2011) (finding a NEPA violation due to agency's failure to disclose critical input on a proposal provided by the agency's own scientists).

232. 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.14(a) (providing that formal consultation is required if "any action *may affect* listed species or critical habitat" (emphasis added)); *id*. § 402.14(b)(1) (providing that formal consultation is not required if a "proposed action is *not likely to adversely affect* any listed species or critical habitat" (emphasis added)).

response to a Ninth Circuit decision finding that the FWS's definition of "destruction or adverse modification" conflicted with the statutory goal of promoting species recovery,[233] the FWS amended the regulatory definition of that term to require consultation if a proposed agency action would prevent recovery, even if it would not cause species jeopardy.[234] It construed "destruction or adverse modification" to mean:

> direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. **Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features**.[235]

But in 2019, the FWS amended the definition again, this time to mean, in relevant part, "a direct or indirect alteration that appreciably diminishes the value of critical habitat *as a whole* for the conservation of a listed species."[236] The 2019 amendment deleted the bolded language above from the 2016 definition and added the italicized language to the new definition. Both changes narrow the range of actions' effects that are likely to qualify as "destruction or adverse modification," and thereby narrow the range of actions that will trigger the ESA's consultation mandates. The deletion eliminates the noninclusive reference to effects that preclude or significantly delay the development of ecosystem characteristics which are essential to species conservation, instead focusing exclusively on diminution of habitat value. The added language makes it clear that unless the entire habitat is

---

Professor Dave Owen identified "a large discrepancy between statutory requirements and actual practice" that predated the adoption of the 2016 amendments. Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 FLA. L. REV. 141, 146 (2012). He found:

> Notwithstanding statutory language that seems to mandate a major role for the adverse modification prohibition, the services have given it hardly any independent significance, instead treating the prohibition as a redundant add-on to the ESA's other protective measures. The services also have consistently treated small-scale habitat degradation as exempt from the adverse modification prohibition, even though no such exemption appears in the ESA itself.

Id. If these practices continued even after adoption of the 2016 regulations, then the Trump Administration's 2019 regulatory amendments, described below, may not have resulted in a significant narrowing in the number of instances in which proposed projects' effects on critical habitat triggered ESA consultations.

233. Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1069–70, 1075 (9th Cir. 2004).

234. Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat, 81 Fed. Reg. 7214, 7216 (Feb. 11, 2016).

235. *Id.* at 7226 (emphasis added).

236. Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976, 45,016 (Aug. 27, 2019) (to be codified at 50 C.F.R. § 402.02) (emphasis added).

diminished, destruction or adverse modification will not have occurred.[237] By narrowing the trigger for consultation, the FWS has limited the circumstances in which an action agency must consult on actions that adversely affect the critical habitat of listed species. The narrowed definition also reduces the number of actions for which, when consultation does occur, the FWS will be allowed to find destruction or adverse modification for which it issues RPAs.[238]

Other provisions of the ESA consultation regulations adopted or amended by the Trump Administration would also curtail consultation responsibilities. The regulations have long required agencies to reinitiate consultation if, among other things: (a) new information reveals potential effects that were not previously considered; (b) an action is modified so as to cause effects not considered in a biological opinion; or (c) a new species is listed or critical habitat designated.[239] But in 2019, the FWS added a provision that allows an agency to avoid reinitiating consultation after the approval of a BLM or U.S. Forest Service land management plan upon listing of a new species or designation of new critical habitat if the plan was adopted by the agency before the date of listing or designation, provided that actions to implement the plan may require site-specific consultation if they may affect the newly listed species or designated critical habitat.[240]

Finally, the FWS amended its regulations in 2019 to allow action agencies and the FWS, by mutual agreement, to engage in "expedited consultation."[241] Just as "streamlined" NEPA procedures create the risk that hasty, ill-prepared, and incomplete EAs and EISs will result,[242] so too may expedited consideration under the ESA save time but result in reduced protection for listed species.

2. Sidelining EPA Input on Fuel Efficiency Standards

Two federal agencies have overlapping authority to regulate the manufacture of new motor vehicles in ways that affect the greenhouse gases ("GHGs") they emit. The Energy Policy and Conservation Act,[243] which Congress adopted in response to the 1973–1974 oil embargo imposed by the Organization of the Petroleum Exporting States,[244] authorizes the Department of Transportation to adopt fuel efficiency standards (known as corporate average fuel economy, or "CAFE" standards), principally to conserve energy resources, by mandating the manufacture of fuel-efficient vehicles.[245] The CAA vests in EPA authority to limit emissions from newly manufactured vehicles of "any air pollutant . . . which in

237. For example, under the 2016 rule, appreciable diminution of fifty percent of a listed species' critical habitat may have sufficed to qualify as adverse modification, even if the other fifty percent remained capable of supporting the species. Under the 2019 rule, it is possible that the FWS will claim that unless 100 percent of habitat is incapable of supporting the species, there is no adverse modification.

238. *See infra* Section III.D.

239. 50 C.F.R. § 402.16(a)(2)–(4) (2019).

240. *Id.* § 402.16(b).

241. *Id.* § 402.14(*l*).

242. *See supra* note 123 and accompanying text.

243. Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975).

244. ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 1109–10 (8th ed. 2019).

245. 49 U.S.C. § 32902(a) (2018).

[EPA's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[246]

These authorities converged when, in response to the Supreme Court's decision in *Massachusetts v. EPA*,[247] EPA sought to limit automotive emissions of carbon dioxide ("CO_2"). The two agencies explained why they converged in the preamble to the jointly issued fuel economy/emission reduction regulations they issued in 2010 during the Obama Administration:

> [T]he relationship between improving fuel economy and reducing CO_2 tailpipe emissions is a very direct and close one. The amount of those CO_2 emissions is essentially constant per gallon combusted of a given type of fuel. Thus, the more fuel efficient a vehicle is, the less fuel it burns to travel a given distance. The less fuel it burns, the less CO_2 it emits in traveling that distance. While there are emission control technologies that reduce the pollutants (e.g., carbon monoxide) produced by imperfect combustion of fuel by capturing or converting them to other compounds, there is no such technology for CO_2. Further, while some of those pollutants can also be reduced by achieving a more complete combustion of fuel, doing so only increases the tailpipe emissions of CO_2. Thus, there is a single pool of technologies for addressing these twin problems, i.e., those that reduce fuel consumption and thereby reduce CO_2 emissions as well.[248]

The two agencies strengthened the standards in 2012.[249]

The Obama regulations did not sit well with President Trump or his environmental agency appointees. Within two months of his inauguration, EPA and the National Highway Traffic Safety Administration ("NHTSA"), the component of the Department of Transportation that implements the CAFE standards program, issued a notice of intent to "reconsider" the Obama regulations.[250] Before long, however, NHTSA and EPA were apparently at loggerheads over how to do so. According to reports, for example, a senior official in EPA's Office of Transportation and Air Quality notified the Trump Administration of his concern that the analysis NHTSA proposed to rely on in rolling back the Obama standards

---

246. 42 U.S.C. § 7521(a)(1).

247. 549 U.S. 497, 534–35 (2007) (remanding EPA's denial of a petition to initiate a rulemaking to limit GHG emissions from new cars and trucks).

248. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324, 25,327 (May 7, 2010) (to be codified at 40 C.F.R. pt. 85–86, 600, 49 C.F.R. pt. 531, 533, 536–38).

249. 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624, 62,626–27 (Oct. 15, 2012) (to be codified at 40 C.F.R. pt. 85–86, 600, 49 C.F.R. pt. 531, 533, 536–38).

250. Notice of Intention to Reconsider the Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light Duty Vehicles, 82 Fed. Reg. 14,671, 14, 82 Fed. Reg. 14,671 (proposed Mar. 22, 2017) (to be codified at 40 C.F.R. pt. 86, 49 C.F.R. pt. 523, 531, 533, 536–37).

was "not consistent with the basic principle of supply and demand."[251] EPA engineers protested the cost–benefit analysis prepared by NHTSA, as well as NHTSA's projection that the weakened rule would save, not cost, lives.[252] Even EPA's Administrator, Andrew Wheeler, took issue with NHTSA's analysis.[253] NHTSA reportedly ignored EPA's objections, including its disagreement with critical factual inaccuracies that left the rule vulnerable to legal challenges.[254] According to one report, "The Trump administration kept the government's top tailpipe-pollution experts from working on the tailpipe-pollution rule. For two years, rival bureaucrats at NHTSA and overworked Trump political appointees stonewalled the EPA team, blocked it from learning of the rollback, and prevented it from seeing analysis of the new rule."[255] The Administration issued its final rules weakening the Obama standards in 2020.[256] This experience contrasts sharply with

---

251. Robinson Meyer, *The Trump Administration Flunked Its Math Homework*, ATLANTIC (Oct. 31, 2018), https://www.theatlantic.com/science/archive/2018/10/trumps-clean-car-rollback-is-riddled-with-math-errors-clouding-its-legal-future/574249/ (claiming that "[t]he Trump administration's official case for repealing car fuel-economy rules is riddled with calculation mistakes, indefensible assumptions, and broken computer models, according to economists, environmental groups, and a major automaker. The errors may seriously endanger the rule," and that "[s]ome of the most glaring errors described in this article were detected by EPA staff" before publication of the proposed rollback).

