

August 26, 2019

**Attention: Docket ID No. CEQ-2019-0002 “Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions”**

**Re: Comments on the White House Council on Environmental Quality’s proposed guidance on consideration of greenhouse gas emissions under the National Environmental Policy Act**

**I. Introduction**

On August 1, 2016, the White House Council on Environmental Quality (CEQ) finalized guidance<sup>1</sup> on how federal agencies should consider the effects of greenhouse gas (GHG) emissions and climate change when evaluating proposed federal actions in accordance with the National Environmental Policy Act (NEPA). On March 28, 2017, President Trump issued an executive order entitled “Promoting Energy Independence and Economic Growth” which revoked numerous “energy and climate-related presidential and regulatory actions” including the August 1, 2016 NEPA GHG guidance (hereinafter previous NEPA GHG guidance).<sup>2</sup>

On June 26, 2019, CEQ issued proposed guidance to replace the previous NEPA GHG guidance revoked by President Trump’s executive order.<sup>3</sup> The proposed guidance would weaken analysis of project-related GHG emissions and alternative mitigation measures by, among other things, dropping the recommendation that agencies quantify a project’s direct and indirect GHG emissions, recommending against a cumulative analysis of GHG emissions, eliminating a recommendation that agencies consider alternatives to mitigate project-related GHG emissions, and stating that agencies should not attempt to monetize the costs associated with project-related GHG emissions and should not use the SCC in any sort of cost-benefit analysis.<sup>4</sup>

The proposed guidance is yet another example of the regulatory capture of the Trump administration by the fossil fuel industry. It ignores scientific, economic, and technical expertise on the costs of carbon pollution in order to cater to the interests of the fossil fuel industry to which the Trump administration is professionally, financially, and politically tied. This comment summarizes the evidence supporting the economic risks of climate change, catalogues

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<sup>1</sup> Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 81 FR 51866, *available at* [https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/nepa\\_final\\_ghg\\_guidance.pdf](https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf)

<sup>2</sup> Executive Order 13783, 82 FR 16093, *available at* <https://www.govinfo.gov/content/pkg/FR-2017-03-31/pdf/2017-06576.pdf>

<sup>3</sup> Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 84 FR 30097, *available at* <https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13576.pdf>

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

the numerous states, companies, and court decisions that support or require monetizing the cost of carbon pollution (often by using the social cost of carbon), and documents the deep and broad ties between the Trump administration and the fossil fuel industry. Measured against these facts, the proposed guidance is arbitrary and capricious in that it is not the product of reasoned decision-making. In addition, the proposed guidance is the product of agency capture by the fossil fuel industry; the facts never had a chance. For both of these reasons, it should be withdrawn.

## II. Facts

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

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

Warnings about a collapse in coastal property values have been issued by organizations as disparate as Freddie Mac,<sup>5</sup> the industry publication *Risk & Insurance*,<sup>6</sup> and the Union of Concerned Scientists.<sup>7</sup> Freddie Mac warns:

While technical solutions may stave off some of the worst effects of climate change, rising sea levels and spreading flood plains nonetheless appear likely to destroy billions of dollars in property and to displace millions of people. The economic losses and social disruptions may happen gradually, but they are likely to be greater in total than those experienced in the housing crisis and the Great Recession.<sup>8</sup>

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<sup>5</sup> "Life's a Beach," Freddie Mac (April 25, 2016), [http://www.freddiemac.com/research/insight/20160426\\_lifes\\_a\\_beach.html](http://www.freddiemac.com/research/insight/20160426_lifes_a_beach.html)

<sup>6</sup> Dan Reynolds, "Coastal Mortgage Value Collapse," *Risk & Insurance* (April 7, 2017), <http://riskandinsurance.com/coastal-mortgage-value-collapse/>

<sup>7</sup> Dahl, et al., "Underwater: Rising Seas, Chronic Floods, and the Implications for US Coastal Real Estate," Union of Concerned Scientists (June 18, 2018), <https://www.ucsusa.org/sites/default/files/attach/2018/06/underwater-analysis-full-report.pdf>

<sup>8</sup> "Life's a Beach," Freddie Mac (April 25, 2016), [http://www.freddiemac.com/research/insight/20160426\\_lifes\\_a\\_beach.html](http://www.freddiemac.com/research/insight/20160426_lifes_a_beach.html)

The First Street Foundation has already documented that coastal properties are not appreciating as quickly as similarly situated properties less exposed to flood risk. It has calculated that coastal properties from Texas to Maine have already lost almost \$16 billion in value since 2005.<sup>9</sup> Peer-reviewed research focusing on real estate values in Miami-Dade County, Florida has confirmed that a spread is now emerging between the growth in inland and coastal property values.<sup>10</sup> This sort of growing spread between coastal and inland real estate prices is precisely what one would expect to see prior to an eventual crash.

With respect to the risk of stranded fossil fuel assets, one recent economic paper reports that “economic literature combined with industry practices suggest the presence of persistent market inefficiencies for fossil fuel reserves, so these assets are likely to be stranded and mispriced, i.e. a carbon bubble exists ....”<sup>11</sup> Another economic paper finds that “the magnitude of ... stranded assets of fossil fuel companies (in a 2 degrees C economy) has been estimated to be around 82% of global coal reserves, 49% of global gas reserves, and 33% of global oil reserves.”<sup>12</sup> That’s 82% of global coal reserves gone, wiped off the balance sheets; 49% of global gas reserves, gone; and 33% of global oil reserves gone. The market value of fossil fuel reserves that can’t be burned is “around \$20 trillion,” according to the World Bank.<sup>13</sup> A study done by the European think tank CEPS predicts that “fossil fuel companies altogether would see their market value fall by half.”<sup>14</sup>

The Bank of England in an official statement has warned, “investments in fossil fuels and related technologies . . . may take a huge hit.”<sup>15</sup> And a recent report from 34 central bank presidents warned that “estimates of losses [...] are large and range from \$1 trillion to \$4 trillion when considering the energy sector alone, or up to \$20 trillion when looking at the economy more

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<sup>9</sup> Texas to Maine: Rising Seas Erode \$15.9 Billion in Relative Home Values, First Street Foundation, *available at* <https://firststreet.org/>

