Supplemental Comments of the Attorneys General of Massachusetts, New York, California, Connecticut, Arizona, Colorado, Delaware, Hawai‘i, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington, Wisconsin, and the District of Columbia, and the Chief Legal Officers of the City of Chicago, Illinois; the City of New York, New York; the City and County of Denver, Colorado; and the City and County of San Francisco, California

on

the Proposed Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards, 90 Fed. Reg. 36,288 (Aug. 1, 2025)

EPA-HQ-OAR-2025-0194

November 25, 2025

I. Introduction

The Attorneys General of Massachusetts, New York, California, Connecticut, Arizona, Colorado, Delaware, Hawai‘i, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington, Wisconsin, and the District of Columbia, and the Chief Legal Officers of the City of Chicago, Illinois; the City of New York, New York; the City and County of Denver, Colorado; and the City and County of San Francisco, California (together, States and Local Governments) submit these supplemental comments, and attached appendices, to highlight new information the Environmental Protection Agency (EPA) must consider in any final action on its Proposed Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards, 90 Fed. Reg. 36,288 (Aug. 1, 2025) (Proposal). *See Sierra Club v. Costle*, 657 F.2d 298, 398 (D.C. Cir. 1981) (upholding EPA's decision to docket and consider comments submitted after the comment deadline).

In particular, the States and Local Governments highlight the following information that is material to the outcome of this proceeding and has emerged since the Proposal's comment deadline: (1) new scientific data that further refute the scientific claims and sources cited in the Proposal; (2) credible information that EPA unlawfully and covertly outsourced drafting of the Regulatory Impact Analysis (RIA) to an individual who was not employed by the federal government; (3) evidence that EPA leadership prioritized work on the Proposal during the lapse in federal appropriations, in violation of the Antideficiency Act, to achieve a prejudged outcome; (4) the U.S. Department of Energy (DOE)'s failure to publish the vast majority of comments on its Climate Working Group draft Report, further barring EPA from relying on the Report in finalizing a rule; (5) Jeffrey Clark's unlawful performance of the relevant functions and duties of the Administrator of the Office of Information and Regulatory Affairs (OIRA), which taints the entirety of the rulemaking process; and (6) additional information, including each of the above revelations, that confirms that EPA has prejudged the outcome of this proceeding and that the rationales in the Proposal are pretextual, making the entire process a farce. This dizzying array of substantive and procedural flaws, adding to the many flaws already outlined in many of the

States and Local Governments' September 22, 2025, comments on the Proposal, warrants withdrawal of the Proposal.[1]

II. New Scientific Data Confirm Climate Change Is Rapidly Advancing and Endangering Public Health and Welfare.

The September 22, 2025, comments of many of the States and Local Governments described the enormous body of scientific evidence documenting that greenhouse gas emissions are causing climate change, and that climate change endangers public health and welfare.[2] New evidence substantiating these conclusions—and further refuting EPA's substantively and procedurally flawed attempt to disprove them—has become available since those comments were submitted and likewise must be considered by EPA in this proceeding.

First, new data confirm that warming is rapidly occurring. The year 2025 is on track to be either the second or third warmest year since 1850.[3] The years 2015 through 2025 will have been the eleven warmest years on record, with 2023 through 2025 being the warmest.[4] Atmospheric carbon dioxide and ocean heat content have hit record highs, and the Greenland and Antarctic ice masses are at record lows.[5] Further, a new study shows that greenhouse gas-driven acidification of Pacific ocean waters off the U.S. West Coast has occurred at higher rates than previously known, impacting the growth rates and survival of critical species in these marine ecosystems and fisheries.[6] We are now close to hitting multiple tipping points, and some may already have been crossed.[7]

Second, new scientific data demonstrate that harms are worsening as climate change worsens. According to an October analysis of U.S. billion-dollar weather and climate disasters—a dataset formerly maintained by the National Oceanic and Atmospheric Administration

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[1] *See* Endangerment Comments of the Attorney General of Massachusetts et al., EPA-HQ-OAR-2025-0194-0093 [hereinafter AGO ENDANGERMENT COMMENTS]; Vehicles Comments of the Attorney General of California et al., EPA-HQ-OAR-2025-0194-0093 [hereinafter AGO VEHICLES COMMENTS].

