POISONING AMERICA: A "REASONED CONSISTENCY" RESPONSE TO THE TRUMP ADMINISTRATION'S REGULATORY SHELL GAME

RICHARD L. REVESZ*

ABSTRACT

This Article, written as part of a conference honoring Professor Richard Stewart on his fifty years as a legal academic, focuses on the inconsistent manner in which the Trump administration dealt with three of the most important conceptual issues that are central to the design of environmental policy: cost-benefit analysis, federalism, and the treatment of dirty, old sources of pollution. The administration acted in a patently inconsistent way in different proceedings, embracing co-benefits in some cases and decrying their use in others; extolling the virtues of state decision-making in some cases and running roughshod over such decision-making in others; and taking extreme actions to protect existing, dirty sources in some cases, while celebrating their replacement in others. The Trump administration simply took whichever side of each of these arguments would advance its deregulatory policies. Though inconsistencies across different regulations—as opposed to inconsistencies within a single regulation—have not been a core concern of the Administrative Procedure Act, its prohibition on "arbitrary and capricious" agency action is sufficiently capacious to embrace egregious actions of this type.

* Lawrence King Professor of Law and Dean Emeritus, New York University School of Law. The generous financial support of the Filomen D'Agostino and Max E. Greenberg Fund at New York University School of Law is gratefully acknowledged. I am very grateful for the comments of E. Donald Elliott and Richard Stewart. Henry Engelstein, William Jackson, Alexander Liguori, and Zoe Palenik performed excellent research assistance.

INTRODUCTION

For almost half a century, Professor Richard Stewart has defined the agenda for much of administrative law and environmental law scholarship. In two enormously influential articles, published, impressively, when he was still in his thirties, *The Reformation of American Administrative Law*[1] and *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*,[2] and, in a third, equally influential, article, co-authored with Bruce Ackerman a few years later, *Reforming Environmental Law,*[3] Professor Stewart laid the groundwork for much of the modern scholarship in the two fields. These works significantly influenced my first exposure to these issues as a law student and virtually all of my work during thirty-five years as an academic.

In this contribution to the conference celebrating Professor Stewart's fifty years of teaching, I focus on one concept: reasoned consistency in administrative decision-making. Professor Stewart explained that under this doctrine, which he identified as an important building block for legitimacy in administrative law, "an agency might be required to articulate the reasons for reaching a choice in a given case even though the loose texture of its legislative directive allowed a range of possible choices."[4] Despite these undeniable benefits, Professor Stewart, ever the pragmatist, warned against slavish adherence to reasoned consistency:

> A requirement of reasoned consistency may hobble the agency in adapting to new contingencies or in dealing with an individual case of abuse whose basis is not easily susceptible to generalized statements, and such a requirement may provide additional tools for litigants resisting agency sanctions and for judges seeking procedural grounds for setting aside dubious decisions.[5]

---

[1] *See generally* Richard B. Stewart, *The Reformation of American Administrative Law,* 88 HARV. L. REV. 1669 (1975).

[2] *See generally* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy,* 86 YALE L.J. 1196 (1977).

[3] *See generally* Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law,* 37 STAN. L. REV. 1333 (1985).

[4] Stewart, *supra* note 1, at 1679–80.

[5] *Id.* at 1680.

The key question is how to evaluate this tradeoff and where to draw the line. It is by now well established that internal inconsistencies in the analysis of the consequences of a regulation are a sufficient reason for a court to set it aside.[6] But what happens when the inconsistency is not within a rule but across rules, such as when an agency takes one position in one rule and a different position in another rule? Or when different positions are taken by different agencies? How far do we want to push a consistency requirement? There must be limits because otherwise opponents of an agency's regulation will often be able to point to some instance, perhaps in a prior administration from a long time ago, that perhaps a different agency took an inconsistent position. In such instances, requiring an agency to provide a reasoned explanation for a departure from a prior position would put an impossible and paralyzing burden on the agency.

To shed some new light on this question, this Article proceeds by induction, using as its data source the environmental regulatory decisions of the Trump administration on three of the most important conceptual issues that are central to the design of environmental policy: cost-benefit analysis, federalism, and the treatment of dirty, old sources of pollution. With respect to cost-benefit analysis, it shows that the Trump administration has argued strenuously against taking into account the indirect benefits of regulation, also known as co-benefits, when doing so favors its deregulatory goals. But, in contrast, when embracing co-benefits favors deregulation, the administration has been all too willing to do so. With respect to federalism, the Trump administration has argued in favor of state autonomy when doing so favors deregulatory outcomes and against state autonomy when the states are regulating stringently rather than laxly. The Trump administration has also argued for extending the lifespan of existing polluters when doing so leads to weaker environmental protections but for hastening their replacement when doing so would support a deregulatory outcome.

Ironically, Andrew Wheeler, who served as Administrator of the Environmental Protection Agency (EPA) under President Trump, accused the Obama administration of "playing a shell game" for taking co-benefits into account in justifying environmental

[6] *See* Bus. Roundtable v. SEC, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) (faulting the agency for "inconsistently and opportunistically fram[ing] the costs and benefits of the rule").

regulation.[7] The fact that taking co-benefits into account is prescribed by well-established economic consensus—as evidenced by the guidance of OMB Circular A-4, which dates back to the George W. Bush Administration, and the consistent practice of administrations of both parties over four decades[8]—seems to have been lost on Wheeler when he leveled this epithet. But the "shell game" characterization fits perfectly with Wheeler's own actions in taking inconsistent positions to suit the occasion and, more generally, with the Trump administration's approach to environmental regulation. Thanks to the work of Professor Stewart, administrative law now has a vocabulary and framework to analyze this regulatory shell game as well as tools to end it.