<sup>10</sup> See, e.g., Jesse M. Keenan, et al., “Climate gentrification: from theory to empiricism in Miami-Dade County, Florida,” 2018 *Environ. Res. Lett.* 13 054001, <http://iopscience.iop.org/article/10.1088/1748-9326/aabb32/pdf>

<sup>11</sup> Thomas Lee, “Fossil Fuel Stranded Assets: Efficient Market or Carbon Bubble,” Penn Wharton Public Policy Initiative (April 12, 2017), <https://publicpolicy.wharton.upenn.edu/live/news/1807-fossil-fuel-stranded-assets-efficient-market-or>

<sup>12</sup> Battiston, et al., “A climate stress-test of the financial system,” *Nature Climate Change* (March 27, 2017), <https://www.nature.com/articles/nclimate3255>

<sup>13</sup> Vladimir Stenek, “Carbon Bubbles & Stranded Assets,” The World Bank (June 3, 2014), <http://blogs.worldbank.org/climatechange/carbon-bubbles-stranded-assets>

<sup>14</sup> Jorge Núñez Ferrer and Pavel Kiparisov, Can the Carbon Bubble become a serious Financial Bubble,” CEPS Energy Climate House, <http://ceps-ech.eu/sites/default/files/Carbon%20Bubble%20background%20briefing%20paper.pdf>

<sup>15</sup> Paul Fisher, “Confronting the challenges of tomorrow’s world,” Bank of England (March 3, 2015), <https://www.bankofengland.co.uk/-/media/boe/files/speech/2015/confronting-the-challenges-of-tomorrows-world.pdf?la=en&hash=DA7050DCC625A7127875DA88665B67094914CB2B>

broadly.”<sup>16</sup> This makes the risk of a carbon bubble not just a risk to fossil fuel investors, but a systemic risk that could result in trillions of losses to the broader economy. A stress test of European financial institutions revealed that some were alarmingly exposed to fossil fuel assets and could be at risk should these assets plunge in value.<sup>17</sup> Indeed, the Bank of England has become so concerned about systemic risk associated with stranded fossil fuel assets that it recently ordered the life insurers it regulates to perform stress tests including a stranded fossil fuel asset scenario.<sup>18</sup>

Economists studying stranded assets warn that high-cost producer regions like the U.S. could “lose almost their entire oil and gas industry.”<sup>19</sup> And because the risk is systemic, the consequences would extend well beyond the fossil fuel industry, including a greater than five percent decline in U.S. GDP and millions of lost jobs.<sup>20</sup> Critically, the economic consequences to the American economy are predicted to be worse “if it continues to promote fossil fuel production and consumption [rather] than if it moves away from them.”<sup>21</sup>

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

- The Fourth National Climate Assessment, a compendium of the best, most up to date knowledge on climate change, produced by 13 federal agencies, states that “with continued growth in emissions at historic rates, annual losses in some economic sectors are projected to reach hundreds of billions of dollars by the end of the century—more than the current gross domestic product (GDP) of many U.S. states.”<sup>22</sup>
- Standard & Poor’s warns “global warming of 3 degrees Celsius is likely to cost us 2% of global output. ... [W]e might even be underestimating the costs of climate change. ... [T]he higher the temperature, the more damaging climate change will be – and in a nonlinear way.”<sup>23</sup>

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<sup>16</sup> “A call for action: Climate change as a source of financial risk,” Network for Greening the Financial System (April 2019), available at [https://www.banque-france.fr/sites/default/files/media/2019/04/17/ngfs\\_first\\_comprehensive\\_report\\_-\\_17042019\\_0.pdf](https://www.banque-france.fr/sites/default/files/media/2019/04/17/ngfs_first_comprehensive_report_-_17042019_0.pdf)

<sup>17</sup> Battiston, et al., “A climate stress-test of the financial system,” *Nature Climate Change* (March 27, 2017), <https://www.nature.com/articles/nclimate3255>

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

<sup>19</sup> Mercure, et al., “Macroeconomic impact of stranded fossil fuel assets,” *Nature Climate Change* (June 4, 2018), <https://www.nature.com/articles/s41558-018-0182-1>

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

<sup>21</sup> *Id.*

<sup>22</sup> Fourth National Climate Assessment, available at <https://nca2018.globalchange.gov/downloads/>

<sup>23</sup> “Why it May Make Economic Sense to Tackle Global Warming,” Standard & Poor’s (Dec. 5, 2018), <https://www.spglobal.com/en/research-insights/articles/why-it-may-make-economic-sense-to-tackle-global-warming>

- The 34 central bank presidents who comprise the Network for Greening the Financial System write, “Estimates suggest that absent action to reduce emissions, the physical impact of climate change on the global economy in the second half of the century will be substantial. The more sophisticated studies suggest average global incomes may be reduced by up to a quarter by the end of the century.”<sup>24</sup>
- Blackrock warns “some 58% of U.S. metro areas would see likely [annual] GDP losses of up to 1% or more, with less than 1% set to enjoy gains of similar magnitude. Florida tops the danger zones, with Naples, Panama City and Key West seeing likely annual GDP losses of up to 15% or more.”<sup>25</sup>
- Citigroup estimates that cumulative losses from climate change will be up to 2.5 percent of global GDP or \$72 trillion through 2060 for a temperature increase of 2.5 degrees Celsius. Losses may balloon to 5 percent of GDP if carbon emissions continue to increase after 2060.<sup>26</sup>
- Peer-reviewed economic research suggests that “the approximate global potential loss is estimated to be US\$ 9,593.71 billion or roughly 3% of the 2100 world GDP for 3°C global warming. At 4°C, losses from global warming increase significantly to US\$ 23,149.18 billion.”<sup>27</sup>
- The United States Department of Agriculture Economic Research Service found that if GHG are not abated, production of U.S. corn and soybeans could decline as much as 80% in the next 60 years. This decline in production, would increase crop insurance \$7.6 billion a year for corn and \$3.3 billion for soybeans.<sup>28</sup>