252. Robinson Meyer, *'We Knew They Had Cooked the Books,'* ATLANTIC (Feb. 12, 2020), https://www.theatlantic.com/science/archive/2020/02/an-inside-account-of-trumps-fuel-economy-debacle/606346/ [hereinafter Meyer, *Cooked the Books*]; *see also* Juliet Eilperin & Brady Dennis, *EPA Staff Warned that Mileage Rollbacks Had Flaws. Trump Officials Ignored Them.*, WASH. POST (May 19, 2020), https://www.washingtonpost.com/climate-environment/epa-staff-warned-that-mileage-rollbacks-had-flaws-trump-officials-ignored-them/2020/05/19/242056ba-960f-11ea-91d7-cf4423d47683_story.html.

Economists at the Office of Management and Budget ("OMB") also raised concerns about the legal basis for the rule. Maxine Joselow, *White House Warned About Legal Concerns, 'Spurious' Tone*, E&E NEWS (May 19, 2020), https://www.eenews.net/stories/1063176467. OMB has reportedly raised concerns about the cursory nature of other Trump EPA regulatory initiatives and the accuracy of the data relied upon to justify them. *See, e.g.*, Amena H. Saiyid, *EPA Disagreed with White House on Updating Mercury Analysis*, BLOOMBERG L. (May 28, 2020), https://news.bloomberglaw.com/environment-and-energy/epa-disagreed-with-white-house-on-updating-mercury-analysis.

253. Lisa Friedman, *Scott Pruitt's Environmental Rollbacks Stumbled in Court. His Successor Is More Thorough*, N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/climate/andrew-wheeler-epa.html.

254. *See* Richard L. Revesz, *Institutional Pathologies in the Regulatory State: What Scott Pruitt Taught Us About Regulatory Policy*, 34 J. LAND USE & ENVTL. L. 211, 234 (2019).

255. Meyer, *Cooked the Books*, *supra* note 252 (stating that "[w]hen the EPA engineers finally saw the flawed study and identified some of its worst errors, the same Trump officials ignored them," and that "[a]fter years of close contact, the NHTSA team seemed to go dark to the EPA team"). EPA Administrator Andrew Wheeler denied, however, that "EPA professional staff were cut out" of the rule's development. *Id.*

256. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 30, 2020) (to be codified at 40 C.F.R. pt. 85–86, 600, 49 C.F.R. pt. 523, 531, 533, 536–37); Rachel Frazin, *Trump Rollback of Obama Mileage Standards Faces Court Challenges*, HILL (Apr. 7, 2020),

the development of fuel efficiency standards under the Obama Administration when "NHTSA relied on the EPA's expertise and its own statutory regulatory authority, and the joint effort 'generated NHTSA's first increase in fuel economy standards for cars in nearly thirty years.'"[257]

C. Reduced Enforcement Oversight

Investigation into regulatory compliance and enforcement of regulatory violations is a critical component of adherence to the rule of law.[258] Systematic failure by regulators to pursue such violations limits accountability for engaging in conduct that Congress or agencies have deemed to be contrary to the public interest.[259]

Under the Trump Administration, EPA has reduced the rigor of environmental regulatory enforcement. It has reduced the number of inspections of regulated facilities. Between fiscal years 2009 and 2016, EPA conducted an average of 18,087 inspections each year. In fiscal year 2017 (which included about three and a half months of the last year of the Obama Administration), it conducted 11,885 inspections. In fiscal year 2019, it conducted only 10,320.[260] In some instances, EPA

---

https://thehill.com/policy/energy-environment/overnights/491653-overnight-energy-trump-rollback-of-obama-era-mileage ("The Trump rule dramatically scales back the year-over-year improvements automakers must make in fuel economy . . . .").

257. Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489, 1561 (2018). *But see* Meyer, *Cooked the Books*, *supra* note 252 (describing a sometimes "corrosive rivalry" between NHTSA and EPA over the years as "NHTSA needed the EPA's data to do its job").

258. *See* Robert L. Glicksman & David L. Markell, *Unraveling the Administrative State: Mechanism Choice, Key Actors, and Regulatory Tools*, 36 VA. ENVTL. L.J. 318, 378 (2018) ("Because accountability is an important component of any regulatory program, an enforcement and compliance regime should seek to hold accountable both regulated entities and regulatory officials."); Mariana Hernandez Crespo G., *A New Chapter in Natural Resource-Seeking Investment: Using Shared Decisions System Design ("SDSD") to Strengthen Investor-State and Community Relationships*, 18 CARDOZO J. CONFLICT RESOL. 551, 562 n. 40 (2017) (listing regulatory enforcement as one of several factors that promote the rule of law); *cf.* Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1718 (2006) (describing failure of police "to enforce the law" as a failure to hold police accountable and noting that "such failure weakens the rule of law").

259. Enforcement officials may have legitimate reasons in particular cases to exercise their enforcement discretion by choosing not to initiate enforcement action. The exercise of that discretion differs from a systemic effort to suppress information that may demonstrate regulatory noncompliance or otherwise to disable the exercise of discretionary authority on a broad scale.

260. The calculations and figures discussed in the text are based on data provided by EPA. *See* OFF. OF ENF'T & COMPLIANCE ASSURANCE, U.S. ENVTL. PROT. AGENCY, FISCAL YEAR 2019: EPA ENFORCEMENT AND COMPLIANCE ANNUAL RESULTS 12 (2020), https://www.epa.gov/sites/production/files/2020-02/documents/fy19-enforcement-annual-results-data-graphs.pdf; *see also* Alex Leary, *Trump Administration Pushes to Deregulate With Less Enforcement*, WALL ST. J. (June 23, 2019), https://www.wsj.com/articles/trump-administration-pushes-to-deregulate-with-less-enforcement-11561291201; Juliet Eilperin & Brady Dennis, *Under Trump, EPA Inspections Fall to a 10-Year Low*, WASH. POST (Feb. 8, 2019), https://www.washingtonpost.com/climate-environment/2019/02/08/under-trump-epa-

has institutionalized a reduction in inspection frequency by regulation.[261] Because inspections are a critical means of gathering information on regulatory compliance, the drop in inspections has deprived EPA of data that would otherwise have shed light on whether enforcement action is warranted.[262]

EPA has also narrowed the information base for assessing regulatory compliance status by reducing or eliminating recordkeeping or reporting obligations of regulated entities. For example, within the first six weeks of the Trump Administration, the agency eliminated a requirement that oil and natural gas facilities provide information on greenhouse gas emissions.[263] EPA reduced the frequency of fenceline monitoring of benzene emissions by petroleum refineries.[264] EPA eliminated requirements that oil and gas companies install technology to detect and fix methane leaks from wells, pipelines, and storage facilities.[265] Other agencies

---

inspections-fall-year-low/; Brett Chase, *Trump Rolls Back EPA Oversight in Midwest, Favoring Polluters*, BETTER GOV'T ASS'N (Nov. 15, 2019), https://www.bettergov.org/news/trump-rolls-back-epa-oversight-in-midwest-favoring-polluters/; *EPA is Losing Employees—And They're Not Being Replaced*, HARVARD SCH. PUB. HEALTH: NEWS, https://www.hsph.harvard.edu/news/hsph-in-the-news/epa-losing-employees-not-replacing-them/ (discussing reduction in EPA criminal enforcement).

Similar cutbacks in enforcement oversight have occurred in other Trump agencies. *See, e.g.*, Deborah Berkowitz, *Workplace Deaths Rising: Fatality Investigations at 10-Year High*, NAT'L EMP. L. PROJECT (Mar. 14, 2019), https://www.nelp.org/publication/workplace-safety-enforcement-continues-decline-trump-administration/ (noting that by the beginning of 2019, OSHA had the lowest number of health and safety inspectors in its history); David Weil, *Why Having Fewer OSHA Inspectors Matters*, CONVERSATION (Mar. 6, 2020), https://theconversation.com/why-having-fewer-osha-inspectors-matters-129209 ("Reducing the number of OSHA inspectors puts more workers in danger of physical harm on the job.").