I. A MONTH RIFE WITH COST-BENEFIT CONTRADICTIONS

April 2020 was a bad month for consistency in the Trump EPA.[9] The agency laid bare its "take whatever side of the argument favors deregulation" approach in three important regulatory proceedings: (1) the withdrawal of the finding that the regulation of the hazardous air pollutant emissions of power plants in the Mercury and Air Toxics Standards (MATS) is "appropriate and necessary,"[10] (2) the significant rollback of the standards for vehicle greenhouse

[7] Coral Davenport & Lisa Friedman, *Trump, Citing Pandemic, Moves to Weaken Two Key Environmental Protections*, N.Y. TIMES (June 4, 2020), https://www.nytimes.com/2020/06/04/climate/trump-environment-coronavirus.html.

[8] *See* Kimberly M. Castle & Richard L. Revesz, *Environmental Standards, Thresholds, and the Next Battleground of Climate Change Regulations*, 103 MINN. L. REV. 1349, 1421–32 (2019).

[9] The discussion in this section relies in part on Richard L. Revesz, *Trump Shows His Cards on Environmental Protection, Or a Lack Thereof*, HILL (Apr. 30, 2020), https://thehill.com/opinion/energy-environment/495457-trump-shows-his-cards-on-environmental-protections-or-lack-thereof.

[10] National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review, 85 Fed. Reg. 31,286, 31,286 (May 22, 2020) [hereinafter MATS Final Rule]. This rule was promulgated on April 16, though not published in the *Federal Register* until a month later. Under § 112(n)(1)(A) of the Clean Air Act, the Administrator must study the public health impact of emissions of hazardous air pollutants, including mercury, and "[t]he Administrator shall regulate electric utility steam generating units … if the Administrator finds such regulation is appropriate and necessary after considering the results of the study." 42 U.S.C. § 7412(n)(1)(A) (2018).

gas emissions in the inaptly named Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule,[11] and (3) the decision not to strengthen the National Ambient Air Quality Standards for particulate matter.[12]

In withdrawing the finding that it is "appropriate and necessary" to regulate power plant emissions of mercury and other hazardous air pollutants,[13] EPA acknowledged that the standards save thousands of lives each year and produce quantified benefits of $36 billion to $89 billion annually, as well as significant unquantified benefits.[14] EPA further admitted that those benefits are far larger than the rule's costs—$9.6 billion.[15] Yet the agency nevertheless claimed that the regulation was not "appropriate," determining that the benefits of the rule did not justify its costs. It did so by arguing that the bulk of the quantified benefits should be excluded from the analysis because they result from reduced particulate matter emissions, an indirect benefit of the regulatory measure,[16] rather than from the direct purpose of the statutory provision under which the regulation was promulgated: reduced emissions of mercury and other hazardous air pollutants.[17]

As indicated above, in excluding the co-benefits from its analysis, EPA departed from the academic consensus and established regulatory practice.[18] Moreover, to say, as the agency does, that the

[11] *See* The 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) [hereinafter SAFE Final Rule].

[12] *See* Review of the National Ambient Air Quality Standards for Particulate Matter, 85 Fed. Reg. 24,094 (Apr. 30, 2020) [hereinafter PM Proposed Standards].

[13] While EPA left the standards in place, the withdrawal of the finding weakens their legal footing and opens the door to lawsuits challenging them.

[14] *See* MATS Final Rule, 85 Fed. Reg. at 31,299.

[15] *See id*. This cost estimate is now regarded as too high. *See* Joseph Aldy et al., *Deep Flaws in a Mercury Regulatory Analysis*, 368 SCI. 247, 248 (Apr. 17, 2020).

[16] *See* MATS Final Rule, 85 Fed. Reg. at 31,298–99. Subsequently, EPA proposed new regulations for cost-benefit analyses conducted under the Clean Air Act that would, effectively, codify this approach. Following the release of this proposal, Wheeler clarified that "[c]o-benefits would not be used" to justify air quality rules. Davenport & Friedman, *supra* note 7.

[17] The agency also waves away the direct benefits that had not been quantified when the standards were promulgated in 2012, even though many of these benefits can now be quantified and are large. *See* Aldy et al., *supra* note 15, at 248.

[18] *See supra* text accompanying note 8.

indirect consequences of regulation must be considered if they are negative[19] but must be ignored if they are positive, is a textbook example of "arbitrary and capricious" conduct.[20] It is difficult to imagine a more arbitrary and capricious methodology than a rule under which EPA must take into account the indirect consequences of regulation if they are negative but must ignore them if they are positive.

But as bad as EPA's analysis is when considered in isolation, the irrationality becomes starker in light of two other significant EPA proceedings completed the same month. EPA used a directly contradictory approach, relying almost exclusively on safety co-benefits, when it justified its major rollback of the Obama administration's Clean Car Standards.[21] In rolling back these standards, which limit the greenhouse gas emissions of cars and light trucks, the agency even used "safety" in the title of the rule, labeling it the Safer Affordable Fuel Efficient (SAFE) Vehicles Rule. But any purported safety changes are co-benefits rather than direct benefits, as EPA has no authority whatsoever to regulate vehicle safety. And, as EPA concedes, the greenhouse gas emissions standards are promulgated pursuant to section 202(a) of the Clean Air Act, which instructs the Administrator to regulate "any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[22] This statute does not confer any authority on EPA to regulate vehicle safety, only pollutant emissions.

And the National Highway Traffic Safety Administration (NHTSA), which jointly promulgated the rule with EPA, did so under a statutory provision designed to improve fuel economy, not safety. While motor vehicle safety is under NHTSA's regulatory purview, the agency is not exercising its authority to regulate vehicle safety when setting fuel economy standards. Rather, NHTSA is

19 *See* MATS Final Rule, 85 Fed. Reg. at 31,303.

20 Natalie Jacewicz & Richard L. Revesz, *EPA Is Rolling Back Protections with Methodology No Respectable Economist Would Endorse*, HILL (Mar. 4, 2019), https://thehill.com/opinion/energy-environment/432471-epa-is-rolling-back-protections-with-methodology-no-respectable.

21 *See* Revesz, *supra* note 9.