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

## **B. A broad consensus exists that the cost of carbon pollution should be monetized**

<sup>24</sup> “A call for action: Climate change as a source of financial risk,” Network for Greening the Financial System (April 2019), available at [https://www.banque-france.fr/sites/default/files/media/2019/04/17/ngfs\\_first\\_comprehensive\\_report\\_-\\_17042019\\_0.pdf](https://www.banque-france.fr/sites/default/files/media/2019/04/17/ngfs_first_comprehensive_report_-_17042019_0.pdf)

<sup>25</sup> “Getting physical: assessing climate risks,” BlackRock (April 4, 2019), <https://www.blackrock.com/us/individual/insights/blackrock-investment-institute/physical-climate-risks#electric-utilities>

<sup>26</sup> “Energy Darwinism II: Why a Low Carbon Future Doesn’t Have to Cost the Earth,” Citigroup (Aug. 2015), <https://ir.citi.com/hsq32J11m4alzieMqH8sBkPnbsqfnwv4Jgb1J2kJPYWIw5eM8vD3FY9VbGpK%3Baax>

<sup>27</sup> Kompass, et al., “The Effects of Climate Change on GDP by Country and the Global Economic Gains From Complying With the Paris Climate Accord,” *Earth’s Future* (July 13, 2018), <https://agupubs.onlinelibrary.wiley.com/doi/full/10.1029/2018EF000922>

<sup>28</sup> Crane-Droesch et al., “Climate Change and Agricultural Risk Management into the 21<sup>st</sup> Century,” United States Department of Agriculture (July 2019), [https://www.ers.usda.gov/webdocs/publications/93547/err266\\_summary.pdf?v=9932.1&mod=article\\_inline](https://www.ers.usda.gov/webdocs/publications/93547/err266_summary.pdf?v=9932.1&mod=article_inline)

A growing number of state governments and agencies as well as foreign governments have determined that the cost of carbon pollution should be monetized. Most often, these entities have embraced the social cost of carbon (SCC) as an appropriate tool to assist them in calculating the costs associated with additional carbon emissions as well as the benefits of foregone emissions. Many businesses have done the same for internal reckoning. In addition, numerous federal court decisions hold that the cost of carbon pollution must be monetized.

At the state level, the New York Public Service Commission and Illinois state legislature have incorporated a SCC estimate into their zero-emission credit (ZEC) programs. The New York ZEC program bases its SCC value on the U.S. Interagency Working Group on the Social Cost of Carbon (IWG).<sup>29</sup> New Jersey enacted a clean energy standard that utilizes the SCC.<sup>30</sup> Like New York, the New Jersey program incorporated payments for its existing nuclear fleet using IWG values as its baseline for generating payments.<sup>31</sup>

Decisions from the Minnesota, Washington, and Colorado energy regulators also support the use of SCC estimates in evaluating potential infrastructure projects.<sup>32</sup> Since 1993, the Minnesota Public Utilities Commission has required utilities to consider the estimated cost of carbon emissions in planning for new infrastructure projects. In 2017, the commission voted to raise its SCC to \$43 per ton.<sup>33</sup> The Colorado Public Utilities Commission recently ordered the local utility Xcel to use the SCC in its resource planning documents. Colorado told its utilities to use \$43 per ton starting in 2022 and to ramp up to nearly \$70 per ton by 2050.<sup>34</sup> The Washington Utilities and Transportation Commission directed its utilities to use the SCC<sup>35</sup> as developed by the IWG in its planning documents for new approvals.

Companies in the United States and around the globe are likewise incorporating the SCC into their own operations and accounting. *The Washington Post* reported that 1,200 global businesses

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<sup>29</sup> Interagency Working Group on Social Cost of Carbon, Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (2016), [https://www.epa.gov/sites/production/files/2016-12/documents/sc\\_co2\\_tsd\\_august\\_2016.pdf](https://www.epa.gov/sites/production/files/2016-12/documents/sc_co2_tsd_august_2016.pdf)

<sup>30</sup> Gavin Bade, "New Jersey passes bills for nuke subsidies, 50% RPS, 2 GW storage target," *Utility Dive* (April 13, 2018), <https://www.utilitydive.com/news/new-jersey-passes-bills-for-nuke-subsidies-50-rps-2-gw-storage-target/521314/>

<sup>31</sup> N.J. Stat. Ann. § 48:3-87.3 (West) ("The social cost of carbon, as calculated by the U.S. Interagency Working Group on the Social Cost of Carbon in its August 2016 Technical Update, is an accepted measure of the cost of carbon emissions. Carbon emissions avoided by selected nuclear power plants are but one component of their emissions avoidance benefits")

<sup>32</sup> Peter Fairley, "States are Using the Social Cost of Carbon in Energy Decisions, Despite Trump's Views," *Inside Climate News* (Aug. 14, 2017), <https://insideclimatenews.org/news/11082017/states-climate-change-policy-calculate-social-cost-carbon>

<sup>33</sup> *Id.*

<sup>34</sup> *See id.*

<sup>35</sup> "Energy regulators want closer look at utilities' coal plant costs," Wash. Util. & Transp. Comm'n (May 7, 2018), <https://www.utc.wa.gov/aboutUs/Lists/News/DispForm.aspx?ID=527>

either have adopted or are adopting a carbon price in some form.<sup>36</sup> The Center for Climate and Energy Solutions found that companies like Microsoft, Disney, Swiss Re, Unilever, Shell, BP, Rio Tinto, and General Motors have all taken steps to put a price on their own use of carbon.<sup>37</sup> Even oil giants like ExxonMobil factor a SCC into their planning and accounting.<sup>38</sup> What's more, investors are beginning to demand that corporations perform this kind of carbon pricing analysis.<sup>39</sup>

Overseas, regulators in industrialized nations such as Canada and the United Kingdom require their departments and agencies to conduct cost-benefit analysis taking into consideration GHG emission changes and effects.<sup>40</sup> In Canada, the SCC is not only being used by all federal departments in regulatory analyses, but also by some provinces. In 2016, Canada published its first official guidance on how the SCC was to be used in cost-benefit analyses, and adopted the IWG SCC estimate.<sup>41</sup> The United Kingdom's Treasury Green Book provides a range of carbon values to be used in policy decisions and project evaluations.<sup>42</sup> The Green Book also requires a comprehensive set of reporting requirements regarding climate change impacts.<sup>43</sup>