[2] AGO ENDANGERMENT COMMENTS, *supra* note 1, at 85–98.

[3] WORLD METEOROLOGICAL ASS'N, STATE OF THE CLIMATE: UPDATE FOR COP30, at 5 (Nov. 4, 2025), https://perma.cc/M33X-T3DG.

[4] *Id.*

[5] William J. Ripple, et al., *The 2025 state of the climate report: a planet on the brink*, BIOSCIENCE (Oct. 29, 2025), https://perma.cc/FQ5L-J59B.

[6] Mary Margaret V. Stoll et al., *A century of change in the California Current: upwelling system amplifies acidification*, 16 NATURE COMMC'NS 9661, 3–5 (Nov. 13, 2025), https://perma.cc/K34F-7BC4; *see also* Conrad Swanson, *Ocean acidification to hit Puget Sound harder, study says*, THE SEATTLE TIMES (Nov. 20, 2025), https://perma.cc/62SU-88R2.

[7] UNIV. OF EXETER GLOB. SYS. INST., GLOBAL TIPPING POINTS REPORT 2025, at 21–23 (Oct. 2025), https://perma.cc/L4WB-FDT8.

(NOAA) but discontinued by this Administration earlier this year[8]—the first half of 2025 was the costliest such period ever for major disasters in the United States, totaling over $100 billion.[9] On October 12, 2025, the remnants of Typhoon Halong hit western Alaska, devastating local Alaska Native communities.[10] The Alaskan shoreline advanced sixty feet inland due in part to global warming-related dynamics, including loss of sea ice and permafrost thaw.[11] Before 2022, only one recorded typhoon had ever reached the Arctic; since 2022, there have been three such typhoons.[12] Also in October 2025, Hurricane Melissa achieved the all-time strongest landfall in the Atlantic Basin, with sustained winds of 185 miles per hour.[13]

With this data as well as the significant scientific evidence described in the prior comments of many of the States and Local Governments, it is beyond dispute that climate change, driven by anthropogenic greenhouse gas emissions, seriously endangers public health and welfare. As such, EPA's attempts to dispense with scientific consensus by relying on a procedurally and scientifically flawed draft report and a handful of narrow studies cannot support EPA's proposed repeal of the longstanding 2009 Endangerment Finding.

III. EPA Appears to Have Unlawfully Outsourced and Obscured the Provenance of a Substantial Portion of the Draft Regulatory Impact Analysis.

The September 22, 2025, comments of many of the States and Local Governments explained that EPA's Proposal is procedurally defective because EPA unlawfully outsourced a major portion of its RIA—namely, Appendix B.[14] The States and Local Governments cited materials docketed by EPA that showed Appendix B had been drafted wholly outside the agency: the White House Office of Management and Budget (OMB) had inserted a fully formed Appendix B into the draft EPA had prepared. We argued that "EPA's uncritical reliance on analysis performed by another agency cannot be reconciled with EPA's duty to exercise its own technical and scientific expertise and to base its decision on the record before it."[15] And now, new revelations since the close of the comment period suggest that Appendix B was drafted in

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[8] *Billion Dollar Weather and Climate Disasters*, NOAA (May 8, 2025) (announcing that NOAA's Billion Dollar Weather and Climate Disasters data product "will be retired, with no updates beyond calendar year 2024"), https://perma.cc/H3KQ-XZF2.

[9] Oliver Milman, *Climate disasters in first half of 2025 costliest ever on record, research shows*, THE GUARDIAN (Oct. 22, 2025), https://perma.cc/5TCJ-L823.

[10] *Typhoon Halong*, COLORADO STATE UNIVERSITY COOP. INST. FOR RSCH. IN THE ATMOSPHERE (Nov. 24, 2025), https://perma.cc/52BU-UEJT.

[11] Sachi Kitajima Mulkey, *A Storm Hit Alaska. Now, a Native Community Is Racing to Save Its History*, NEW YORK TIMES (updated Nov. 9, 2025), https://www.nytimes.com/2025/11/04/climate/typhoon-alaska-archaeology.html.

[12] *Id.*

[13] Claire Brown, *A Meteorologist Explains Hurricane Melissa,* NEW YORK TIMES (Oct. 30, 2025), https://www.nytimes.com/2025/10/30/climate/a-meteorologist-explains-hurricane-melissa.html.