22 42 U.S.C. § 7521(a) (2018).

acting pursuant to the Energy Policy and Conservation Act, which provides that the fuel economy standards shall be set in light of "technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy."[23] Vehicle safety is not listed as a consideration in the relevant statutory text and is thus a co-benefit.

Putting these two regulatory proceedings together, the message that the Trump administration sends is clear: co-benefits should be taken into account if they justify weakening a rule but should not be considered if they justify maintaining a safeguard or making it more stringent.

EPA's other justification for ignoring the life-saving reductions of particulate matter that result from mercury regulation was that the agency could address particulate pollution directly, by regulating it through other provisions of the Clean Air Act. But in the very same month, given the opportunity to issue such regulations, the agency balked. Ignoring the advice of its own scientists,[24] it proposed not to strengthen the National Ambient Air Quality Standards for particulate matter.[25]

Looking now at these three proceedings, completed within weeks of one another, further exposes the shameless analytic opportunism of the Trump EPA. It was willing to speak out of both sides of its mouth, relying on one argument in one proceeding and an opposite argument in a different one. The result was a slate of deregulatory actions that put thousands of lives at risk each year, cause serious adverse health impacts on many more, and impose net harms on the American people. A heedless commitment to dangerous deregulation is the only logic that explains its actions.

II. EMPTY FEDERALISM

Another piece of the Trump EPA's shell game was the selective invocation of federalism. Scott Pruitt, Trump's first EPA

[23] 49 U.S.C. § 32902(f) (2018).

[24] *See* Marianne Lavelle, *Ignoring Scientists' Advice, Trump's EPA Rejects Stricter Air Quality Standard*, INSIDE CLIMATE NEWS (Apr. 15, 2020), https://insideclimatenews.org/news/14042020/air-pollution-epa-covid-pm2.5-secret-science-rule-health-fuel-standard-climate-change.

[25] *See* PM Proposed Standards, 85 Fed. Reg. at 24,094.

administrator, spoke frequently about the virtues of "cooperative federalism" and was a fervent opponent of Obama-era Clean Air Act regulations during his days as Oklahoma's Attorney General.[26] His successor, Administrator Wheeler, used similar rhetoric. But both deployed their support of state autonomy in a wholly cynical way, using it to justify weakening federal standards to promote the interests of states with preferences for weaker regulation, but opposing states that favor more stringent regulation than what is federally prescribed, arguing that otherwise those stringent states would hold the nation hostage to their idiosyncratic preferences. In their one-sided world, federalism is simply synonymous with deregulation.

In his opening statement at his confirmation hearing, Pruitt explained his view of federal environmental policy, stating that "[i]f we truly want to advance and achieve cleaner air and water the States must be partners and not mere passive instruments of federal will."[27] Similarly, in early 2017, Pruitt spoke at the Conservative Political Action Conference and vowed to "restore federalism" and "ensure that 'regulations are reined in,'"[28] thereby equating federalism with deregulation.

After replacing Pruitt in mid-2018, Wheeler continued extolling the virtues of federalism. In a 2018 memorandum, he emphasized that cooperative federalism was a "fundamental priority" of EPA's 2018–2022 Strategic Plan, and urged "general deference" to states and tribes.[29]

---

[26] Chris Mooney et al*., Trump Names Scott Pruitt, Oklahoma Attorney General Suing EPA on Climate Change, to Head the EPA*, N.Y. TIMES (Dec. 8, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/12/07/trump-names-scott-pruitt-oklahoma-attorney-general-suing-epa-on-climate-change-to-head-the-epa/.

[27] Scott Pruitt, Att'y Gen., State of Okla., Senate Confirmation Hearing Opening Statement (Jan. 18, 2017), https://www.epw.senate.gov/public/_cache/files/0e505de4-aa91-4dcc-ba23-dc9ddab01c0b/scott-pruitt-opening-statement-final-.pdf.

[28] Oliver Milman, *Scott Pruitt Vows to Slash Climate and Water Pollution Regulations at CPAC*, GUARDIAN (Feb. 25, 2017), https://www.theguardian.com/environment/2017/feb/25/scott-pruitt-epa-cpac-climate-change-pollution-regulation.

[29] Andrew R. Wheeler, Acting Adm'r, EPA, Principles and Best Practices for Oversight of Federal Environmental Programs Implemented by States and Tribes 1, 2 (Oct. 30, 2018), https://www.epa.gov/sites/production/files/2019-03/documents/fep_oversight_memo.10.30.18.pdf.

Invocations to federalism were not limited to public pronouncements. One of the Trump administration's first priorities was the repeal of the Clean Power Plan—the Obama administration regulation limiting the greenhouse gas emissions of existing power plants.[30] In signing the proposed repeal rule, Pruitt justified the action through references to federalism. He noted that "[w]e can now assess whether further regulatory action is warranted, and, if so, what is the most appropriate path forward, consistent with the Clean Air Act and principles of cooperative federalism," and criticized the previous Clean Power Plan for "ignor[ing] states' concerns and erod[ing] long-standing and important partnerships that are a necessary part of achieving positive environmental outcomes."[31]

Another prime Trump administration target was the Clean Water Rule, which defined the scope of federal jurisdiction under the Clean Water Act.[32] EPA significantly narrowed the definition in January 2020,[33] praising the replacement rule as "achiev[ing] the proper relationship between the federal government and states."[34] Additionally, in a guest commentary in the *Kansas City Star*, Wheeler celebrated the rollback as an exercise in "giving states and tribes the certainty to manage their waters in ways that best protect their natural resource and local economies."[35]

---

[30] *See* EPA, FACT SHEET: OVERVIEW OF THE CLEAN POWER PLAN, https://archive.epa.gov/epa/cleanpowerplan/fact-sheet-overview-clean-power-plan.html (last visited July 10, 2020).

[31] Juliet Eilperin, *EPA's Pruitt Signs Proposed Rule to Unravel Clean Power Plan*, WASH. POST (Oct. 10, 2017), https://www.washingtonpost.com/politics/epas-pruitt-signs-proposed-rule-to-unravel-clean-power-plan/2017/10/10/96c83d2c-add2-11e7-a908-a3470754bbb9_story.html.