261. *See* Keith B. Belton & John D. Graham, *Trump's Deregulation Record: Is It Working?*, 71 ADMIN. L. REV. 803, 860 (2019) (discussing inspections for methane leaks at oil and gas drilling facilities).

262. For a disturbing account of the widespread extent of noncompliance with federal pollution control requirements, see generally CYNTHIA GILES, HARVARD L. SCH. ENVTL. ENERGY L. PROGRAM, NEXT GENERATION COMPLIANCE: ENVIRONMENTAL REGULATION FOR THE MODERN ERA: PART 2: NONCOMPLIANCE WITH ENVIRONMENTAL RULES IS WORSE THAN YOU THINK 3 (2020), http://eelp.law.harvard.edu/wp-content/uploads/Cynthia-Giles-Part-2-FINAL.pdf.

263. Notice Regarding Withdrawal of Obligation to Submit Information, 82 Fed. Reg. 12,817, 12,817 (Mar. 7, 2017); *see also EPA Withdraws Information Request for the Oil and Gas Industry*, U.S. ENVTL. PROT. AGENCY (Mar. 2, 2017), https://archive.epa.gov/epa/newsreleases/epa-withdraws-information-request-oil-and-gas-industry.html.

264. National Emission Standards for Hazardous Air Pollutants and New Source Performance Standards: Petroleum Refinery Sector Amendments, 83 Fed. Reg. 60,696, 60,698, 60,706–07 (Nov. 26, 2018) (to be codified at 40 C.F.R. pt. 60, 63).

265. U.S. ENVTL. PROT. AGENCY, NOTICE, OIL AND NATURAL GAS SECTOR: EMISSION STANDARDS FOR NEW, RECONSTRUCTED, AND MODIFIED SOURCES REVIEW, https://www.epa.gov/sites/production/files/2020-08/documents/frn_oil_and_gas_review_2060-at90_final_20200812_admin_web.pdf (to be codified at 40 C.F.R. pt. 60); *see also* Lisa Friedman & Coral Davenport, *Curbs on Methane, Potent Greenhouse Gas, to Be Relaxed in U.S.*, N.Y. TIMES (Aug. 30, 2019), https://www.nytimes.com/2019/08/29/climate/epa-

followed suit. The BLM, for example, rescinded a rule adopted during the Obama Administration that had imposed leak detection requirements on operators of oil and gas activities on public lands.[266]

These information suppression measures not only weaken the government's capacity to enforce but also reduce the effectiveness of private enforcement, such as under the citizen suit provisions of the federal pollution control statutes.[267] Citizen suit provisions that authorize individuals or nongovernmental organizations to sue regulated entities alleged to be in noncompliance with their regulatory responsibilities "foster the rule of law, agency accountability, representational democracy, and environmental stewardship."[268] They also "bring essential technical data and knowledge to the attention of federal agencies."[269] They play an especially important role when governmental enforcement is deficient due to lack of resources or political will.[270] But "[e]asy access to accurate information is a prerequisite to bringing successful citizen suits. One of the primary reasons that most of the private enforcement activity has centered on the Clean Water Act is the

---

methane-greenhouse-gas.html; *cf.* U.S. ENVTL. PROT. AGENCY, NOTICE, OIL AND NATURAL GAS SECTOR: EMISSION STANDARDS FOR NEW, RECONSTRUCTED, AND MODIFIED SOURCES RECONSIDERATION, https://www.epa.gov/sites/production/files/2020-08/documents/frn_og_reconsideration_2060-at54_final_rule_20200812_admin_web.pdf (to be codified at 40 C.F.R. pt. 60); Niina Farah & Jennifer Hijazi, *EPA Must Confront Judge's 'Powerful Reasoning' on Methane*, E&E NEWS: CLIMATEWIRE (Aug. 17, 2020), https://www.eenews.net/climatewire/stories/1063711765 (noting that these final regulations "decreased the frequency with which companies need to check for and repair methane leaks"); Catherine Rampell, *Forget the Trump Tweets. This Is the Trump Action that Might Actually Kill Us.*, WASH. POST (Aug. 18, 2020), https://www.washingtonpost.com/opinions/forget-the-trump-tweets-this-is-the-trump-action-that-might-actually-kill-us/2020/08/17/e912c0ae-e0b8-11ea-b69b-64f7b0477ed4_story.html ("The new rules, first and foremost, are not merely anti-science, but anti-*measurement*. That is, the rollback's primary initial impact is to keep Americans in the dark about a climate-damaging pollutant.").

EPA also approved state efforts to eliminate recordkeeping, reporting, and public disclosure obligations for regulated sources. *See, e.g.*, Sierra Club v. EPA, No. 19-2562, 2020 WL 5051536, at *12–14 (3d Cir. Aug. 27, 2020) (vacating EPA's approval of provisions of Pennsylvania's state implementation plan under the CAA that created a "gaping loophole . . . in the enforcement regime" by delegating recordkeeping to the state without requiring that records be available to the public, thereby endorsing "an emissions regime with no discernable enforcement mechanism").

266. Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 49,184, 49,184 (Sept. 28, 2018) (to be codified at 43 C.F.R. pt. 3160, 3170).

267. *See, e.g.*, 33 U.S.C. § 1365 (2018) (permitting citizen suits to enforce the CWA); 42 U.S.C. § 7604 (2018) (permitting citizen suits to enforce the CAA).

268. James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 5 (2003).

269. Adelman & Glicksman, *supra* note 222, at 405.

270. *Id*. at 405–06 (arguing, however, that the traditional narratives in favor of and against citizen suits, broadly defined, to promote accountability are incomplete).

system of monitoring, self-reporting and data processing developed under that statute."[271]

More fundamental changes to the government's enforcement apparatus may be in the offing. In early 2020, the Office of Management and Budget ("OMB") published a request for information to inform its evaluation of "a full range of options to make significant reforms in the context of administrative enforcement and adjudication."[272] The questions on which OMB sought input indicate that the administration is considering requiring the government to show cause that an investigation is justified, altering burdens of persuasion to make it harder for the government to demonstrate liability for regulatory violations, limiting the kinds of evidence the government may introduce as part of its prima facie case, reforming the rules governing penalty amounts to prevent allegedly disproportionate and unfair penalties, and taking steps to prevent the government from "coerc[ing] Americans into resolutions/settlements."[273] What all these potential reforms have in common is that they would make it more difficult for the government to demonstrate regulatory violations or would reduce the severity of the sanctions available when the government is able to make such a showing.[274] The harder it is for the government to acquire information about compliance status, by neutering investigatory authority, the more difficult it will be for it to meet the heightened burdens these reforms would impose on it.

D. Superficial Environmental Evaluation

The Trump Administration seeks to limit agency obligations and capacity necessary to gather information that is essential for informed evaluation of the consequences of public and private activities on the environment. The multitude of ways that the CEQ's proposed NEPA revisions[275] would either exempt agency proposals from NEPA review, allow an agency to apply categorical exclusions, or expand the circumstances that EAs, rather than EISs, would suffice, would all result in agencies producing less information about the potential adverse consequences of their actions.

---

271. Bryant Garth, Ilene H. Nagel & S. Jay Plager, *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 387 n.126 (1988).

272. Improving and Reforming Regulatory Enforcement and Adjudication, 85 Fed. Reg. 5483, 5483 (Jan. 30, 2020).

273. *Id*. at 5484. *See also* Memorandum from Paul J. Ray, Administrator, Office of Information and Regulatory Affairs, Implementation of Section 6 of Executive Order 13924, at 4 (Aug. 31, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/08/M-20-31.pdf (expressing concern about administrative enforcement that is driven by "[r]etaliatory or punitive motives or the desire to compel capitulation").

274. Critics of OMB's January 2020 notice charged that "the effort intends to neuter regulatory enforcement and reinforce the administration's push to make life easier for business." Kelsey Brugger, *Administration Eyes Changes to Environmental Enforcement*, E&E NEWS: GREENWIRE (Jan. 30, 2020), https://www.eenews.net/greenwire/2020/01/30/stories/1062219913.

275. *See supra* Section I.B.2.

