April 25, 2025

The Honorable Lee M. Zeldin
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Zeldin:

We applaud your efforts to reform the Environmental Protection Agency through the Powering the Great American Comeback initiative. In his 2025 Joint Address to Congress, President Trump prioritized work to protect the taxpayers' interests, including the EPA's collaboration with the Department of Justice to review recent Agency actions. We also applaud EPA's multitude of announcements on reviewing the Endangerment Finding, Clean Power Plan, MATS, PM 2.5, ELG for steam electric power, OOOO, WOTUS, NESHAPs, and many others.

As you undo regulatory overreach and bring the Agency's activities in line with its statutory mandates, we write to bring additional information to your attention. We ask, based on troubling information in the public domain (which is almost certainly also supported in the Agency's internal files) that you formally confess to the courts certain errors the Agency made under your predecessors' leadership.

We suggest two significant, methodical transgressions by the prior administration in advancing and defending its regulatory overreaches which particularly warrant a confession of error. By citing documentary evidence previously withheld from the courts, the administration can efficiently and durably rescind improperly promulgated rules by confessing error while avoiding what is historically drawn-out litigation over claims of procedural imperfections when an agency attempts recission solely by means of actions published in the Federal Register.

Specifically, we address what the previous administration called its “suite of standards,"[1] which expressly aimed to force the premature retirement of power generation facilities as a means of reducing greenhouse gas emissions.[2] As former Administrator Michael Regan said when these rules were all finalized:

> “The industry gets to take a look at this suite of rules all at once and say, 'Is it worth doubling down on investments in this current facility or operation, or should we look at the cost and say no, it's time to pivot and invest in a clean energy future?”

The current Administration has already denounced these policies, with President Trump specifically invoking the unfolding electricity reliability crisis in declaring an energy emergency. Some of these rules facially present “major questions” in seeking to impose an ideological national energy policy rather than merely implement existing statutory authority. Taking former Administrator Regan at his word that the entire “suite of rules” was issued to force generation shifting for reasons of climate policy, all of these rules individually and collectively merit major questions review. On this same basis, they each run afoul of *West Virginia v. EPA*. Unfortunately, the courts were not presented with the evidence necessary to confront this because the prior administration hid the ball.

The former administration failed to reveal its true objective in the respective administrative records; some filings went so far as to deny the motivations for the “suite” of rules as confessed by former Administrator Regan in media interviews.[3] Similarly, the administrative records' silence on the rules' true purpose shielded these rules from scrutiny of another related and fatal

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[1] https://www.epa.gov/newsreleases/biden-harris-administration-finalizes-suite-standards-reduce-pollution-fossil-fuel. The Agency’s Biden-era overreaches include the tightened “MATS” standard and its replacement rule for the Clean Power Plan (following the Obama EPA’s regulation limiting carbon dioxide emissions from power plants being vacated by the Supreme Court in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022)). This campaign of using a cascade of rules to force “expedited retirement” of power plants also includes EPA’s tightened PM NAAQS, See *Commonwealth of Kentucky, et al v. EPA, et al*. (D.C. Cir. Case #24-1050, Document #2058290, June 6, 2024; EPA-89FR16202, litigation over EPA’s “Reconsideration of the National Ambient Air Quality Standards for Particulate Matter,” 89 Fed. Reg. 16202 (Mar. 6, 2024)). They also include and coal ash and water effluent standards under non-Clean Air Act regimes. This is despite the Supreme Court’s admonitions in *Michigan v. EPA*, 576 U.S. 743 (2015) against revising public-health regulation for climate-policy reasons, and particularly when seeking to force generation-shifting which, per *West Virginia*, is an improper objective for EPA.

[2] “The industry gets to take a look at this suite of rules all at once and say, ‘Is it worth doubling down on investments in this current facility or operation, or should we look at the cost and say no, it’s time to pivot and invest in a clean energy future?’” Regan told reporters after his keynote address.” Jean Chemnick, Mike Lee, “What the EPA’s New Plans for Regulating Power Plants Mean for Carbon: Administrator Michael Regan argues regulation of mercury, ozone, water and coal ash will also curb greenhouse gases,” Scientific American, March 11, 2022, https://www.scientificamerican.com/article/what-the-epas-new-plans-for-regulating-power-plants-mean-for-carbon/.

[3] For example, see, Brief of Government Accountability & Oversight as Amicus Curiae in Support of Petitioners, *Kentucky et al. v EPA et al.*, D.C. Cir. 24-1050 Document #2048332 April 5, 2024, at pp. 4-5.

impropriety, which is the pretext confessed to in public by the Agency's then-Administrator quoted above. As such, each of the same "suite of rules" violates the rule against pretext, as reaffirmed by the Supreme Court in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019) (remanding a rule where the evidence tells a story that does not match the secretary's explanation for his decision).[4]

Challengers to EPA regulations have raised major questions violations, or the admission of impermissible pretext. But only the Agency itself can confess error and address the fatally flawed administrative record built by bureaucrats on a foundation of pretext.