[14] *See* AGO VEHICLES COMMENTS, *supra* note 1, at 130.

[15] *Id.*

whole or in part by a *private citizen*, which is unlawful for several reasons and provides further reason for EPA to withdraw the Proposal.

Specifically, new information reveals that economics professor Casey Mulligan, who was neither an employee nor a contractor of or advisor to the government during the relevant period, drafted Appendix B. In November, Mulligan reportedly refused to answer a reporter's direct question as to "whether or not he'd written Appendix B."[16] "I'd have to check to see what you're looking at," Mulligan responded.[17] Two former EPA employees and "numerous outside experts" also confirmed that Appendix B bears a "striking resemblance" to Mulligan's research and writing.[18] Indeed, Appendix B relies heavily, and uncritically, on Mulligan's work to reject EPA's methodology used in the 2021 and 2024 vehicle rulemakings,[19] citing a 2023 working paper that Mulligan co-authored with Professor Timothy Fitzgerald of the University of Tennessee-Knoxville.[20] Appendix B also cites to a *Wall Street Journal* op-ed Mulligan co-authored as the sole support for the proposition that the 2021 and 2024 vehicle rules caused a sixteen percent increase in the inter-manufacturer-market price of regulatory credits.[21]

During the period of the draft RIA's preparation and review, Mulligan was a private citizen employed by the University of Chicago. It was not until August 1, 2025, two days *after* EPA announced the Proposal and publicly released the draft RIA that includes Appendix B, that Mulligan was confirmed by the Senate as Chief Counsel for Advocacy for the Small Business Administration.[22] There is no public evidence that Mulligan was a federal employee, contractor, or advisor between that date and the end of the first Trump Administration, in which Mulligan served for a period on the White House Council of Economic Advisors.[23]

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[16] Jean Chemnick, *White House wrote half of EPA's cost-benefit analysis for climate rule rollback*, E&ENEWS: CLIMATEWIRE (Nov. 4, 2025), https://www.eenews.net/articles/white-house-wrote-half-of-epas-cost-benefit-analysis-for-climate-rule-rollback/.

[17] The Small Business Administration, EPA, and OMB did not respond to inquiries for this story. *Id.*

[18] *Id.*

[19] For example, Appendix B relies solely on research by Mulligan and his co-author to reject EPA's methodology used in the 2021 and 2024 vehicle rulemakings to calculate the opportunity cost of powering EVs. EPA, RECONSIDERATION OF 2009 ENDANGERMENT FINDING AND GREENHOUSE GAS VEHICLE STANDARDS: DRAFT REGULATORY IMPACT ANALYSIS 39–41 (July 2025), https://www.epa.gov/system/files/documents/2025-07/420d25003.pdf [hereinafter DRAFT RIA].

[20] *Id.* at 39, 59; *see also* Timothy Fitzgerald & Casey B. Mulligan, *The Economic Opportunity Cost of Green Recovery Plans: Working Paper No. 30956*, NAT'L BUREAU OF ECON. RESEARCH (Feb. 2023), https://perma.cc/2DVF-NKWV.

[21] DRAFT RIA, *supra* note 19, at 36 n.58; *see also* Kevin Hassett & Casey B. Mulligan, *Nobelists for Harris Are Unburdened by Proof*, WALL STREET JOURNAL (Oct. 29, 2024).

[22] 171 Cong. Rec. S5181 (daily ed. Aug. 1, 2025).

[23] Indeed, there is also evidence suggesting that Mulligan may have begun work for the Small Business Administration when he was a private citizen. A few days after his confirmation, he "released a comprehensive report to the President and Congress, analyzing more than 12,000 rules." SBA, *Chief Counsel for Advocacy Casey Mulligan Hits the Ground Running on Day One with Report to Congress*

Such outside-party involvement in preparation of the RIA is unlawful in at least four ways. *First*, EPA's outsourcing of the drafting of Appendix B to Mulligan violates the Antideficiency Act. In relevant part, the law bars the federal government from accepting "voluntary services . . . except for emergencies involving the safety of human life or the protection of property." *See* 31 U.S.C. § 1342. A federal agency may accept such unpaid services only if the person offering those services executes an advance written agreement and is not otherwise entitled to a statutory rate of pay.[24] There is no evidence that Mulligan served as a federal employee, contractor, expert, or consultant during the relevant period. *See* 5 U.S.C. § 3109. Nor is there evidence of an advance, written agreement in which Mulligan waived any future pay claims against the government for services performed for OMB, EPA, or any other agency. Thus, any government official's acceptance of Mulligan's services in drafting Appendix B violates the voluntary-services provision of the Antideficiency Act. *See* 31 U.S.C. § 1342.