Similarly, the FWS's narrowed definition of "destruction or adverse modification" of designated critical habitat[276] would limit the flow of information generated during the ESA consultation process. That regulatory change would reduce the number of consultations that culminate in "jeopardy opinions."[277] The statute requires the FWS to formulate RPAs only when it issues a jeopardy opinion.[278] In deciding whether to include a jeopardy or no jeopardy finding in a biological opinion it prepares at the culmination of formal consultation, FWS regulations require the agency to "[e]valuate the effects of the action and cumulative effects on the listed species or critical habitat."[279] The biological opinion itself must include "[a] detailed discussion of the effects of the action on listed species or critical habitat."[280] The regulations define "effects of the action" as:

> [A]ll consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action. (See § 402.17).[281]

Section 402.17, which was added to the regulations in 2019, specifies that "[a] conclusion of reasonably certain to occur must be based on *clear and substantial information*, using the best scientific and commercial data available."[282] That standard is arguably at odds with the policy of "institutionalized caution" that the Supreme Court interpreted the ESA to reflect in the landmark *Tennessee Valley Authority v. Hill* case.[283] Section 402.17 also provides:

> Considerations for determining that a consequence to the species or critical habitat is not caused by the proposed action include, but are not limited to:
>
> (1) The consequence is so remote in time from the action under consultation that it is not reasonably certain to occur; or
>
> (2) The consequence is so geographically remote from the immediate area involved in the action that it is not reasonably certain to occur; or
>
> (3) The consequence is only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur.[284]

---

276. *See supra* Section III.B.1.

277. The term "jeopardy opinion" as used here includes an opinion finding that a proposed action would be likely to result in adverse habitat modification, even if it would not be likely to jeopardize the continued existence of listed species.

278. 16 U.S.C. § 1536(b)(3)(A) (2018).

279. 50 C.F.R. § 402.14(g)(3) (2019).

280. *Id.* § 402.14(h)(1)(iii).

281. *Id.* § 402.02.

282. *Id.* § 402.17(a) (emphasis added).

283. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978).

284. 50 C.F.R. § 402.17(b).

These provisions seem designed to minimize the degree that the FWS, as part of the consultation process, will need to generate and consider information concerning the effects of actions—for example, the effects of actions that generate greenhouse gases that contribute to climate change—that are not immediately and directly linked in time and space to the implementation of the action agency's proposal. This interpretation of the requirements imposed on the FWS by the no-jeopardy provision is at odds with substantial judicial precedent concerning the duty to consider the long-term effects of an action.[285] Its result will be a reduction in the flow of information from the FWS to action agencies that informs them how they may be able to achieve project goals while avoiding or mitigating adverse effects on listed species or their habitats.

Another forum in which the Trump Administration has reduced the internal output of information useful in assessing the environmental effects of government action is the agency planning processes. The organic statutes of the four principal federal land management agencies—the National Park Service ("NPS"), the FWS, the Forest Service, and the BLM—require these agencies to engage in land use planning.[286] The Federal Land Policy and Management Act ("FLPMA") (the organic statute of the BLM) and the National Forest Management Act ("NFMA") (the organic statute of the Forest Service) require agency actions such as the issuance of grazing permits, entry into timber contracts, or oil and gas leases to conform to plan provisions.[287] The information agencies acquire during the planning process allows them to make informed decisions about matters like whether particular areas of the lands they manage should be open to or unavailable for different uses and what level of authorized use generates unacceptable adverse environmental

---

285. *See, e.g.*, Wild Fish Conservancy v. Irving, 221 F. Supp. 3d 1224, 1233–34 (E.D. Wash. 2016) (remanding biological opinion on operation of fish hatchery based on failure to consider future potential climate change effects on stream flow and water quality); Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 184 F. Supp. 3d 861, 917–23 (D. Or. 2016) (finding that NMFS's failure to use best available science concerning climate change in biological opinion on operation of Columbia River Power System was arbitrary and capricious); Oceana, Inc. v. Pritzker, 125 F. Supp. 3d 232, 250–52 (D.D.C. 2015) (remanding to address NMFS's inadequate consideration of the effects of climate change on loggerhead turtles); Nat. Res. Def. Council v. Kempthorne, 506 F. Supp. 2d 322, 367–70 (E.D. Cal. 2007) (vacating biological opinion that neglected to consider the impact of climate change on listed species and habitat).

286. *See* 2 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 16:1 (2d ed. 2007). NPS planning is governed by 54 U.S.C. § 100502 (2018), while NWS planning for the national wildlife refuges is governed by 16 U.S.C. § 668dd(e) (2018).

287. 43 U.S.C. § 1732(a) (2018) (requiring management of public lands "in accordance with the land use plans developed" under § 1712 of FLPMA); 16 U.S.C. § 1604(i) (2018) (requiring that "resource plans and permits, contracts, and other such instruments" for the use and occupancy of the national forests "be consistent with the land management plans" adopted under NFMA).

consequences.[288] Moreover, the organic statutes of both the Forest Service and the BLM require the agencies to invite public participation in the planning process.[289]

The BLM's land use plans were long regarded by some natural resources law experts as vague and inadequate.[290] During the last full month of the Obama Administration, the BLM replaced its planning rules with a new, more detailed version,[291] the first time they had been updated in three decades. The BLM explained that its goals in revising its planning regulations included: enhancing BLM's ability to respond to change and providing meaningful opportunities for other federal agencies, state and local governments, Indian tribes, and the public to be involved in the planning process.[292] The regulations required planners to "consider the impacts of resource management plans on resource, environmental, ecological, social, and economic conditions at relevant scales."[293] Before even initiating the preparation of a plan, the BLM had to complete a planning assessment after gathering relevant information and assessing the quality of the information collected and of the resource, environmental, ecological, social, and economic conditions of the planning area.[294] The 2016 regulations required the agency to gather additional information after a plan went into effect. Additionally, the BLM needed to monitor and evaluate the adopted plan to determine if its objectives were being met and if there was relevant new information or other sufficient cause to warrant consideration of amendment or revision of the plan.[295]

The 2016 planning regulations had a short shelf life. Acting pursuant to the Congressional Review Act,[296] Congress passed a joint resolution of disapproval early in 2017, which President Trump eagerly signed into law.[297] The effect was to repeal the 2016 planning rules.[298] As I have argued elsewhere, "[t]he repeal of the

---

288. *See* COGGINS & GLICKSMAN, *supra* note 286, § 16:18 (noting that planning activity entails "data gathering and assessment of management options"). The federal land management agencies must also prepare NEPA analyses of their land use plans. *See, e.g.*, 16 U.S.C. § 1604(g)(1) (requiring the Forest Service to promulgate regulations that require that land management plans be adopted in accordance with NEPA); 43 C.F.R. § 1610.4-1 (2019) (requiring BLM resource management plan to comply with the scoping process required by regulations implementing NEPA). To the extent that the Trump Administration's NEPA regulatory revisions generate less information than prior versions of the CEQ regulations did, the land use planning process will be that much less informative.

289. 16 U.S.C. § 1604(d)(1) (requiring Forest Service to "provide for public participation"); 43 U.S.C. § 1712(f) (mandating BLM provide "opportunity for public involvement").

290. *See* COGGINS & GLICKSMAN, *supra* note 286, §§ 16:18, 16:21.

291. Resource Management Planning, 81 Fed. Reg. 89,580 (Dec. 12, 2016) (to be codified at 43 C.F.R. pt. 1600).

292. *Id.* at 89,585; *see also id.* at 89,663–65 (to be codified at 43 C.F.R. §§ 1610.2-1 to 1610.2-3 (repealed 2017)).

293. *Id.* at 89,663 (to be codified at 43 C.F.R. § 1601.0-8 (repealed 2017)).

294. *Id.* at 89,666 (modifying 43 C.F.R. § 1610.4 (repealed 2017)).

295. *Id.* at 89,669 (to be codified at 43 C.F.R. § 1610.6-4 (repealed 2017)).

296. 5 U.S.C. § 801(b)(1) (2018).

297. Joint Resolution of Mar. 27, 2017, Pub. L. No. 115-12, 131 Stat. 76 (2017).

298. Valerie Volcovici, *Senate Revokes Obama Federal Land-Planning Rule*, REUTERS (Mar. 7, 2017), https://www.reuters.com/article/us-usa-congress-publicland/senate-revokes-obama-federal-land-planning-rule-idUSKBN16E2UZ.

2016 regulations blocked a much needed updating of the BLM's planning regulations that would have enhanced public participation opportunities, enabled the agency to rely on advancements in scientific knowledge, and facilitated landscape-level planning, which is critically important to respond to ecological threats, including climate change."[299]

But the repeal of the 2016 planning rules may have only begun the Trump Administration's efforts to curtail the scope of the BLM's information-gathering responsibilities during the planning process. In early 2020, the State Director of the BLM in Alaska sent a letter to tribal leaders in the state to inform them that the agency was considering a further effort to "update" its land use planning regulations.[300] The Director indicated that the changes being considered "would result in planning efforts that take less time, cost less money, and are more responsive to local needs."[301] While any such revisions might well accomplish those goals, they might also further narrow the agency's responsibilities to acquire the information needed to place its resource management planning on a firm factual foundation.