Numerous federal courts have concluded that climate change must be considered in an environmental impact statement as an adverse effect.<sup>44</sup> These courts have held that agencies

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<sup>36</sup> Sophie Yeo, "General Motors, Disney, Shell and 1,200 other companies are taking steps to fight climate change, report says," *The Washington Post* (Sept. 12, 2017), [https://www.washingtonpost.com/news/energy-environment/wp/2017/09/12/general-motors-disney-shell-and-1200-other-companies-are-taking-steps-to-fight-climate-change-report-says/?utm\\_term=.679ec41b9dc7](https://www.washingtonpost.com/news/energy-environment/wp/2017/09/12/general-motors-disney-shell-and-1200-other-companies-are-taking-steps-to-fight-climate-change-report-says/?utm_term=.679ec41b9dc7)

<sup>37</sup> Manjyot Bhan Ahluwalia, "The Business of Pricing Carbon," Center for Climate and Energy Solutions (2017), <https://www.c2es.org/site/assets/uploads/2017/09/business-pricing-carbon.pdf>

<sup>38</sup> Benjamin Hulac, "This is how an oil giant uses an internal carbon pricing," *E&E News* (June 15, 2017), <https://www.eenews.net/stories/1060056076>

<sup>39</sup> "Companies are moving faster than many governments on Carbon Price," *The Economist* (Jan. 11, 2018), <https://www.economist.com/business/2018/01/11/companies-are-moving-faster-than-many-governments-on-carbon-pricing>

<sup>40</sup> "Selecting a Value for CO2 Emissions of Government of Canada Regulatory Impact Analysis Statements," Environment Canada (2011), <http://www.ec.gc.ca/cc/default.asp?lang=En&n=BE705779-1>

<sup>41</sup> Warren Goodlet, "Canada's Approach on the Social Cost of Greenhouse Gases," Environment and Climate Change Canada, (June 14, 2017),

[https://sites.nationalacademies.org/es/groups/dbasse/site/documents/webpage/dbasse\\_180944.pdf](https://sites.nationalacademies.org/es/groups/dbasse/site/documents/webpage/dbasse_180944.pdf)

<sup>42</sup> "Updated Short-Term Traded Carbon Values 2," U.K. Dep't for Business, Energy & Industrial Strategy (2018), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/671194/Updated-short-term-traded-carbon-values-for-appraisal-purposes.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/671194/Updated-short-term-traded-carbon-values-for-appraisal-purposes.pdf)

<sup>43</sup> "Valuation of Energy Use and Greenhouse Gas," U.K. Dep't for Business, Energy & Industrial Strategy (2018), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/671205/Valuation\\_of\\_energy\\_use\\_and\\_greenhouse\\_gas\\_emissions\\_for\\_appraisal\\_2017.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/671205/Valuation_of_energy_use_and_greenhouse_gas_emissions_for_appraisal_2017.pdf)

<sup>44</sup> See, e.g., *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008); *High Country Conservation Advocates v. Forest Service*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014); *Border Power Plant Working Grp. v. U.S. Dep't of Energy*, 260 F. Supp. 2d 997, 1028-29 (S.D. Cal. 2003). Courts have also directed agencies to better quantify the upstream and downstream emissions coming from energy projects. In New Mexico, *San Juan Citizens Alliance v. United States Bureau of Land Management*, 586 F. Supp. 2d 1270 (D.N.M. 2008), a federal district court found that NEPA requires the BLM to consider the "upstream" and "downstream" and cumulative emissions from the use of fuel produced from the oil and gas production on public lands. The court decision stated, "an agency must first prepare a draft EIS in which it evaluates the proposed action

must present costs and benefits fairly and cannot selectively monetize benefits without monetizing related costs, and that using a SCC is an appropriate way of monetizing costs for climate change. No court has concluded that the SCC is not legitimate simply because there is no precise consensus value; a reasonable, principled, and sincere effort ought to yield a result that survives judicial scrutiny.<sup>45</sup> While values may be open to debate, zero is clearly a wrong answer.

In 2006, the National Highway Transportation Safety Administration (NHTSA) promulgated a rule for vehicle fuel economy standards that failed to monetize the costs of carbon emissions from vehicles, arguing that the values were too uncertain. In 2007, the U.S. Court of Appeals for the Ninth Circuit rejected NHTSA's uncertainty argument, finding that the cost of carbon pollution is "certainly not zero"<sup>46</sup> and its "decision not to monetize the benefit of carbon emissions reduction was arbitrary and capricious."<sup>47</sup> Specifically, it was arbitrary to "assign no value to *the most significant benefit* of more stringent [vehicle fuel efficiency] standards: reduction in carbon emissions."<sup>48</sup> As the court found, it is arbitrary to "put a thumb on the scale by undervaluing the benefits and overvaluing the costs."<sup>49</sup>

Since that decision, additional federal courts have come to similar conclusions. The U.S. Court of Appeals for the Tenth Circuit told the Bureau of Land Management (BLM) that its analysis of GHG emissions was arbitrary and capricious when it concluded that issuance of four coal leases in Wyoming's Powder River Basin would not result in higher national greenhouse gas emissions than declining the leases.<sup>50</sup> In *High Country Conservation Advocates v. Forest Service*, the U.S. District Court of Colorado found that it was "arbitrary and capricious to quantify the *benefits* of [coal] lease modifications and then explain that a similar analysis of the *costs* was impossible when such an analysis was in fact possible. . . ."<sup>51</sup> In that instance the agency had "weighed several specific economic benefits—coal recovered, payroll, associated purchases of supplies and services, and royalties,"<sup>52</sup> but arbitrarily failed to monetized climate costs using the readily

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and its direct, indirect, and cumulative impact on the environment." *Id.* at 1279. A federal court in Montana earlier this year also ruled against an Interior Department plan to open more than 15 million acres of public land and mineral rights to fossil fuel extraction, concluding the government failed to adequately consider how the oil, gas and coal development would affect the climate and other environmental resources. See *W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, 2018 WL 1475470 (D. Mont. 2018). Specifically, the decision notes that "NEPA requires BLM to consider in the EIS the environmental consequences of the downstream combustion of the coal, oil and gas resources potentially open to development under these RMPs." *Id.* at \*13.