Second, to the extent Mulligan participated in the preparation of Appendix B, his bias taints the analysis therein. If Mulligan authored a portion of Appendix B, such authorship would create a conflict of interest because Mulligan is unable to critically review his own research in the same manner as an OMB or EPA staffer, particularly given that Mulligan's methodologies directly conflict with EPA's longstanding methods for assessing the economic costs and benefits of regulatory proposals. There is a much "higher likelihood" that EPA abused its discretion in analyzing and weighing the impacts of the Proposal and the final rule if the initial drafter of the analysis has a conflict of interest. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 117 (2008) (noting that "administrative law[] can ask judges to determine lawfulness by taking account of several different, often case-specific, factors" like a conflict of interest); *see also Indiana Sugars, Inc. v. ICC*, 694 F.2d 1098, 1100 n.5 (7th Cir. 1982) ("A decision might be found 'arbitrary and capricious' upon grounds unrelated to evidentiary support (*e.g.* if a conflict of interest or corruption were proved)."). That is particularly so if, as the public record suggests, EPA was not aware of any role Mulligan played in the drafting process and did not take measures to insulate the rulemaking from the effects of a resulting conflict.

Third, even if Mulligan's involvement were not de facto unlawful, obscuring his involvement is. Obscuring the authorship of Appendix B is unlawful as it is inconsistent "with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law." *Home Box Off., Inc. v. FCC*, 567 F.2d 9, 56 (D.C. Cir. 1977). Where an agency relies on outside parties to conduct its business, "lines of accountability may blur, undermining an important democratic check on government decision-making." *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565–66 (D.C. Cir. 2004). While a federal agency may permissibly "rely on advice and assistance from private actors," those actors must be "subject to its 'authority and surveillance.'"

(Aug. 5, 2025), https://perma.cc/WS3M-VZXF; *see also* SBA Office of Advocacy, *Biden Administration Rules Certified Under the Regulatory Flexibility Act* 2 (Aug. 5, 2025) (forward from Mulligan attesting to "my review"), https://perma.cc/GC9V-R6GQ .

[24] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., DECISION B-324214, MATTER OF: DEPARTMENT OF TREASURY—ACCEPTANCE OF VOLUNTARY SERVICES 3 (Jan. 27, 2014), https://perma.cc/TK7M-33GL (finding that the Department of the Treasury violated the Antideficiency Act's voluntary services provision when it accepted the unpaid services of four individuals without an advance written agreement that the services were offered without expectation of payment and expressly waiving any future pay claims against the government).

FCC v. Consumers' Research, 606 U.S. 656, 692 (2025) (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 399 (1940)). In particular, the provenance of a draft RIA (or portion thereof) is a key element of "the methodology used in obtaining the data and in analyzing the data" upon which a proposed rule is based. 42 U.S.C. § 7607(d)(3)(B). OMB itself has explained that "[a] good [RIA] should be transparent" and that the agency "should also disclose the use of outside consultants, their qualifications, and history of contracts and employment with the agency (e.g., in a preface to the RIA)."[25] EPA's draft RIA includes no such disclosure. The fact and identity of a drafter outside the government are thus "critical factual material" that "must have been made public in the proceeding and exposed to refutation." *Owner-Operator Indep. Drivers v. FMCSA*, 494 F.3d 188, 199 (D.C. Cir. 2007) (internal citations and emphases omitted) (holding rule unlawful for agency's failure to disclose and subject to comment methodology used to assess proposed rule's costs and benefits). EPA's failure to disclose that material deprived the public of meaningful opportunity for comment and requires withdrawal of the Proposal.