E. The Unquenchable Thirst for Information on Economic Impacts

The Administration has not been equally hostile to all forms of information, however. Indeed, it shows an enthusiasm for developing information about the adverse *economic* effects of environmental protection measures, even when the law appears to make reliance on that information unlawful.[302]

For example, the ESA requires the FWS to make decisions on whether to list species as endangered or threatened "solely on the basis of the best scientific and commercial data available."[303] Consistent with that mandate, FWS regulations long provided that listing and delisting determinations had to be made "without reference to possible economic or other impacts of such determination[s]."[304] However in 2019, the FWS, in the course of amending its ESA listing regulations, posited that, even though the statute makes it clear that species listing decisions must be made

---

299. COGGINS & GLICKSMAN, *supra* note 286, § 16:21.

300. Letter from Chad B. Padgett, State Dir., Bureau of Land Mgmt., to Tribal Rep. (Jan. 7, 2020) (link provided at Dino Grandoni, *Trump Administration Considers Changing Way It Decides How to Use Public Lands*, WASH POST: POWERPOST (Jan. 31, 2020), https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2020/01/31/the-energy-202-trump-administration-considers-changing-way-it-decides-how-to-use-public-lands/5e33152a88e0fa42c4c6c134/).

301. *Id.*

302. The information it uses has not necessarily been accurate, however. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-254, SOCIAL COST OF CARBON: IDENTIFYING A FEDERAL ENTITY TO ADDRESS THE NATIONAL ACADEMIES' RECOMMENDATIONS COULD STRENGTHEN REGULATORY ANALYSIS 14–16, 24–27 (2020), https://www.gao.gov/assets/710/707776.pdf (describing the Trump Administration's changes to two key assumptions that resulted in lowering previous estimates of the social cost of carbon, recommendations by the National Academies of Sciences, Engineering and Medicine for improving the accuracy of those estimates, and statements by officials at the OMB that the agency has no plans to implement those recommendations).

303. 16 U.S.C. § 1533(b)(1)(A) (2018).

304. 50 C.F.R. § 424.11(b) (2019).

solely on the basis of scientific information, "the Act does not prohibit the Services from compiling economic information or presenting that information to the public, as long as such information does not influence the listing determination."[305] It added that experience under the CAA[306] demonstrates that "it is possible for an agency to compile and present economic data for one purpose while not considering it in the course of carrying out a decision process where consideration of economic data is prohibited."[307] The FWS explained, relying on its "inherent authority to administer [its] programs in the interest of public transparency," that although the ESA does not expressly authorize *compiling* economic information, it also does not prohibit it from doing so.[308] That approach may make good policy sense and might even be legally justifiable. It contrasts sharply, however, with the Administration's apparent hostility to finding out about or disclosing information regarding environmental considerations. Its reference to promoting transparency is also jarring when compared to the myriad of ways, discussed in Part I above, that it is conducting environmental decision-making in secret.

IV. RESISTANCE TO SHUTTERED GOVERNMENT

This Article has surveyed a host of Trump Administration strategies for keeping public input out of the governmental decision-making processes, blocking public access to the information used to make government decisions, and limiting the responsibilities or ability of agency officials to develop or rely on information that would assist them in making more knowledgeable decisions on environmental matters. These strategies have already taken a toll on key aspects of democratic governance that include public participation, transparency, public and private sector accountability, and adherence to rule of law precepts. The Trump Administration's strategies also impaired the capacity of the nation's environmental laws to serve their protective purposes.

The depiction of an administration whose environmental information management flouts critical aspects of good governance is bleak and disturbing. There is evidence, however, that resistance to these strategies within the government has developed—even among some officials appointed by the Trump Administration. First, prominent government scientific experts, such as members of the SAB, have issued reports criticizing deficiencies in EPA's analysis of scientific information.[309] Second, whistleblowers within federal agencies have revealed allegedly unlawful or otherwise inappropriate conduct by agency leaders. Third, courts have derailed some

305. Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45,020, 45,024 (Aug. 27, 2019) (to be codified at 50 C.F.R. pt. 424).

306. The CAA bars EPA from considering economic impact in adopting or revising NAAQS. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 464–71 (2001). In *Whitman*, Justice Scalia noted that if, as alleged, EPA was found to have secretly considered the costs of attaining the NAAQS "without telling anyone . . . it would be grounds for vacating the NAAQS, because the Administrator had not followed the law." *Id.* at 471 n.4.

307. Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. at 45,024–25.

308. *Id.* at 45,025.

309. For a description of the role of the SAB, see *supra* notes 143–45 and accompanying text.

of the Administration's efforts to manipulate the information base on which its environmental decisions have relied.

A. Pushback from Government Scientific Experts

Early in 2020, a majority of the members of the SAB, including a significant number of Trump Administration appointees,[310] issued a series of reports objecting to four sets of proposed EPA rules: a rule redefining the scope of CWA jurisdiction,[311] the secret science rule,[312] a rule governing fuel efficiency standards for passenger cars and light trucks,[313] and a rule governing mercury and other hazardous air pollutant emissions from power plants.[314]

All four reports, which were studded with citations to peer-reviewed scientific literature, took issue with EPA's scientific analysis. The reports criticized

---

310. *See* Coral Davenport & Lisa Friedman, *Science Panel Staffed With Trump Appointees Says E.P.A. Rollbacks Lack Scientific Rigor*, N.Y. TIMES (Dec. 31, 2019), https://www.nytimes.com/2019/12/31/climate/epa-science-panel-trump.html (stating that "many" of the members of the SAB that issued the draft reports were "hand-selected by the Trump administration"); Rebecca Beitsch, *EPA's Independent Science Board Questions Underpinnings of Numerous Agency Rollbacks*, HILL (Dec. 31, 2019), https://thehill.com/policy/energy-environment/476397-epas-independent-science-board-questions-underpinnings-of-numerous (noting that "many" of the SAB's members were appointed by President Trump).

311. MICHAEL HONEYCUTT, SCI. ADVISORY BD. (SAB), EPA-SAB-20-002, COMMENTARY ON THE PROPOSED RULE DEFINING THE SCOPE OF WATERS FEDERALLY REGULATED UNDER THE CLEAN WATER ACT 2 (2020), https://yosemite.epa.gov/sab/sabproduct.nsf/WebBOARD/729C61F75763B8878525851F00632D1C/$File/EPA-SAB-20-002+.pdf [hereinafter SAB, WATERS].

EPA issued the final rule to which the SAB advisory report objected early in 2020. Navigable Waters Protection Rule, 85 Fed. Reg. 22,250 (Apr. 21, 2020) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pt. 110, 112, 116–17, 120, 122, 230, 232, 300, 302, 401).

312. MICHAEL HONEYCUTT, SCI. ADVISORY BD. (SAB), EPA-SAB-20-005, CONSIDERATION OF THE SCIENTIFIC AND TECHNICAL BASIS OF EPA'S PROPOSED RULE TITLED *STRENGTHENING TRANSPARENCY IN REGULATORY SCIENCE* (2020), https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebReportsLastMonthBOARD/2DB3986BB8390B308525855800630FCB/$File/EPA-SAB-20-005.pdf [hereinafter SAB, TRANSPARENCY].

313. MICHAEL HONEYCUTT, SCI. ADVISORY BD. (SAB), EPA-SAB-20-003, CONSIDERATION OF THE SCIENTIFIC AND TECHNICAL BASIS OF THE EPA'S PROPOSED RULE TITLED *THE SAFER AFFORDABLE FUEL-EFFICIENT (SAFE) VEHICLES RULE FOR MODEL YEARS 2021-2026 PASSENGER CARS AND LIGHT-TRUCKS* (2020), https://yosemite.epa.gov/sab/sabproduct.nsf/RSSRecentHappeningsBOARD/1FACEE5C03725F268525851F006319BB/$File/EPA-SAB-20-003+.pdf [hereinafter SAB, SAFE].

EPA issued its final rule in 2020. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 20, 2020) (to be codified at 40 C.F.R. pt. 86, 600, 49 C.F.R. pt. 523, 531, 533, 536–37).

314. MICHAEL HONEYCUTT, SCI. ADVISORY BD. (SAB), EPA-SAB-20-004, CONSIDERATION OF THE SCIENTIFIC AND TECHNICAL BASIS OF EPA'S PROPOSED *MERCURY AND AIR TOXICS STANDARDS FOR POWER PLANTS RESIDUAL RISK AND TECHNOLOGY REVIEW AND COST REVIEW* 1 (2020), https://yosemite.epa.gov/sab/sabproduct.nsf/RSSRecentHappeningsBOARD/4908A62FD4C0DE2285258549005B8797/$File/EPA-SAB-20-004+.pdf [hereinafter SAB, MERCURY].