[32] *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,053, 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328, & 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 300, 302, and 401).

[33] *See* Press Release, EPA, EPA and Army Deliver on President Trump's Promise to Issue the Navigable Waters Protection Rule – A New Definition of WOTUS (Jan. 23, 2020), https://www.epa.gov/newsreleases/epa-and-army-deliver-president-trumps-promise-issue-navigable-waters-protection-rule-0; *see also* Coral Davenport, *Trump Removes Pollution Controls on Streams and Wetlands*, N.Y. TIMES (Jan. 22, 2020), https://www.nytimes.com/2020/01/22/climate/trump-environment-water.html.

[34] Press Release, *supra* note 33.

[35] Andrew Wheeler, Opinion, *Trump Administration's Waters of the United States Rule Gives Power Back to States*, KAN. CITY STAR (Dec. 12, 2018),

However, in a separate rule only seven months later, Wheeler significantly undermined the authority of states under Section 401 of the Clean Water Act,[36] which requires that applicants for projects, such as pipelines requiring federal permits, also obtain permits from the states in which the facilities are located.[37] The new rule limited the scope of state review and imposed strict time limits for this process, waiving the need for state certification if states do not take action within a year.[38] Justifying the action, which may have been undertaken in response to the decisions by New York and Washington State to deny permits for the Constitution Pipeline and the Millennium Coal Terminal, respectively,[39] Wheeler indicated that it was necessary to prevent states from holding "our nation's energy infrastructure projects hostage."[40]

Wheeler used similar rhetoric in connection with the most significant affront to the authority of a state under the Clean Air Act, when EPA withdrew the waiver that allowed California to set its own greenhouse gas standards for new vehicles. While the Clean Air Act preempts all other states from setting their own vehicle emissions standards, California can request a waiver to impose more stringent standards.[41] Since the enactment of the waiver provision in 1967, EPA has granted more than fifty waivers for California and

https://www.kansascity.com/opinion/readers-opinion/guest-commentary/article222945575.html.

[36] *See generally* Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020) (to be codified at 40 C.F.R. pt. 121).

[37] *See* 33 U.S.C. § 1341 (2018).

[38] *See* Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. at 42,236–40.

[39] *See* Rebecca Beitsch, *20 States Sue Over Trump Rule Limiting States from Blocking Pipeline Projects*, HILL (July 21, 2020), https://thehill.com/policy/energy-environment/508371-20-states-sue-over-trump-rule-limiting-states-from-blocking.

[40] Valerie Volcovici, *California, New York, Other States Sue U.S. Over Trump Clean-Water Rollback*, REUTERS (July 21, 2020), https://www.reuters.com/article/us-usa-environment-water/california-new-york-other-states-sue-u-s-over-trump-clean-water-rollback-idUSKCN24M2LZ#:~:text=Last%20month%2C%20EPA%20Administrator%20Andrew,the%20section%20401%20certification%20process.%E2%80%9D.

[41] *See* DENISE A. GRAB ET AL., INST. FOR POL'Y INTEGRITY, NO TURNING BACK: AN ANALYSIS OF EPA'S AUTHORITY TO WITHDRAW CALIFORNIA'S PREEMPTION WAIVER UNDER SECTION 209 OF THE CLEAN AIR ACT 1 (2018), https://policyintegrity.org/files/publications/No_Turning_Back.pdf.

fully denied only one, a decision it subsequently reversed.[42] It has never withdrawn a waiver that it had previously granted. [43] EPA's unprecedented move upset significant reliance interests on the part of California, because California reasonably relied on the waiver "in developing plans to comply with federal air quality standards and to achieve state environmental goals."[44] Again, Wheeler returned to his "hostage" metaphor: "We embrace federalism and the role of the states, but federalism does not mean that one state can dictate standards for the nation."[45]

In this case, Wheeler's claim is particularly galling because twelve other states, accounting for more than a third of the vehicle market, had opted to follow the California standards, rather than the federal standards, as they can do under Section 177 of the Clean Air Act.[46] The Attorney General of Colorado stated that "this stepping-on-states' rights, is a threat to the very principle of states' rights."[47] Twenty-three states joined a lawsuit challenging the waiver revocation, including eleven states that were not participating in California's emissions program.[48]

The Trump administration's assault on California did not end with the withdrawal of the waiver. The Justice Department began an unprecedented antitrust investigation against four car manufacturers that had indicated they would enter into an agreement with California to accept more stringent standards, in defiance of pressure from the Trump administration; the investigation began before an

[42] *See id.* at 2–3.

[43] *See id.* at 4.

[44] *Id.* at 12.

[45] Alex Guillén, *Trump Blocks California Auto Emission Rules*, POLITICO (Sept. 17, 2019), https://www.politico.com/story/2019/09/17/epa-california-obama-waiver-1500336.

[46] *See* GRAB ET AL., *supra* note 41, at 4.

[47] Coral Davenport, *A "Chilling Message": Trump Critics See a Deeper Agenda in California Feud*, N.Y. TIMES (Oct. 3, 2019), https://www.nytimes.com/2019/10/03/climate/trump-california-environment.html.

[48] *See* David Shepardson, *California, Other U.S. States Sue to Block EPA from Revoking State Emissions Authority*, REUTERS (Nov. 15, 2019), https://www.reuters.com/article/us-autos-emissions-california/california-other-u-s-states-sue-to-block-epa-from-revoking-state-emissions-authority-idUSKBN1XP25Q.

agreement was even signed.[49] The investigation was eventually dropped[50] following widespread criticism.[51] The Trump administration also weaponized the enforcement of federal environmental statutes to punish California for the temerity of trying to protect its citizens through more stringent vehicle emission standards—a tool that Congress made available to California under the Clean Air Act. For example, EPA threatened to withhold federal highway funding if California did not address its backlog of State Implementation Plans under the Clean Air Act[52] and raised concerns about the enforcement of the Clean Water Act and the Safe Drinking Water Act within the state.[53] These moves were interpreted as thinly veiled political attacks because states with far worse environmental records were not subjected to such treatment.[54] Additionally, the Trump

[49] *See* Keith Laing & Breana Noble, *Feds Launch Unprecedented Antitrust Probe into Calif. MPG Deal with Ford,* DET. NEWS (Sept. 6, 2019), https://www.detroitnews.com/story/business/autos/2019/09/06/feds-antitrust-probe-california-mpg-deal-ford-vw-honda-bmw/2231506001/.