Fourth, an outside party's involvement in the preparation of Appendix B may also violate the Federal Advisory Committee Act (FACA), 5 U.S.C. §§ 1001 *et seq*. The States and Local Governments have already explained, in the context of DOE's Climate Working Group draft report, why FACA required substantial disclosures of information relevant to DOE's (and, by extension, EPA's) proceeding.[26] To the extent Mulligan participated in the preparation of the draft RIA (or any other aspect of EPA's Proposal or a final rule) *and* did so in conjunction with at least one other person (either inside or outside the government), such action would violate FACA and likewise warrant withdrawal of the Proposal. In sum, new revelations regarding an outside party's preparation of Appendix B irreparably taint the Proposal and warrant its withdrawal.

IV. EPA Staff Worked on the Proposal During the 43-Day Government Shutdown in Violation of the Antideficiency Act to Achieve a Prejudged Political Outcome.

During the recent 43-day lapse in federal appropriations, EPA leadership reportedly required agency staff to work on the Proposal to continue advancing the administration's political priorities even in the absence of Congressional appropriations, in violation of the Antideficiency Act.[27] These actions contradicted the agency's own formal shutdown staffing plan, which states that "significant agency activities" including the issuance of regulations must cease during a lapse in appropriations.[28]

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[25] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR A-4 17 (Sept. 17, 2003), https://perma.cc/7V89-AMYM; *see also* 90 Fed. Reg. 9065, 9067 (Feb. 6, 2025) (Exec. Order 14,192 directing reinstatement of this version of Circular A-4).

[26] AGO ENDANGERMENT COMMENT, *supra* note 1, at 100–06.

[27] Ellie Borst & Jean Chemnick, *EPA flush with cash for 'priority' staff*, E&E NEWS (Oct. 29, 2025), https://www.eenews.net/articles/epa-flush-with-cash-for-priority-staff/; *see also* Myah Ward, Megan Messerly & Sophia Cai, *Trump shields immigration and trade from shutdown fallout*, POLITICO (Oct. 1, 2025), https://www.politico.com/news/2025/10/01/trump-protecting-priorities-from-shutdown-00588657 (anonymously quoting a first-term Trump official saying: "If something is going to put a kink in Trump's agenda even for a couple of days, they will find a creative way to make that work.").

[28] EPA, U.S. ENVIRONMENTAL PROTECTION AGENCY CONTINGENCY PLAN FOR SHUTDOWN 3 (Sept. 2, 2025), https://perma.cc/5QTX-E4PX [hereinafter EPA CONTINGENCY PLAN].

Notably, the Department of Justice (DOJ) reads the Antideficiency Act to bar executive agency staff from working during a shutdown "even on a voluntary basis, except in very limited circumstances including emergencies involving the safety of human life or the protection of property."[29] As DOJ recently explained in seeking to stay litigation challenging DOE's Climate Working Group (CWG), the term "emergencies" "does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property."[30]

Contrary to that position, however, numerous public reports have confirmed that "virtually everyone who is working to undo marquee Biden-era regulations for air pollution, climate change, and water quality" was still working during the shutdown, including on EPA's Proposal.[31] As Administrator Zeldin told the N.Y. Post at the end of October: "Our entire regulatory agenda has been moving forward this month. . . . The only impact of the shutdown that I could think of is any proposed rule that can't start a public comment period during a shutdown."[32] By contrast, EPA leadership quickly furloughed staff *not* working on political priority policies—including agency experts that should be involved in any final rule. For example, staff within the Office of Air and Radiation engaged in greenhouse gas reporting and inventories were sent home in the first round of furloughs.[33] The furlough notices stated that the agency could no longer incur "further financial obligations."[34]

EPA Administrator Zeldin stated in an interview that the agency had sufficient carryover funds to cover the costs of select EPA staff continuing to work on the Proposal.[35] But EPA has not identified the source, purpose, and designated expenditure of such funds, nor pointed to specific past appropriations authorizing agency leadership to select which staff to furlough based on political priorities.

Relatedly, to the extent EPA staff at any point relied or are relying on artificial intelligence (AI) or other computer models to accelerate the rulemaking process notwithstanding the shutdown, such use must be disclosed, as the States and Local Governments explained in

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[29] Mot. For a Stay of Proceedings in Light of Lapse in Appropriations at 1–2, Env't Def. Fund, et al. v. Christopher Wright, in his official capacity as Sec'y of Energy, et al., No. 1:25-cv-12249-WGY (D. Mass. Oct. 20, 2025).