EPA for ignoring or failing to respond to prior SAB offers to assist EPA's analyses;[315] failing to incorporate scientific research previously reviewed and endorsed by the SAB;[316] failing to provide peer-reviewed studies to support EPA's scientific analyses;[317] relying on flawed cost–benefit analyses[318] or risk assessments;[319] offering no or insufficient justifications for departing from long-standing practices of EPA or OMB;[320] failing to justify departures from established scientific norms;[321] failing to justify modeling assumptions;[322] using "incorrect" and "inadequate" modeling techniques;[323] and omitting key considerations.[324] They also identified "significant weaknesses in [EPA's] scientific analysis"[325] in support of its regulations,[326] and took EPA to task for reaching "implausible results."[327]

The SAB's criticism of EPA's redefining the scope of the CWA's jurisdiction was perhaps the most straightforward and least technical in its description of the rule's deficiencies.[328] The SAB report on what was then EPA's proposed rule stated that "the proposed revised definition of [waters of the United States] decreases protection for our Nation's waters and does not provide a scientific basis in support of its consistency with the [CWA's] objective of restoring and maintaining 'the chemical, physical and biological integrity' of these waters."[329] EPA's proposed rule failed to incorporate "the body of science on connectivity of waters reviewed previously by the SAB and found to represent a scientific

315. *See* SAB, WATERS, *supra* note 311, at 2.

316. *See id.*

317. *See id.*

318. *See* SAB, SAFE, *supra* note 313 (finding that "the estimated net benefits of [EPA's proposed weakening of fuel efficiency standards] may be substantially overstated"); *id.* at 35 (same); SAB, MERCURY, *supra* note 314, at 11.

319. *See* SAB, MERCURY, *supra* note 314, at 3–6, 10.

320. *See id.* at 2 ("EPA's benefit-cost analysis of the proposed action categorically excludes co-benefits. That departs from the Agency's long-standing practice and is contrary to both the Agency's guidance document on economic analysis . . . and to the recommendations of [OMB]."); SAB, SAFE, *supra* note 313, at 11.

321. *See* SAB, TRANSPARENCY, *supra* note 312, at 18.

322. *See* SAB, MERCURY, *supra* note 314, at 14.

323. *See* SAB, SAFE, *supra* note 313, at 8–9.

324. *See id.* at 9.

325. *Id.* at 1, 35.

326. *See id.* at 2.

327. *Id.* ("Together the weaknesses [in sales and scrappage equations] lead to implausible results regarding the overall size of the vehicle fleet, predicting that an increase in vehicle prices due to regulation will cause the fleet to grow substantially when it would usually be expected to shrink."); *id.* at 35.

328. One source described the SAB report as "a scathing review" of the proposed rule. Sean Reilly et al., *Advisory Panel Slams Trump's Regulatory Rollbacks*, E&E NEWS: GREENWIRE (Jan. 2, 2020), https://www.eenews.net/greenwire/2020/01/02/stories/1061975927.

329. SAB, WATERS, *supra* note 311, at 2.

justification for including functional connectivity in rule making."[330] The report ended with this indictment:

> In summary, current scientific understanding of the connectivity of surface and ground water, which has been reviewed by the SAB previously, is not reflected in the proposed Rule. Specifically, the proposed definition of [waters of the United States] excludes ground water, ephemeral streams, and wetlands which connect to navigable waters below the surface. The proposed Rule does not present new science to support this definition, thus the SAB finds that the proposed Rule lacks a scientific justification, while potentially introducing new risks to human and environmental health.[331]

The SAB's report on EPA's proposed secret science rule was equally blunt:

> There is minimal justification provided in the Proposed Rule for why existing procedures and norms utilized across the U.S. scientific community, including the federal government, are inadequate, and how the Proposed Rule will improve transparency and the scientific integrity of the regulatory outcomes in an effective and efficient manner. It is plausible that in some situations, the Proposed Rule will decrease efficiency and reduce scientific integrity, [but] determining if in fact that will be the case requires a thorough and thoughtful examination that is currently absent in the Proposed Rule. Moving forward with altered transparency requirements beyond those already in use, in the absence of such a robust analysis, risks serious and perverse outcomes.[332]

These reports are likely to be part of the administrative record that a court reviews in any challenge to the validity of the final versions of the rules. At least some SAB members are committed to providing an unvarnished version of the scientific evidence relevant to assessing the impact of EPA's rules, and to pointing out instances of EPA's decisions to ignore that evidence. The willingness of some government officials to act as honest brokers of knowledge holds out some promise of a counterweight to the manipulative information strategies discussed in this Article.

---

330. *Id.*; *see also id.* at 3 (lodging a similar criticism for excluding groundwater from the statute's coverage and stating that EPA's approach "neither rests upon science, nor provides long term clarity").

331. *Id.* at 4.

332. SAB, TRANSPARENCY, *supra* note 312, at 18; *see also id.* at 8–9 ("The lack of criteria for satisfying the requirement to 'make all such studies available to the public to the extent practicable' makes it difficult to understand the implications of the requirement . . . [M]eeting the requirement would be enormously expensive and time consuming at best and could be expected to result in the exclusion of much of the scientific literature from consideration (the machine data may no longer be available and/or the researchers may no longer be alive or in a position to assemble the data).").

B. Whistleblowers

Officials who act as whistleblowers can serve a similar counterweight function.[333] Whistleblowers within EPA,[334] the Interior Department,[335] the Centers for Disease Control and Prevention,[336] the Department of Health and Human Services,[337] and other agencies have spoken out about many issues including what they regard as illegitimate efforts by Trump Administration officials to suppress information about climate change.[338] For example, some former Interior Department scientists alleged in testimony before Congress that they experienced retaliation such as demotions for their work on climate change that deviated from the Administration's consistent downplaying of the threats it presents.[339] Those

---

333. *See* Jesselyn Radack, *The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible at Last*, 17 GEO. J. LEGAL ETHICS 125, 125 (2003) (referring to "[c]ourageous public servants at beleaguered government agencies . . . [who] speak[] out against wrongdoing" and earn "respect for the integrity and importance of whistleblowing"). *See generally* Heidi Kitrosser, *On Public Employees and Judicial Buck-Passing: The Respective Roles of Statutory and Constitutional Protections for Government Whistleblowers*, 94 NOTRE DAME L. REV. 1699 (2019) (evaluating First Amendment and statutory protections for public employee speech).

334. *See, e.g.*, Leigh Ann Caldwell, *Fired Whistleblower Details Corruption at EPA*, NBC (Apr. 12, 2018), https://www.nbcnews.com/politics/congress/fired-whistleblower-details-corruption-epa-n865461; Oliver Milman, *The Silenced: Meet the Climate Whistleblowers Muzzled by Trump*, GUARDIAN (Sept. 17, 2019), https://www.theguardian.com/environment/2019/sep/17/whistleblowers-scientists-climate-crisis-trump-administration.

335. *See, e.g.*, Scott Bronstein et al., *Whistleblower Says He Was Pressured by Trump Administration to Reverse Environmental Decision*, CNN (July 9, 2019), https://www.cnn.com/2019/07/08/politics/interior-department-arizona-development-bernhardt/index.html; Rebecca Beitsch, *Interior Whistleblowers Say Agency Has Sidelined Scientists Under Trump*, HILL (July 25, 2019), https://thehill.com/policy/energy-environment/454805-interior-whistleblowers-say-agency-has-sidelined-scientists-under [hereinafter Beitsch, *Whistleblowers*]; Kyla Mandel, *Former Interior Scientist Calls Out 'Culture of Fear, Censorship, and Suppression' Under Trump*, THINK PROGRESS (July 17, 2019), https://thinkprogress.org/former-interior-scientist-calls-out-culture-of-fear-censorship-and-suppression-under-trump-2b8813e95b18/.

336. *See, e.g.*, Marianne Lavelle & Georgina Gustin, *Top CDC Health and Climate Scientist Files Whistleblower Complaint*, INSIDE CLIMATE NEWS (Aug. 16, 2019), https://insideclimatenews.org/news/16082019/cdc-scientist-whistleblower-complaint-climate-health-research-trump-usda-epa.