[50] *See* Coral Davenport, *Justice Department Drops Antitrust Probe Against Automakers That Sided with California on Emissions*, N.Y. TIMES (Feb. 7, 2020), https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html.

[51] *See* Herbert Hovenkamp, *Are Regulatory Agreements to Address Climate Change Anticompetitive?*, REGUL. REV. (Sept. 11, 2019), https://www.theregreview.org/2019/09/11/hovenkamp-are-regulatory-agreements-to-address-climate-change-anticompetitive/.

[52] *See* Coral Davenport, *Trump Administration Threatens to Cut U.S. Highway Funds From California*, N.Y. TIMES (Sept. 24, 2019), https://www.nytimes.com/2019/09/24/climate/trump-california-climate-change.html; Letter from Andrew Wheeler, Adm'r., EPA, to Mary D. Nichols, Chair, Calif. Air Res. Bd. (Sept. 24, 2019), https://documentcloud.adobe.com/link/track?uri=urn%3Aaaid%3Ascds%3AUS%3A846a6159-dc9a-4e13-838c-815cfcc438d1#pageNum=1.

[53] *See* Lisa Friedman, *E.P.A. Accuses California of "Significant" Air and Water Problems*, N.Y. TIMES (Sept. 26, 2019), https://www.nytimes.com/2019/09/26/climate/trump-california.html; *see also* Letter from Andrew Wheeler, Adm'r., EPA, to Gavin Newsom, Governor of Cal. (Sept. 26, 2019), https://int.nyt.com/data/documenthelper/1854-epa-letter-to-california/5bea05fe6a916e64e079/optimized/full.pdf#page=1.

[54] *See* Davenport, *supra* note 47.

administration filed suit to challenge California's emissions trading program with Quebec,[55] which had been in effect since 2014.[56]

The Trump administration's response to interstate air pollution further underscores that its approach to federalism did not derive from a consistent philosophy but, instead, was nothing more than a label to be wielded to oppose regulatory efforts, even when those efforts bring substantial net benefits to the American people. If there were ever one environmental function that the federal government should embrace with enthusiasm, it is the control of interjurisdictional externalities.[57] States have undesirable incentives to send excessive pollution to downwind states because they obtain the full labor and fiscal benefits of the economic activity that causes the pollution but do not suffer the full health and environmental harms, part of which affects downwind states.[58] As Justice Ginsburg stated in the first paragraph of her majority opinion in *EPA v. E.M.E. Homer City Generation, L.P.*:[59]

> [l]eft unregulated, the emitting or upwind State reaps the benefits of the economic activity causing the pollution without bearing all the costs. Conversely, downwind States to which the pollution travels are unable to achieve clean air because of the influx of out-of-state pollution they lack authority to control.[60]

Interpreting the Clean Air Act's Good Neighbor Provision, the Court held that EPA could choose the most cost-effective allocation of pollution control burdens that would ensure that the National Ambient Air Quality Standards would be met in both upwind and downwind states.[61]

---

[55] *See* Lisa Friedman & Kate Benner, *Justice Dept. Sues California to Stop Climate Initiative from Extending to Canada*, N.Y. TIMES (Oct. 23, 2019), https://www.nytimes.com/2019/10/23/climate/trump-california-climate-change.html

[56] *See Program Linkage*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/our-work/programs/cap-and-trade-program/program-linkage (last visited Feb. 21, 2021).

[57] *See* Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2341–43 (1996).

[58] *See id.*

[59] 572 U.S. 489, 489 (2014).

[60] *Id.* at 495 (citing Revesz, *supra* note 57, at 2343).

[61] *See id.* at 519.

The Trump administration repeatedly flouted its obligations under the Good Neighbor Provision. In its first three years, the administration astonishingly lost, in whole or in part, all eight cases litigated in federal court.[62] For example, in 2018, the Trump Administration released the Cross-State Air Pollution Rule "Close-Out," which aimed to resolve the obligations of twenty-two upwind states under the 2008 National Ambient Air Quality Standards for ozone. EPA sought to allow upwind states to contribute excessive pollution to downwind states for two additional years past the relevant attainment deadline.[63] The D.C. Circuit struck down the rule, holding that EPA had impermissibly allowed upwind states to "continue contributing significantly to downwind nonattainment."[64] In this case, Wheeler was apparently unconcerned that the upwind states were "dictat[ing] . . . standards for the nation"[65] by worsening the environmental quality of the downwind states.

Also, in order to avoid imposing further controls on upwind sources, EPA misapplied the core holding of *E.M.E. Homer City Generation*: that the Good Neighbor Provision requires that the National Ambient Air Quality Standards be met. In one proceeding, the agency conceded that upwind sources were preventing Maryland from achieving federal ozone standards.[66] It claimed, however, that requiring some upwind facilities to put in place the pollution controls necessary to avoid this violation was not "cost-effective," simply because such emission reductions would be more expensive on a per-ton basis than those that EPA had required in a past rulemaking.[67] Of course, the fact that in a past rulemaking cheaper pollution controls had been sufficient to meet a different ambient

[62] *See generally* Ctr. for Biological Diversity v. Pruitt, 2017 WL 11514792 (N.D. Cal. Sept. 18, 2017); New York v. Pruitt, 2018 WL 2976018 (S.D.N.Y. June 12, 2018); Maryland v. Pruitt, 320 F.Supp.3d 722 (D. Md. 2018); New York v. Wheeler, 2019 WL 3337996 (S.D.N.Y. July 25, 2019); Wisconsin v. EPA, 938 F.3d 303 (D.C. Cir. 2019); New York v. EPA, 781 F. App'x 4 (D.C. Cir. 2019); Maryland v. EPA, 958 F.3d 1185 (D.C. Cir. 2020); New York v. EPA, 964 F.3d 1214 (D.C. Cir. 2020).