<sup>45</sup> See *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357 (D.C. Cir. 2017).

<sup>46</sup> *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 508 F.3d 508, 533 (9th Cir. 2007).

<sup>47</sup> *Id.* at 535.

<sup>48</sup> *Id.* at 531.

<sup>49</sup> *Id.*

<sup>50</sup> See *WildEarth Guardians v. United States Bureau of Land Mgmt.*, 870 F.3d 1222, 1240 (10th Cir. 2017).

<sup>51</sup> *High Country Conservation Advocates v. United States Forest Serv.*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014).

<sup>52</sup> *Id.* at 1190.



available SCC.<sup>53</sup> Likewise, in *Montana Environmental Information Center v. Office of Surface Mining*, the U.S. District Court of Montana found that it was arbitrary and capricious for an agency to quantify the benefits of action (such as employment payroll, tax revenue, and royalties) while failing to use the SCC to quantify the costs.<sup>54</sup> In 2017, a three-judge panel from the U.S. Court of Appeals for the D.C. Circuit ruled that the Federal Energy Regulatory Commission (FERC) must consider the effects of carbon emissions that would result from a natural gas pipeline project.<sup>55</sup>

Courts have also upheld at least one federal agency's use of the SCC against an industry challenge. In 2016, the U.S. Court of Appeals for the Seventh Circuit upheld the Department of Energy's use of the SCC in the agency's standards for commercial refrigeration equipment.<sup>56</sup> The court rejected most of industry's arguments stating, "DOE conducted a cost-benefit analysis that is within its statutory authority and is supported by substantial evidence. Its methodology and conclusions were not arbitrary or capricious. It also gave appropriate consideration to the rule's effect on small businesses and the role of other agency regulations."<sup>57</sup>

The proposed guidance ignores this growing body of legal precedent.

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

Donald Trump's 2016 was richly funded by the fossil fuel industry. Individuals associated with coal company Murray Energy were his largest source of donations; coal company Alliance Resource Partners was his fifth largest source of donations.<sup>58</sup>

Once Trump was elected, the money began to pour in, and Trump raised a record amount for his inauguration, nearly doubling the previous record.<sup>59</sup> Murray Energy contributed \$300,000, and Hess, Chevron, BP, Citgo, ExxonMobil, Consol Energy, Anadarko Petroleum, Cheniere Energy, Continental Resources, and Valero all made six or seven figure donations.<sup>60</sup> In fact, companies and individuals in the oil & gas and mining sectors were the second largest source of donations

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<sup>53</sup> *See id.*

<sup>54</sup> *See Montana Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074 (D. Mont. 2017), amended in part, adhered to in part sub nom. *Montana Envtl. Info. Ctr. v. United States Office of Surface Mining*, 2017 WL 5047901 (D. Mont. 2017).

<sup>55</sup> *See Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357 (D.C. Cir. 2017).

<sup>56</sup> *See Zero Zone, Inc. v. United States Dep't of Energy*, 832 F.3d 654 (7th Cir. 2016).

<sup>57</sup> *Id.* at 661.

<sup>58</sup> Top contributors, federal election data for Donald Trump 2016 cycle, The Center For Responsive Politics, <https://www.opensecrets.org/pres16/contributors?cycle=2016&id=N00023864&src=c&type=f> (viewed on Aug. 9, 2019)

<sup>59</sup> Trump 2017 Inauguration Donors, The Center For Responsive Politics, <https://www.opensecrets.org/trump/inauguration-donors> (viewed on Aug. 9, 2019)

<sup>60</sup> *Id.*

after the financial services sector, providing a total of more than \$10.4 million to Trump's inaugural committee.<sup>61</sup>

The fossil fuel industry wasn't just a major source of donations for Trump; it also provided him with many of his closest advisors. During his campaign, when most publicly traded companies didn't want to be associated with a candidate famous for making offensive and controversial statements, oil and gas billionaire Harold Hamm created the Trump Leadership Council, a group of business leaders from mostly privately held companies to advise the president.<sup>62</sup> The energy industry was the industrial sector most represented on the Trump Leadership Council, with the heads of Alliance Resource Partners, Baker Hughes (an oil services company), Murray Energy, and Devon Energy all serving on the Council.<sup>63</sup> In addition, the head of the National Association of Manufacturers, a trade association whose membership includes many fossil fuel companies, was also a member of the Council.<sup>64</sup> The Council's influence on Trump was clear, as Trump adopted the fossil fuel industry's talking points about slashing regulations and achieving "complete American energy independence."<sup>65</sup>

Once Trump took office, the fossil fuel industry continued to mold energy and environmental policy. In March of 2017, Murray Energy CEO Bob Murray shopped an "action plan" around to various administration officials. Murray met with Energy Secretary Rick Perry to discuss his deregulatory wish list, and also provided copies of it to Vice President Mike Pence and Environmental Protection Agency (EPA) Administrator Scott Pruitt.<sup>66</sup> Notably, Murray's "action plan" called for repealing the Clean Power Plan and withdrawing from the Paris Agreement,<sup>67</sup> both of which the Trump administration is in the process of doing.

Trump and his administration almost immediately began delivering for his fossil fuel donors. Less than a month after Murray presented administration officials with his wish list, Trump issued an executive order revoking numerous presidential actions relating to GHG emissions including the previous NEPA GHG guidance and ordering the review of numerous rules relating to GHG emissions. This executive order served as the foundation for the administration's unprecedented efforts to cater to the interests of the fossil fuel industry. If there was any doubt about whom this executive order was intended to benefit, that doubt was dispelled at the signing

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<sup>61</sup> *Id.*

<sup>62</sup> Andy Kroll, "The Shadow Cabinet: How a Group of Powerful Business Leaders Drove Trump's Agenda," *RollingStone* (June 19, 2019), <https://www.rollingstone.com/politics/politics-features/trump-leadership-council-members-full-list-848274/>

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Lisa Friedman, "How a Coal Baron's Wish List Became President Trump's To-Do List," *The New York Times* (Jan. 9, 2018), <https://www.nytimes.com/2018/01/09/climate/coal-murray-trump-memo.html>