337. *See, e.g.*, Dan Diamond, *Trump Officials Interfered with CDC Reports on Covid-19*, POLITICO (Sept. 11, 2020), https://www.politico.com/news/2020/09/11/exclusive-trump-officials-interfered-with-cdc-reports-on-covid-19-412809 (describing complaints by officials of the Department of Health and Human Services of demands by the Department's political appointees that CDC officials alter their reports to downplay the scope of the COVID-19 pandemic and the risks it presents); Sheryl Gay Stolberg, *Virus Whistle-Blower Says Trump Administration Steered Contracts to Cronies*, N.Y. TIMES (May 5, 2020), https://www.nytimes.com/2020/05/05/us/politics/rick-bright-coronavirus-whistleblower.html; Kaitlan Collins et al., *Ousted Vaccine Director Files Whistleblower Complaint Alleging Coronavirus Warnings Were Ignored*, CNN (May 5, 2020), https://www.cnn.com/2020/05/05/politics/rick-bright-complaint/index.html.

338. *See, e.g.*, Milman, *supra* note 334.

339. *See* Beitsch, *Whistleblowers*, *supra* note 335.

allegations are consistent with a pattern of firings of Administration officials who have testified at the impeachment hearings[340] or taken issue with President Trump's medical advice concerning COVID-19.[341] These personnel actions not only remove from office those who have been willing to counter the Administration's positions but also may dissuade others from coming forward in the future for fear of both the professional and personal repercussions.[342] Nevertheless, the filing of official complaints and less formal instances of whistleblowing continue, serving as another counterweight to the Administration's information manipulation and distortion efforts.

C. Judicial Review

Additional checks on agency misuse of information stem from judicial review. Courts provided checks on agencies during past presidencies that flouted their environmental protection responsibilities.[343] They have already found that environmental agencies under Trump have violated public participation and transparency procedural requirements.[344] They also required the disclosure of information improperly withheld in response to FOIA requests.[345] Additionally, they invalidated agency decisions on substantive grounds when they have determined that the agencies have ignored, distorted, or omitted relevant information in rendering their decisions.[346] And they have overturned efforts to limit the

---

340. *See* Alana Abramson, *Trump's Attack on Vindman May Violate Whistleblower Protection Laws. But Challenging It Could Be Risky.*, TIME (Feb. 12, 2020), https://time.com/5783160/trumps-attack-on-vindman-may-violate-whistleblower-protection-laws-but-challenging-it-could-be-risky/ (concerning the removal of Colonel Alexander Vindman from the White House National Security Council).

341. *See* Katherine Eban, *"Political Connections and Cronyism": In Blistering Whistleblower Complaint, Rick Bright Blasts Team Trump's Pandemic Response*, VANITY FAIR (May 5, 2020), https://www.vanityfair.com/news/2020/05/whistleblower-complaint-rick-bright-blasts-team-trumps-pandemic-response (describing the removal of Rick Bright as the head of the Biomedical Advanced Research and Development Authority).

342. Whistleblowers and their legal representatives have received threats to their personal safety. *See* Reis Thebault, '*We Will Hunt You Down': Man Threatened Attorney of Trump Whistleblower, Prosecutors Say*, WASH. POST (Feb. 20, 2020), https://www.washingtonpost.com/nation/2020/02/20/whistleblower-attorney-threatened/.

343. *See* Adelman & Glicksman, *supra* note 222, at 431 (discussing critical role that courts played in checking the environmental policies of the George W. Bush Administration); *id.* at 446 (referring to the "independent review of agency decision making" provided by courts).

344. *See, e.g.*, *supra* Part I.B.1.2 (cases cited therein).

345. *See supra* note 192 and accompanying text.

346. *See, e.g.*, Defs. of Wildlife v. U.S. Dep't of the Interior, 931 F.3d 339, 359–60 (4th Cir. 2019) (invalidating biological opinion and incidental take statement prepared under the ESA on a proposed natural gas pipeline construction project); Sw. Elec. Power Co. v. EPA, 920 F.3d 999, 1020 (5th Cir. 2019) (refusing to allow EPA to "simply plead a lack of data to justify its decision" to set improperly lenient effluent limitation regulations under the CWA); WildEarth Guardians v. U.S. Fish & Wildlife Serv., 416 F. Supp. 3d 909, 929–32 (D. Ariz. 2019) (invalidating biological opinion under the ESA); WildEarth Guardians v. Jeffries, 370 F. Supp. 3d 1208, 1237–38 (D. Or. 2019) (finding violation of NEPA and land and resource management plan under the NFMA as a result of arbitrary and capricious failure to

information that regulated entities were required to submit to the government to help it implement statutes with environmental protection objectives.[347]

As long as courts continue to serve as a check on agency efforts to manipulate, ignore, or distort relevant information, the courts may foster the public participation, transparency, and government accountability goals of democratic governance that the Administration seems intent on undermining through its decision-making processes. Coupled with the efforts of current and former agency officials to spotlight mismanagement of information by the Trump environmental agencies, judicial review can help open the shutters that the Administration has sought to bolt down to keep unwanted information out and information that undercuts the rationale for the Administration's environmental policy in.

CONCLUSION

This Article described a wide range of techniques that the Trump Administration has used to narrow the informational foundation for its decisions with environmental implications. These techniques reflect a series of overlapping strategies. One approach is keeping out input from those outside government that might cast doubt on the wisdom of pursuing initiatives that create health, safety, and environmental risks. A second strategy entails blocking the disclosure of information from inside the federal environmental agencies that might reveal environmental risks, especially the risks that the Administration is unwilling to acknowledge and create obstacles to its deregulatory agenda. Third, the Trump Administration's practices suppress the development of "inconvenient"[348] information within the government, such as by preventing officials with environmental expertise from one agency from effectively contributing to environmental decision-making by other agencies, even when applicable statutes encourage or require such transmission of information.

Viewed separately, the Administration's information management actions may seem justifiable. Like the secret science rule that EPA has pursued, they are often couched as efforts to promote important administrative law values such as transparency. However, the unmistakable pattern described in this Article debunks many of those justifications. From its inception, the Trump Administration has

---

provide "quality information" on effects of authorizing off-highway vehicle use in a national forest); WildEarth Guardians v. Zinke, 368 F. Supp. 3d 41, 67–77 (D.D.C. 2019) (remanding EA under NEPA due to failure to quantify reasonably foreseeable cumulative GHG emissions from oil and gas leasing).

347. *See, e.g.*, Envtl. Def. Fund v. EPA, 922 F.3d 446, 453–55 (D.C. Cir. 2019) (finding that rule issued under the Toxic Substances Control Act was arbitrary and capricious because it failed to require that chemical companies substantiate that chemical identity of substance they sought to keep confidential was not readily discoverable through reverse engineering).

348. *Cf.* AN INCONVENIENT TRUTH (Participant Media 2006) (describing global threats posed by climate change in the face of denial of those threats by some politicians).

boasted about its deregulatory zeal.[349] Much of that deregulatory thrust has focused on weakening the environmental protections that the laws provide for and demand.

In addition, viewed on their own, any one of the strategies described in this Article may seem unlikely to do irreparable harm to that protective web. Although it is hard to know which of them is likely to prove most damaging, the obliteration of scientific expertise within the government, which may take years if not decades to restore, is a prime candidate.[350] Ideologically-driven rulemaking's justifications appear to be reverse engineered to reach a predetermined result, such as the rollback of corporate fuel economy standards, and are also extremely troubling, given the array of threats posed by climate change. Regardless of how one ranks the perniciousness of each of the individual strategies, the cumulative adverse effect of the Administration's multi-pronged manipulation of information on the public health and the physical environment will likely be disastrous. When the Administration fears that honest evaluation of the merits and demerits of its favored deregulatory measures efforts would reveal health, safety, and environmental risks that the American public would likely find unacceptable, its response has been to use all available means of suppressing, distorting, or ignoring that information.[351]

---

349. *See, e.g.*, Cheryl Bolen, *Trump Boasts of 'Record' Savings from Deregulation*, BLOOMBERG L. (Oct. 17, 2018), https://news.bloomberglaw.com/federal-contracting/trump-boasts-of-record-savings-from-deregulation.

350. A former congressional staffer put it this way:

> Of all the impacts of the Trump administration's attacks on government, this flight of experience and talent could wind up being among the most consequential. We're losing a generation of highly skilled public servants in both the executive and legislative branches. It will take years to recruit and train competent scientists, policy experts, and professional administrators who can once again staff the federal government.