[63] *See New York v. EPA*, 781 F. App'x at 6.

[64] *Id.* at 7.

[65] Guillén, *supra* note 45.

[66] *See* Response to Section 126(b) Petitions from Delaware and Maryland, 83 Fed. Reg. 50,444, 50,464 (Oct. 5, 2018).

[67] *Id.* at 50,449.

standard does not mean that those same controls are appropriate when they would lead to a violation of such a standard. Not surprisingly, the D.C. Circuit determined that EPA had misapplied the concept of cost-effectiveness.[68]

In summary, the core philosophy of the Trump administration was that federalism principles should be invoked to allow states to evade environmental requirements, in the name of protecting their preferences and their autonomy, regardless of the adverse social welfare consequences on the nation. But such federalism principles should also be invoked to quash the efforts of states that want to regulate stringently; the preference and autonomy of these states should be trampled rather than protected. These states are punished as hostage-takers regardless of whether their actions are socially beneficial.[69]

III. INCOHERENT APPROACH TO EXISTING SOURCES

The Trump administration's internal contradictions are equally evident in connection with the question of when it is desirable to adopt environmental standards that displace existing sources, and when, in contrast, it is desirable to do the opposite: protect existing sources to prevent their displacement. President Trump campaigned on ending the "war on coal" by preventing environmental regulation that could lead to the closing of coal-fired power plants.[70]

---

[68] *See* Maryland v. EPA, 958 F.3d 1185, 1207–08 (D.C. Cir. 2020).

[69] *See* Richard L. Revesz, *According to Scott Pruitt, States Only Have the Right to Pollute, Not To Protect Their Environments*, L.A. TIMES (Mar. 20, 2017), https://www.latimes.com/opinion/op-ed/la-oe-revesz-pruitt-epa-federalism-20170320-story.html.

[70] Keith Johnson, *Trump Can't Save Coal Country*, FOREIGN POL'Y (Oct. 30, 2019), https://foreignpolicy.com/2019/10/30/trump-save-coal-country-murray-bankruptcy-gas/. The President has even intervened personally on this issue. In early 2019 he tweeted about keeping a specific TVA-owned power plant in Kentucky open that was voting on whether to close, writing, "[c]oal is an important part of our electricity generation mix . . . [TVA] should give serious consideration to all factors before voting to close viable power plants, like Paradise #3 in Kentucky!" Timothy Gardener, *Trump Urges U.S.-Owned TVA to Keep Coal Plant Open*, REUTERS (Feb. 11, 2019), https://www.reuters.com/article/us-usa-trump-coal/trump-urges-us-owned-tva-to-keep-coal-plant-open-idUSKCN1Q02GB.

Despite the fact that producing electricity by burning coal is significantly more environmentally harmful than its alternatives,[71] EPA under the Trump administration took significant actions to weaken the regulatory standards that apply to coal-fired power plants. Most importantly, as discussed above,[72] EPA repealed that Clean Power Plan and replaced it with the far-weaker and perhaps downright counter-productive Affordable Clean Energy Rule.[73]

Moreover, to further reduce the regulatory costs imposed on coal fired-power plants, EPA rolled back two Obama-era coal water-quality regulations, the Effluent Limits Guidelines Rule and the Coal Combustion Residuals Rule.[74] The replacement rules, which delayed compliance deadlines and weakened pollution limits, are expected to extend the lives of the affected coal plants.[75]

The Trump administration's efforts to prop up failing coal plants were not limited to EPA. In September 2017, Rick Perry, then the Secretary of Energy, asked the Federal Energy Regulatory Commission to stop "continued loss of baseload generation with on-site fuel supplies, such as coal and nuclear."[76] Perry attached a proposed rule that included subsidies for coal and nuclear power generators, arguing that these sources were essential for "grid reliability and resilience."[77] The Commission, an independent agency, unanimously rejected Perry's proposal.[78] Commissioner Richard Glick,

---

71 *See* RICHARD L. REVESZ & JACK LIENKE, STRUGGLING FOR AIR: POWER PLANTS AND THE "WAR ON COAL" 10–12, 34, 134–35 (2016).

72 *See supra* text accompanying notes 30–31.

73 *See* Jack Lienke & Richard L. Revesz, *EPA Will Say Anything to Avoid Addressing Climate Change*, REGUL. REV. (July 29, 2019), https://www.theregreview.org/2019/07/29/revesz-lienke-epa-avoid-addressing-climate-change/.

74 *See* Lisa Friedman, *E.P.A. Weakens Rules Governing Toxic Water Pollution from Coal Plants*, N.Y. TIMES (Nov. 4, 2019), https://www.nytimes.com/2019-/11/04/climate/coal-ash-water-pollution-trump.html.

75 *See id.*

76 Letter from Rick Perry, Sec'y of Energy, to Cheryl A. LaFleur & Robert F. Powelson, Comm'rs, FERC at 6–7 (Sept. 28, 2017), https://www.energy.gov/sites/prod/files/2017/09/f37/Secretary%20Rick%20Perry%27s%20Letter%20to%20the%20Federal%20Energy%20Regulatory%20Commission.pdf.

77 *Id*. at 7–8.

78 *See* Brad Plumer, *Rick Perry's Plan to Rescue Struggling Coal and Nuclear Plants Is Rejected*, N.Y. TIMES (Jan. 8, 2018), https://www.nytimes.com/2018/01/08/climate/trump-coal-nuclear.html?smid=tw-nytclimate&smtyp=cur&_r=1.

concurring in the decision, wrote "[t]he Proposed Rule had little, if anything, to do with resilience, and was instead aimed at subsidizing certain uncompetitive electric generation technologies."[79] Subsequently, a leaked memo suggested that the administration considered turning to the Defense Production Act to prop up the coal industry, again raising the argument that coal and nuclear were essential to national security.[80] However, this action never came to fruition.