<sup>67</sup> "Action Plan for the Administration of President Donald J. Trump," Murray Energy (March 1, 2017), available at <https://www.nytimes.com/interactive/2018/01/09/climate/document-Murray-Energy-Action-Plan.html>

ceremony, to which coal company executives, industry association representatives, and coal miners were all invited.<sup>68</sup>

In the first 23 months of the Trump administration, executive agencies have taken at least 92 actions to weaken policies to limit GHG emissions or promote fossil fuels.<sup>69</sup> These include proposals to rescind and replace the Clean Power Plan, freeze fuel economy standards for cars and light duty trucks, weaken methane leak testing and repair rules for oil and gas facilities, and weaken emissions rules for new coal-fired power plants.<sup>70</sup>

In addition to specific regulatory changes to benefit the fossil fuel industry, the Trump administration has also significantly reduced its enforcement efforts against polluters, many of them from the fossil fuel industry, that violate the Clean Air and Clean Water Acts as well as other federal laws and regulations. An investigation by *The New York Times* found that enforcement actions by the Trump EPA declined precipitously both in number and penalty size when compared to enforcement actions under the George W. Bush and Obama EPAs.<sup>71</sup> What's more, the Trump EPA moved to centralize decision-making around enforcement actions, taking power away from career civil servants and giving it to political appointees.<sup>72</sup>

Under the Trump administration, anti-climate, pro-fossil fuels actions have not been limited to just a few agencies, but rather have been carried out by multiple agencies across the federal government. The White House, EPA, Department of the Interior, Department of State, Department of Energy, Department of Transportation, Department of Agriculture, Department of Justice, as well as other federal agencies have all taken anti-climate actions under the Trump administration.<sup>73</sup>

Some of us have previously documented the close political, financial, and business connections between political leadership at EPA, including EPA Administrators Scott Pruitt and Andrew Wheeler and EPA Air Office chief Bill Wehrum, in several comments on EPA proposals to weaken rules limiting GHG emissions or seeking to restrict the types of scientific studies that can

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<sup>68</sup> Valerie Volcovici and Jeff Mason, "Trump signs order dismantling Obama-era climate policies," *Reuters* (March 28, 2017), <https://www.reuters.com/article/us-usa-trump-energy/trump-signs-order-dismantling-obama-era-climate-policies-idUSKBN16Z1L6>

<sup>69</sup> Senators Ed Markey and Sheldon Whitehouse, "The Most Anti-Climate Administration in History" (Dec. 2018), <https://www.markey.senate.gov/imo/media/doc/ANTI-CLIMATE%20REPORT%20.pdf>

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

<sup>71</sup> Eric Lipton and Danielle Ivory, "Under Trump, E.P.A. Has Slowed Actions Against Polluters and Put Limits on Enforcement Officers," *The New York Times* (Dec. 10, 2017), <https://www.nytimes.com/2017/12/10/us/politics/pollution-epa-regulations.html>

<sup>72</sup> *Id.*

<sup>73</sup> Senator Edward J. Markey and Senator Sheldon Whitehouse, "The Most Anti-Climate Administration in History" (Dec. 2018), <https://www.markey.senate.gov/imo/media/doc/ANTI-CLIMATE%20REPORT%20.pdf>

be used in rulemaking.<sup>74</sup> These comments also document the ways in which the fossil fuel industry, often through the myriad trade associations and front groups that it funds, orchestrated and dictated the terms of these regulatory rollbacks.

More recently, Senators Carper and Whitehouse documented how former EPA Air Office chief Bill Wehrum and his deputy David Harlow used their position at EPA to benefit clients of their former law firm; many of these clients hail from the fossil fuel industry.<sup>75</sup>

Moreover, peer-reviewed scientific research has concluded that EPA is exhibiting warning signs of regulatory capture. A study published in the *American Journal of Public Health* found that EPA is exhibiting many signs of regulatory capture.<sup>76</sup> The authors of this article examined EPA actions from December 2016 through June 2017 and they interviewed 45 current and retired EPA employees. Among their findings pointing to regulatory capture:

- “Appointees have deep ties with industries.”
- “Significant policy changes at the EPA favor businesses and industry, while probably incurring considerable health and environmental consequences.”
- “Pruitt has regularly championed the interests of regulated industries, while rarely affirming environmental and health protections.”
- “Pruitt dismissed many members of the EPA’s Science Advisory Board and its Board of Scientific Counselors, created a new rule preventing EPA-funded scientists from serving on those boards, and—for the first time in agency history—allowed lobbyists on scientific advisory boards.”
- “Pruitt’s own meetings and schedule... are almost exclusively with company and trade organizations and rarely with environmental, public health, or citizen groups.”<sup>77</sup>

Unfortunately, the regulatory capture of the Trump administration by the fossil fuel industry is not limited to EPA. As discussed above, it extends all the way to the White House, from which the proposed guidance emanated. There is also abundant evidence that other federal agencies,

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<sup>74</sup> See, e.g., Sheldon Whitehouse, *et al.*, “Comment on EPA Administrator Scott Pruitt’s improper involvement in Clean Power Plan-related rulemaking,” available at <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-17190>; Sheldon Whitehouse, *et al.*, “Comments on EPA and NHTSA’s Proposed Rule Freezing Fuel Economy and Greenhouse Gas Emissions Standards for Cars and Light Trucks,” available at <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0283-5483>; and Sheldon Whitehouse, *et al.*, “Comments of EPA’s Proposed Rule Excluding Important Scientific Studies From EPA Rulemaking,” available at <https://www.regulations.gov/document?D=EPA-HQ-OA-2018-0259-6912>

<sup>75</sup> Tom Carper and Sheldon Whitehouse, “Redefining Air: Industry’s Pipeline to Power at EPA’s Office of Air and Radiation” (July 2019), [https://www.epw.senate.gov/public/\\_cache/files/2/d/2d7a4d97-5260-4be1-92bf-152ac5d7ed21/020F44F63FF7BAC62FBDC77C0C55D82F.epw-report-carper-whitehouse-redefining-air-wehrum-7-2019.pdf](https://www.epw.senate.gov/public/_cache/files/2/d/2d7a4d97-5260-4be1-92bf-152ac5d7ed21/020F44F63FF7BAC62FBDC77C0C55D82F.epw-report-carper-whitehouse-redefining-air-wehrum-7-2019.pdf)