Based on records made public through FOIA, there is already a strong indication that the Agency possesses contemporary written discussions of this plan to use these rules collectively to force facility-shifting as described by the then-Administrator in the above quote.[5] A review of the internal record is certainly in order based on what is already in the public domain. Even given just that information, to protect the integrity of the rulemaking process and hopefully guard against further adventurism in the future vacatur is not merely appropriate but imperative. A durable vacatur, and avoidance of unnecessary delay and uncertainty, requires confessing this error.

This tendency by the courts to find procedural fault in regulations rescinded only by way of the Federal Register promises years of litigation and uncertainty in for your efforts to reconsider EPA regulations.[6] Even when reversals eventually succeed, delay through litigation can often prove fatal; the previous Trump administration's experience with re-permitting the Keystone XL pipeline comes to mind.

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[4] We write fully aware of the history of courts refusing to allow remand and vacatur, or rescission, by ruling that replacement of one administrative act with another failed to satisfy procedural requirements and ordering that rules remain in place. For example, the Obama administration famously asked a court to remand and vacate a late-hour Bush administration regulation of mining activities near streams. In *NPCA v Salazar,* 660 F. Supp. 2d 3 (D.D.C. 2009), the D.C. District Court declined, stating that while the new Secretary confessed error he did so "point[ing] to no new evidence." *See Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.D.C. 1993) (holding that where there was significant new evidence, a remand was appropriate).

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[5] We note that heavily redacted records suggest this approach, called "law whispering" by its practitioners, began almost immediately upon the previous administration assuming office. See "Law Whispering is Dead. Long Live Law Whispering!," February 28, 2023, https://govoversight.org/law-whispering-is-dead-long-live-law-whispering/, and Power Point slide show linked therein, at https://govoversight.org/wp-content/uploads/2023/02/October-2022-Release-ED_006414_00000550_Formal_RWR.pdf.

[6] We also note the industry dedicated to ensuring such delays, through litigation. See, e.g., Daniel Lyons, "The Administrative Law of Deregulation: The Long Road for the Trump Administration to Undo Obama-Era Regulations," Boston Bar Association, August 9, 2017, https://bostonbar.org/journal/the-administrative-law-of-deregulation-the-long-road-for-the-trump-administration-to-undo-obama-era-regulations/; Telis Demos, Jinjoo Lee, David Wainer, "Not All Trump 2.0 Regulatory Initiatives Will Survive—Here's Why," Wall Street Journal, Nov. 24, 2024, https://www.wsj.com/politics/policy/not-all-trump-2-0-regulatory-initiatives-will-surviveheres-why-aab33ab3 . See also *Department of Homeland Security v. Regents of Univ. of Cal.*, 591 U.S. 1 (2020) (DACA).

Reviewing the Agency's internal record is a responsible step in reconsidering any prior action. For example, emails and privilege logs of randomly selected (by EPA) withheld-in-full records from Freedom of Information Act litigation suggest that the December 2009 "Endangerment finding"[7] was the product of unalterably closed minds. Further, the logs and emails raise questions about what EPA told the Office of Inspector General about the origins and timeline of the Endangerment Finding, when that Office's inquiry concluded the Endangerment Finding failed certain procedural requirements.[8] That is, there is a sound basis for believing there was no realistic chance the process would achieve any other outcome, in violation of the Administrative Procedure Act. Other information suggests that the Agency also sanitized internal expert comments deemed not helpful to EPA's rules, for example whether the technology underpinning the "Clean Power Plan 2.0" has in fact been "adequately demonstrated." All such violations of the rulemaking process must be included in any action rescinding these rules in order to ensure these reversals are durable.

If you have any questions, please do not hesitate to contact us. It is our hope that, after examining the record, you will agree that the most effective, efficient, and durable approach to reforming regulatory overreach is to admit and document for the courts this pattern of error.

Sincerely,

Thomas Pyle
American Energy Alliance

Daren Bakst
Competitive Enterprise Institute

Phil Kerpen
American Commitment

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[7] Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, December 7, 2009, Docket ID No. EPA-HQ-OAR-2009-0171, https://www.epa.gov/sites/default/files/2021-05/documents/federal_register-epa-hq-oar-2009-0171-dec.15-09.pdf.

[8] U.S. EPA Office of Inspector General*, Procedural Review of EPA's Greenhouse Gases Endangerment Finding Data Quality Processes,* Sept. 26, 2011, https://www.epa.gov/sites/default/files/2015-10/documents/20110926-11-p-0702.pdf.