In contrast to the efforts to extend the useful lives of dirty coal-power plants, the Trump administration took the other side of the argument in justifying its rollback of the Clean Car Standards.[81] Wheeler stated: "We want to encourage people to buy new cars. Older cars are worse for the environment and for public safety."[82] In a similar vein, President Trump tweeted: "Great news! American families will now be able to buy safer, more affordable, and environmentally friendly cars with our new SAFE VEHICLES RULE."[83] And the rule itself states that "by lowering the auto industry's costs to comply with the program, with a commensurate reduction in per-vehicle costs to consumers, the standards enhance the ability of the fleet to turn over to newer, cleaner and safer vehicles."[84]

What the Trump administration does not say is that even if the SAFE Rule leads to replacing a greater proportion of old cars with cleaner new cars, the overall environmental consequence is negative; the agency's own analysis shows that the increased pollution caused by the rollback will lead to hundreds of premature deaths,

---

79 Grid Reliability and Resilience Pricing, Docket Nos. RM18-1-000, AD18-7-000, FERC 1 (Jan. 8, 2018) (Glick, Comm'r, concurring).

80 *See* Gavin Bade, *Trump Administration Preparing 2-Year Coal, Nuke Bailout*, UTIL. DIVE (June 1, 2018), https://www.utilitydive.com/news/trump-administration-preparing-2-year-coal-nuke-bailout/524788/.

81 *See supra* text accompanying notes 22–23.

82 Dave Flessner, *During Chattanooga Visit, EPA Chief Says Stricter Mileage Standards Hurt New Car Sales and Safety*, CHATTANOOGA TIMES FREE PRESS (Sept. 9, 2019), https://www.timesfreepress.com/news/business/aroundregion/story/2019/sep/09/ephead-says-stricter-mileage-standards-hurt-n/503160/.

83 Ledyard King, *Trump Administration Scraps Obama Fuel-Efficiency Standard, Opts for Laxer Rule*, USA TODAY (Mar. 31, 2020), https://www.usatoday.com/story/news/politics/2020/03/31/trump-eases-up-obama-era-fuel-efficiencies-rules-cars-trucks/5093923002/.

84 SAFE Final Rule, *supra* note 11, at 24,176.

with a low estimate of 444 and a high estimate of 1000.[85] As explained in Part I, it is only when the safety co-benefits are taken into account that any plausible argument can be made that there are circumstances under which the rule might not impose net harms on the American people.[86]

Leaving this important issue aside, the contradiction between celebrating the retirement of old, dirty cars but embracing the extension of the life of old, dirty power plants is plain. In dealing with the two most important Obama administration rules limiting the emissions of greenhouse gases, the Trump administration has taken diametrically opposite positions with respect to the virtues of replacing existing sources of pollution. It celebrated it in the car standards and decried it in the power plant standards.

The contradictions do not stop here. It is not the case that the Trump administration has one approach for the replacement of stationary sources and another one for the replacement of vehicles. Indeed, its enthusiasm for accelerating the replacement of the vehicle fleet did not extend to trucks, for which it took the opposite position than for cars. EPA sought in multiple ways to exempt a class of heavily polluting vehicles referred to as "glider trucks" from the emissions limitations imposed by the Clean Air Act. Glider trucks consist of old diesel engines that are inserted into new frames.[87] EPA's own testing demonstrated that these trucks emit massive amounts of pollution when compared to newly manufactured models.[88] Due to a loophole in the Clean Air Act that determined emissions limitations based on the year of engine manufacture, many of these glider trucks were subject to lower emissions standards until

[85] *See id.* at 25,083; Richard L. Revesz, *Insight: Clean Car Standards is "Arbitrary and Capricious*," BLOOMBERG L. (Apr. 14, 2020), https://news.bloomberglaw.com/environment-and-energy/insight-clean-car-standards-rollback-is-arbitrary-and-capricious.

[86] *See supra* text accompanying notes 20–23.

[87] *See* Comments of the Environmental Defense Fund et al. on Repeal of Emission Requirement for Glider Trucks, Glider Engines, and Glider Kits 6 (Jan. 5, 2018), https://www.edf.org/sites/default/files/content/EDF%20ELPC%20WE%20ACT%20Comments%20on%20Gliders%20Proposed%20Repeal%20final.pdf.

[88] *See id* at 13 ("[V]ehicles and two compliant tractors manufactured in 2014 and 2015 showed that NOx emissions from the glider vehicles were as much as 43 times higher than the compliant vehicles. Particulate emissions ranged as much as 450 times higher.").

2016, when EPA finalized a rule to impose emissions limits based on year of assembly.[89] However, in late 2017, EPA issued a proposed rule seeking to exempt these trucks from emissions limitations, thereby delaying their replacement with far cleaner new trucks.[90]

Following this proposal, then-Administrator Pruitt issued a no-action letter indicating that EPA would not be enforcing the caps imposed by the 2016 rule.[91] After the D.C. Circuit entered an administrative stay on the no-action letter, Wheeler withdrew it.[92] But the proposed rule seeking the exemption of glider trucks from regulatory requirements remained in place through the end of the Trump administration, though it was not finalized.

These contradictions in EPA's approach to the replacement of old, dirty sources can be explained only by one principle: the agency simply took whichever side of the argument furthers its deregulatory agenda. When it thought it could do so by urging the replacement of old sources, as was the case for the repeal of the Clean Car Standards, it extolled the benefits of accelerating the introduction of new sources. But it sung the precise opposite tune when deregulation would be furthered by extending the life of existing sources, as was

[89] *See* Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2, 81 Fed. Reg. 73,478, 73,478 (Oct. 25, 2016) (to be codified at 40 C.F.R. pts. 9, 22, 85, 86, 600, 1033, 1036, 1037, 1039, 1042, 1043, 1065, 1066, and 1068, & 49 C.F.R. pts. 523, 534, 535, and 538); Jennifer Lu, *'Glider Trucks' Are Pollution Machines, But They Might Roll Past EPA Regulations*, POPULAR SCI. (July 27, 2018), https://www.popsci.com/glider-trucks-pollution-loophole/.