<sup>76</sup> Lindsey Dillon, *et al.*, “The Environmental Protection Agency in the Early Trump Administration: Prelude to Regulatory Capture,” *American Journal of Public Health* (April 2018)

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

most notably the Department of the Interior and the Department of Energy, take their marching orders from the fossil fuel industry. For example, David Bernhardt, the Secretary of the Interior, is a former lobbyist for the fossil fuel industry and has delivered on many of industry's priorities.<sup>78</sup> And Secretary of Energy Rick Perry attempted to come up with a scheme to subsidize the coal industry after being directed to do so by President Trump.<sup>79</sup>

### III. Argument

#### A. **The proposed guidance is arbitrary and capricious**

The Administrative Procedure Act<sup>80</sup> permits courts to set aside agency actions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>81</sup> In determining whether an agency action was “arbitrary and capricious, the courts look to several factors, whether: “(1) the agency ‘relied on factors which Congress has not intended it to consider,’ (2) the agency ‘failed to consider an important aspect of the problem,’ (3) the agency explained its decision in a way ‘that runs counter to the evidence,’ or (4) the action ‘is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’”<sup>82</sup>

Courts have also held that an agency action is arbitrary and capricious if the agency did not “genuinely engage in reasoned decision making”<sup>83</sup> or if it did not “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>84</sup>

While judicial review of agency actions is usually “exceedingly deferential,”<sup>85</sup> when, given the totality of the circumstances, the agency appears not to have engaged in reasoned decision-making, an agency action should be invalidated.

“The scope of review under the “arbitrary and capricious” standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must

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<sup>78</sup> Emily Holden, “Former fossil fuel lobbyist to head interior department as Zinke exits,” *The Guardian* (Dec. 16, 2018), <https://www.theguardian.com/us-news/2018/dec/16/david-bernhardt-ryan-zinke-lobbyist-interior-department>

<sup>79</sup> Brad Plumer, “Trump Orders a Lifeline for Struggling Coal and Nuclear Plants,” *The New York Times* (June 1, 2018), <https://www.nytimes.com/2018/06/01/climate/trump-coal-nuclear-power.html>

<sup>80</sup> 5 USC §500 *et seq.*

<sup>81</sup> 5 USC §706(2)(a)

<sup>82</sup> *Mendoza v. Secretary, Department of Homeland Security*, 851 F.3d 1348, 1353 (11<sup>th</sup> Cir. 2017) (quoting *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1264 (11<sup>th</sup> Cir. 2009))

<sup>83</sup> *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970)

<sup>84</sup> *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 US 29, 43 (1983), quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)

<sup>85</sup> *See, e.g., Fund for Animals v. Rice*, 85 F.3d 535, 541 (11<sup>th</sup> Cir. 1996)

examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.” In reviewing that explanation, we must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”<sup>86</sup>

This heightened level of scrutiny calls on a court to “intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a ‘hard look’ at the salient problems, and has not genuinely engaged in reasoned decision-making.”<sup>87</sup> These concerns are epidemic for the proposed guidance.

Additionally, courts have found that it is appropriate to more closely scrutinize regulatory decisions that constitute an abrupt change in course. If an agency makes such a regulatory U-turn, it must “provide a more detailed justification than would suffice for a new policy [...] when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy. [...] It would be arbitrary and capricious to ignore such matters.”<sup>88</sup> “An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past.”<sup>89</sup>

Recently, the United States District Court for the District of Montana rejected a Trump administration regulatory U-turn for exactly these reasons.<sup>90</sup> That case is instructive here. In 2015, the Obama administration denied a permit for the construction of the Keystone XL pipeline. That decision detailed how the pipeline was not consistent with climate change-related foreign policy considerations, and explained why 2015 was a critical time for climate action given rising carbon emissions and international movement towards limiting emissions. The Trump administration reversed that decision in 2017 without addressing either of these issues. The Montana court held this was arbitrary and capricious, writing, “[t]he [State] Department’s 2017 conclusory analysis that climate-related impacts from Keystone subsequently would prove inconsequential and its corresponding reliance on this conclusion as a centerpiece of its policy

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<sup>86</sup> *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 US 29, 43 (1983), quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) and *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, *supra*, at 419 U.S. 285. See also, *Massachusetts v. EPA* (constraining EPA’s discretion and subjecting the agency’s deferral of a decision to hard look review)

<sup>87</sup> *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 844-5 (D.C. Cir. 1970). In *Greater Boston Television Corp.*, the biggest “danger signal” that caused the court to give an agency’s actions a “hard look” was the fact that the chair of the Federal Communications Commission (FCC) had had potentially improper contacts with an executive at one of companies competing for a broadcast license to be attributed by the agency. Other “danger signals” that courts have held to trigger heightened scrutiny of agency actions include “abrupt shifts in policy” and “where the agency has demonstrated undue bias towards particular private interests.”

<sup>88</sup> *FCC v. Fox Television Stations*, 566 U.S. 502, 515 – 16 (2009)

<sup>89</sup> *Id.* at 537 (Kennedy, J., concurring).