Justin Talbot-Zorn, *How to Reverse the Trump-Era Brain Drain*, AM. PROSPECT (Mar. 7, 2018), https://prospect.org/power/reverse-trump-era-brain-drain/; *cf*. Lisa Leiman, Comment, *Should the Brain Drain Be Plugged? A Behavioral Economics Approach*, 39 TEX. INT'L L.J. 675, 682 (2004) ("One major problem with the brain drain is that it is not just individuals departing, but really capital investments—the products of training programs that countries have funded—taking their valuable assets elsewhere."); Mary Jane Angelo, *Harnessing the Power of Science in Environmental Law: Why We Should, Why We Don't, and How We Can*, 86 TEX. L. REV. 1527, 1570 (2008) ("To ensure that agencies such as EPA keep abreast of and seek out new scientific ideas to improve their decision making, we must restore a scientific culture to the agencies. Agencies that are asked to make decisions critical to human-health and environmental protection based on science must respect science and scientists.").

351. *Cf*. Toluse Olorunnipa, *Trump Tightens Grip on Coronavirus Information as He Pushes to Restart the Economy*, WASH. POST (May 7, 2020), https://www.washingtonpost.com/politics/trump-tightens-grip-on-coronavirus-information-as-he-pushes-to-restart-the-economy/2020/05/07/d4a05e42-9068-11ea-a9c0-73b93422d691_story.html (reporting that President Trump "has sought to block or downplay information about the severity of the coronavirus pandemic," that his administration "has sidelined or replaced officials not seen as loyal, rebuffed congressional requests for testimony, [and] dismissed jarring statistics and models"). A political science professor opined that "[i]f the message were to go out with complete objectivity, it would be disastrous for Trump" and charged that "he is doing his best to prevent experts from speaking out or using their expertise, and he's simply trying to divert attention." *Id.*

However, the practice of shuttered government has broader and even more sinister implications. As Justice Douglas once remarked, "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be 'uninhibited, robust, and wide-open' debate."[352] Relatedly, as Justice O'Connor pointed out in the context of racial gerrymandering, government's efforts to represent the interests of only one group or viewpoint through techniques such as those explored here are "altogether antithetical to our system of representative democracy."[353] The Trump Administration's operation of shuttered government has been both secretive and exclusionary.[354] The mechanisms discussed in Part IV above may mitigate the ongoing damage to democratic governance and accountability, but that operation has already taken a heavy toll.

Shutters are not apt to block the light forever. Sooner or later, they will be breached, but it is worth considering how to accelerate the process. Part IV above identifies three forms of pushback against the Trump Administration's subversion and debilitation of the administrative state through information manipulation. The impact of each form can be magnified. The ability of experts within the government to counter misinformation campaigns by political appointees may be strengthened if Congress makes it clear that requirements for balanced membership on advisory committees and safeguards against special interest influence in statutes such as FACA[355] are judicially reviewable and enforceable.[356] Statutory whistleblower protections can be bolstered,[357] the protection of the independence of agency

352. N.Y. Times Co. v. United States, 403 U.S. 713, 724 (1971) (Douglas, J., concurring) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269–70 (1964).

353. Shaw v. Reno, 509 U.S. 630, 648 (1993).

354. *See, e.g.*, W. Watersheds Project v. Zinke, 441 F. Supp. 3d 1042, 1072 (D. Idaho 2020) (finding that, despite "differing viewpoints about how federal lands are to be managed, . . . the record contains compelling evidence that BLM made an intentional decision to limit the opportunity for (and, in some circumstances, to preclude entirely) contemporaneous public involvement in decisions concerning whether to grant oil and gas leases on federal lands"); *id.* ("Here, BLM inescapably intended to reduce and even eliminate public participation in the future decision-making process."); *id.* at 1073–74 (finding that the BLM "jettisoned prior processes, practices and norms in favor of changes that emphasized economic maximization—to the detriment, if not outright exclusion of pre-decisional opportunities for the public to contribute to the decision-making process affecting management of public lands"); *id.* at 1074 (concluding that the BLM "reduc[ed] or eliminat[ed] public involvement in the oil and gas leasing process *because* such public involvement hindered the oil and gas production industry").

355. 5 U.S.C. app. 2. § 2(b)(2)–(3) (2018).

356. Courts have split on whether FACA's requirement that advisory committees reflect a fair balance of points of view is reviewable. *Compare* Union of Concerned Scientists v. Wheeler, 954 F.3d 11, 19 (1st Cir. 2020) (reviewable) *with* Pub. Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods, 886 F.2d 419, 429–30 (D.C. Cir. 1989) (unreviewable). This and the other recommendations set forth in this Conclusion presume a functioning legislative branch.

357. *See, e.g.*, Dana L. Gold, *Introduction: Speaking Up for Justice, Suffering Injustice: Whistleblower Protection and the Need for Reform*, 11 SEATTLE J. FOR SOC. JUST. 555, 559 (2013) ("Despite the undeniably important role that whistleblowers play in service

decision-makers such as adjudicatory officials can be enhanced,[358] and good-cause removal restrictions for agency officials (to the extent that Article II's vesting and take care clauses allow) can be imposed to prevent the firing of agency officials simply because they are not willing to implement administration policy. The deterrent impact of judicial review can be increased if courts are willing to impose strong remedies for administrative misconduct.[359]

What is urgently needed is a reinvigoration of the system of checks and balances that has served the nation throughout history to prevent abuses of executive power. Sometimes, the system has failed, and Congress has asserted itself anew. It did so in the wake of the abuses of presidential power that occurred during the Nixon presidency.[360] It pursued a series of statutory reforms,[361] some of which have stood the test of time better than others.[362]

The misuse of executive power, such as through the illustrative strategies described in this Article, calls for a similar search for innovative solutions now. One possibility may be to enhance the independence of inspectors general from the agencies whose work they oversee and from presidential oversight, whim, and intimidation.[363] Legislation introduced in 2020, for example, would establish seven-

---

of promoting justice and accountability, the legal protections that exist to support employees of conscience largely fail to either encourage employees to serve as enforcement mechanisms for existing laws or to protect them if they suffer retaliation for raising concerns.").

358. *See* Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. (forthcoming 2020) (suggesting adoption of the central panel model for appointment of federal administrative law judges).

359. *See* Glicksman & Hammond, *supra* note 21, at 1686–1711 (discussing remedies such as fee-shifting, specific injunctions, reinstatement of repealed agency regulation, and contempt penalties).

360. *See* Philip A. Lacovara, *Watergate: Next Time, Will We Be So Lucky? Watergate and the Constitution*, 88 YALE L.J. 659, 660 (1979) (identifying as "the real lesson of Watergate . . . the inadequacy of the means available for controlling abuses of power—specifically the lack of a viable impeachment mechanism").

361. These included amendments to FOIA, Pub. L. No. 93-502, 88 Stat. 1561 (1974); the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976); and the Ethics in Government Act of 1978, Pub. L. No. 95-521, tit. VII, 92 Stat. 1824 (1978).

362. *See* Stanley I. Kutler, *In the Shadow of Watergate: Legal, Political, and Cultural Implications*, 18 NOVA L. REV. 1743, 1744 (1994) ("[T]he perceived abuses of power during the Nixon presidency led to various 'reforms,' ranging from attempts to institutionalize the special prosecutor, to curbs on presidential manipulation of executive agencies for personal political gain, to new campaign-financing laws."); *cf.* Neil Kinkopf, *Is It Better to Be Loved or Feared? Some Thoughts on Lessons Learned from the Presidency of George W. Bush*, 4 DUKE J. CONST. L. & PUB. POL'Y 45, 55 (2009) ("Watergate, however, provides a cautionary example. In the wake of that scandal, a wave of reforms swept over Washington. Congress enacted a vast array of legislation to prevent executive abuses of power. Yet here we are thirty years later, worrying about the same issues.").

363. *See, e.g.*, P'SHIP FOR PUB. SERV., WALKING THE LINE: INSPECTORS GENERAL BALANCING INDEPENDENCE AND IMPACT (2016), https://ourpublicservice.org/wp-content/uploads/2019/02/Walking-the-Line.pdf.

The authority and responsibilities of agency inspectors general are governed by the Inspector General Act of 1978. 5 U.S.C. app. §§ 1–13 (2018). *See generally* PAUL C.

year terms for inspectors general and restrict their removal to good cause to restrain politically motivated firing.[364] Proponents of good government should be searching for similar fixes to bad faith and destructive governance such as that reflected in the Trump Administration's operation of shuttered government.

LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY (1993).

364. Inspectors General Independence Act of 2020, S. 3664, 116th Cong. (2020); *see also* Inspectors General Independence Act of 2020, H.R. 6668, 116th Cong. (2020); Courtney Bublé, *Proposed Legislation Seeks to Protect Inspectors General From Political Firings*, GOV'T EXEC. (Apr. 10, 2020), https://www.govexec.com/oversight/2020/04/proposed-legislation-seeks-protect-inspectors-general-political-firings/164519/.