[90] *See* Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits, 82 Fed. Reg. 53,442 (Nov. 16, 2017) (to be codified at 40 C.F.R. pt 1037, 1068).

[91] *See* Letter from Susan Parker Bodine, Assistant Adm'r, Off. Enf't & Compliance Assurance, EPA to Bill Wehrum, Assistant Adm'r, Off. Air & Radiation, EPA, Conditional No Action Assurance Regarding Small Manufacturers of Glider Vehicles (July 6, 2018), https://www.epa.gov/sites/production/files/2018-07/documents/glidernoactionassurance070618.pdf.

[92] *See* Letter from Andrew Wheeler, Acting Adm'r EPA, to Susan Parker Bodine, Assistant Adm'r, Off. Enf't & Compliance Assurance, & William L. Wehrum, Assistant Adm'r, Off. Air & Radiation, EPA, Withdrawal of Conditional No Action Assurance Regarding Small Manufacturers of Glider Vehicles (July 26, 2018), https://www.epa.gov/sites/production/files/2018-07/documents/memo_re_withdrawal_of_conditional_naa_regarding_small_manufacturers_of_glider_vehicles_07-26-2018.pdf.

the case for the repeal of the Clean Power Plan and the exemption for glider trucks.

CONCLUSION: RETHINKING THE ADMINISTRATIVE PROCEDURE ACT

The three examples analyzed in this Article inexorably point to the conclusion that administrative law should embrace a more robust approach to consistency that looks not only at whether the justification for a particular rule is internally consistent but also at whether consistency is applied by the same agency across temporally proximate rules. Such an approach might be termed a "cross-proceeding consistency of principle."

If the Trump EPA had promulgated a regulation providing that on issues involving the application of cost-benefit analysis, federalism, and the treatment of old, dirty sources of pollution it would take whatever side of the argument justified deregulatory ends, there is little doubt that this explicit embrace of inconsistency would be struck down as "arbitrary and capricious" under the Administrative Procedure Act in a challenge brought by a party with standing. The same result should probably follow if an Executive Order asked multiple agencies to follow such an approach. There is no compelling reason for dealing differently with a situation where the Trump administration's actions are functionally identical to those that would flow from such a regulation or Executive Order.

The idea that the Administrative Procedure Act's consistency requirements should be applied not only to internal inconsistencies in the analysis of a single regulation,[93] but also to inconsistencies across regulations has intuitive appeal. As Professor Yoav Dotan noted, "[t]here is hardly any more suitable reason to label the administrative process as 'arbitrary and capricious' than in the case of a process that treats like cases differently."[94] Similarly, Professor William Buzbee argued that the most important "meta-rule" governing administrative action is the "agency's obligation to act consistently with its own commitments and practices."[95]

---

[93] *See supra* text accompanying note 6.

[94] Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995, 1000–01 (2005).

[95] William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U.L. REV. 1357, 1401 (2018).

And this type of analysis is not wholly unfamiliar to the Administrative Procedure Act's landscape. In 2005, in *National Cable & Telecommunications Association v. Brand X Internet Services* ("*Brand X*"),[96] the Supreme Court considered whether inconsistencies in regulatory treatment across different rules could be arbitrary and capricious.[97] The alleged inconsistency in that case involved the Federal Communications Commission's respective treatment of modem internet providers, which use cable wires, and DSL internet providers, which use phone lines.[98] In one rulemaking, the Commission had classified DSL service as a "telecommunications service," which subjected it to common-carrier regulations, and in a subsequent rulemaking it had classified cable modem service as an "information service," which exempted it from comparable regulations.[99] The Court noted that an "unexplained inconsistency" could be a reason for holding the agency's action "to be an arbitrary and capricious change,"[100] but it did not find an inconsistency in that case.[101]

This Article is not the place to explore the limits of what an inter-regulation consistency doctrine might look like, but a few concluding thoughts are appropriate. As Professor Stewart cautioned, consistency requirements must be careful not to "hobble" agencies in "adapting to new contingencies."[102] A requirement of consistency across administrations would be less compelling than a requirement within an administration. It is unreasonable to expect that an agency seeking to promulgate a rule scour the *Federal Register* to determine whether it might have taken a different position with respect to an analytical matter in a different regulatory proceeding, and such a requirement of consistency is less compelling across agencies than within an agency because the burden would be greater. For that reason, the claim for applying a "cross-proceeding consistency of principle" approach is stronger for the co-benefits and federalism

96 *See generally* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

97 *See id*. at 981, 1000–02.

98 *See id*. at 975.

99 *See id*. at 968, 977–78, 1000.

100 *Id.* at 981.

101 *See id.* at 1000–02.

102 Stewart, *supra* note 1, at 1680.

examples discussed in this Article than for the example involving the incoherent approach to existing sources.

However, where the same agency in the same administration, at the same time, takes inconsistent positions with respect to key analytical issues, the situation is altogether different. The agency does not need to scour the *Federal Register* to make sure that it is not overlooking an inadvertent inconsistency—it knows exactly what it is doing. That is particularly true when the inconsistent approaches arise in regulations under the jurisdiction of the same division of an agency, as is the case of EPA's air pollution regulations. For that reason, out of the three case studies discussed in this Article, the co-benefits example is the most compelling vehicle for insisting on a "cross-proceeding consistency of principle."

Consider again the hypothetical single regulation providing that on these key issues the agency will take whichever side of the argument happens to promote deregulation in a particular proceeding. That regulation, as indicated above, would clearly run afoul of the Administrative Procedure Act. There is no conceptually defensible reason for dealing differently with an agency practice that precisely mirrors such a regulation.