<sup>90</sup> *Indigenous Environmental Network v. U.S. Dep’t. of State*, Case No. 4:17-cv-00031 (D. Mont. 2018)

change required the Department to provide a ‘reasoned explanation.’ The Department instead simply discarded prior factual findings related to climate change to support its course reversal.”<sup>91</sup>

The proposed guidance is yet another example of a regulatory U-turn that is entirely unsupported by factual determinations, differing from the previous NEPA GHG guidance in several significant ways. First, the proposed guidance no longer recommends that agencies quantify a project’s direct and indirect emissions.<sup>92</sup> Second, it states a cumulative analysis of GHG emissions is not necessary.<sup>93</sup> Third, it no longer recommends that agencies consider alternatives to mitigate project-related GHG emissions.<sup>94</sup> And fourth, it specifically states that agencies should not attempt to monetize the costs associated with project-related GHG emissions and should not use the SCC in any sort of cost-benefit analysis.<sup>95</sup>

The proposed guidance cites to no scientific, economic, technical, or other expertise to justify these changes. In fact, the entire proposal is virtually devoid of references to any sort of expertise whatsoever. By way of comparison, the previous NEPA GHG guidance relied heavily on the Third National Climate Assessment and cited to among other sources of expertise, the President’s State, Local, and Tribal Leaders Task Force on Climate Preparedness and Resilience Recommendations to the President, the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, and peer-reviewed scientific studies.<sup>96</sup> The proposed guidance provides no evidentiary basis to justify the multiple ways in which it waters down analysis of the effects of GHG emissions, nor does it attempt to explain why the previous NEPA GHG guidance was incorrect. As such, the proposed guidance is arbitrary and capricious under both the *Fox Television Stations* and *Indigenous Environmental Network* decisions.

Courts have also held that while they “must defer to an agency’s expertise, [they] must do so only to the extent that the agency utilizes, rather than ignores, the analysis of its experts.”<sup>97</sup> In cases where agency expertise is ignored, the agency action will be found to be arbitrary and capricious. In the instant case, CEQ ignored the expertise of the 13 federal agencies that contributed to the Fourth National Climate Assessment, which the proposed guidance does not even mention. In addition to ignoring agency expertise, CEQ ignored the overwhelming economic and scientific expertise discussed in Part II A of this comment. Economic, financial, and scientific actors the world over are warning ever more urgently of the massive economic

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<sup>91</sup> *Id.*

<sup>92</sup> Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 84 FR 30097, available at <https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13576.pdf>

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 81 FR 51866, available at [https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/nepa\\_final\\_ghg\\_guidance.pdf](https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf)

<sup>97</sup> *Defenders of Wildlife v. Babbitt*, 958 F.Supp. 670, 685 (D.C. Cir. 1997)

losses that will occur due to GHG emissions, and yet CEQ decided that there was no need to monetize the costs associated with these emissions. This decision flies in the face not only of expertise, but of how states, countries, and corporations are now routinely monetizing the cost of GHG emissions.

The obvious conclusion is that CEQ did not care about the facts or expertise. It cared about the results that the oil and gas industry wanted: the replacement of the previous NEPA GHG guidance with guidance that would minimize the analysis of GHG emissions and their associated costs. The factual record laid out in this comment details precisely the sort of “danger signals” the courts have found to warrant “hard look” review. “Abrupt shifts in policy,”<sup>98</sup> and “undue bias towards particular private interests”<sup>99</sup> are all present in this tawdry tale of industry capture. Based on this record, no court could plausibly conclude that CEQ “genuinely engaged in reasoned decision making”<sup>100</sup> nor conclude that CEQ could “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>101</sup>

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

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

Just as an agency action will be set aside if a court determines that it was arbitrary and capricious, an agency action should be invalidated if a court finds that the agency delegated its authority to one or more private interests, because Congress “cannot delegate regulatory authority to a private entity.”<sup>102</sup> “Although objections to delegations are “typically presented in the context of a transfer of legislative authority from the Congress to agencies, [...] the difficulties sparked by such allocations are even more prevalent in the context of agency delegations to private individuals.”<sup>103</sup>

While it is clear that an agency may not *explicitly* delegate its authority to private interests, an agency that *implicitly* delegates its authority to private interests raises the same concerns. An agency is effectively captured by the private interests it regulates when its “regulation is . . .

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<sup>98</sup> *United Church of Christ v. FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983)

<sup>99</sup> *NRDC v. SEC*, 606 F.2d 1031, 1050 (D.C. Cir. 1979)

<sup>100</sup> *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970)

<sup>101</sup> *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 US 29, 43 (1983), quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)

<sup>102</sup> *Ass'n of American Railroads v. USDOT*, 721 F.3d 666, 670 (D.C. Cir. 2013) rev'd on other grounds

<sup>103</sup> *Id.*, quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143 (DC Cir. 1984).



directed away from the public interest and toward the interest of the regulated industry’ by ‘intent and action’ of industries and their allies.”<sup>104</sup>

As described above, the proposed guidance was the product of an administration that has effectively delegated environmental and energy policy making to the fossil fuel industry. In addition to the fact that the proposed guidance comports with the fossil fuel industry’s desire to minimize the costs associated with combusting fossil fuels, there is also abundant evidence that the Trump administration essentially takes direction from the fossil fuel industry. The fossil fuel industry had open access to the administration. Senior administration officials are closely tied to the fossil fuel industry and have been uniformly hostile towards rules designed to reduce GHG emissions, particularly on behalf of industry donors who have been generous political patrons of President Trump or industry clients they represented as lawyers or lobbyists prior to joining the Trump administration.

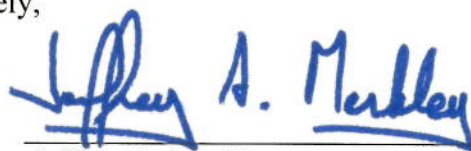
The purpose and prize of the fossil fuel industry’s well-documented regulatory capture of the Trump administration was that the administration effectively delegated its authority to the industry that captured it. There is no substantive difference between an agency explicitly telling a company or industry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

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

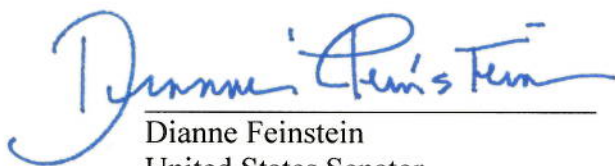
Sincerely,



Sheldon Whitehouse  
United States Senator



Jeffrey A. Merkley  
United States Senator



Dianne Feinstein  
United States Senator



Benjamin L. Cardin  
United States Senator

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<sup>104</sup> Lindsey Dillon, *et al.*, “The Environmental Protection Agency in the Early Trump Administration: Prelude to Regulatory Capture,” *American Journal of Public Health* (April 2018), <https://ajph.aphapublications.org/doi/10.2105/AJPH.2018.304360>, quoting, Daniel Carpenter, editor, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, pg. 73, Cambridge University Press (2014)