[30] *Id.*

[31] Borst & Chemnick, *supra* note 27.

[32] Josh Christenson, *EPA to furlough 89% of workforce if shutdown drags into November, Lee Zeldin says*, N.Y. POST (Oct. 29, 2025).

[33] Borst & Chemnick, *supra* note 27.

[34] Kevin Bogardus & Ellie Borst, *EPA sends first furlough notices*, E&E NEWS: GREENWIRE (Oct. 9, 2025), https://subscriber.politicopro.com/article/eenews/2025/10/09/epa-out-of-carryover-cash-sends-first-furlough-notices-00599812.

[35] Borst & Chemnick, *supra* note 27.

their initial comment on the Proposal.[36] And if such AI use occurred during the government shutdown, then that use must also be traced to a specific appropriation to demonstrate compliance with the Antideficiency Act.

In sum, EPA's work on this proceeding during the lapse in appropriations is unlawful and, as described *infra* Section VII, further confirms the agency's prejudged outcome and pretextual rationales.

V. DOE's Failure to Publish Comments on the Draft CWG Report Further Bars EPA from Relying on the Report in Its Proposal

The Proposal relies primarily on a draft of the DOE's Climate Working Group (CWG) Report to support its rejection of decades of scientific consensus. In addition to the many procedural and substantive flaws of this draft report as detailed in the initial comments of many of the States and Local Governments,[37] intervening evidence of DOE's failure to post the vast majority of public comments submitted on the draft confirms the impropriety of EPA's reliance on it. DOE offered the public 32 days to submit comments on the CWG Report, and 59,563 comments were submitted.[38] Yet as of the date of this filing, only 351 comments have been posted to the public docket on the CWG Report. Indeed, DOE disbanded the CWG one day after the public comment period closed (in apparent response to litigation), and DOE seems to have stopped the public comment posting process altogether.[39] For several reasons, DOE's failure to post the remaining 59,212 comments further precludes EPA's reliance on any version of the CWG Report to support the Proposal.

First, the failure to publish these comments prevents EPA from considering critical new information contradicting the CWG's findings. As many of the States and Local Governments explained in their September 22, 2025, comments, it would be arbitrary and capricious for EPA to rely on the facially flawed report of another agency, *see Ergon-West Va., Inc. v. EPA*, 896 F.3d 600, 610 (4th Cir. 2018), not to mention a non-final draft of such report. EPA may not "blindly adopt [those] conclusions" nor "turn a blind eye to errors or omissions apparent on the face of the report." *Id.* at 610, 612 (holding it was arbitrary and capricious for EPA to rely on erroneous findings in a DOE report concerning criteria for granting a waiver for compliance with renewable fuel standards program). Such facial errors or omissions may arise where a rulemaking agency fails to take into account "'new' information—*i.e.*, information the [consultant agency] did not take into account—which challenges the [report's] conclusions."

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[36] AGO ENDANGERMENT COMMENT, *supra* note 1 at 201–02.

[37] *Id.* at 98–163; Climate Working Group Comments of the Attorney General of New York et al., DOE-HQ-2025-0207.

[38] Notice of Availability: A Critical Review of Impacts of Greenhouse Gas Emissions on the U.S. Climate, 90 Fed. Reg. 36,150 (Aug. 1, 2025).

[39] U.S. Dep't of Energy, Rulemaking Docket: A Critical Review of Impacts of Greenhouse Gas Emissions on the U.S. Climate, https://perma.cc/5M7Q-86EL (indicating that all but six of the 351 comments were posted before close of comment period); Decl. of Jeff Novak, Ex. 1 at 1, Env't Def. Fund v. Wright, No. 1:25-cv-12249 (D. Mass Sept. 4, 2025), ECF No. 44-1 (disbanding CWG one day after close of comment period).

Shafer & Freeman Lakes Env't Conservation Corp. v. FERC, 992 F.3d 1071, 1093 (D.C. Cir. 2021). The public comments submitted on the draft CWG Report are a critical source of such new information, both for EPA and the public. Yet there is no indication from EPA's docket that DOE has provided any of the comments on the draft CWG Report to EPA, nor that there is any other way for EPA to view public comments on the draft CWG Report except through DOE's woefully incomplete docket. Because DOE has not posted the comments, EPA presumably has not considered this new information. And even if EPA did somehow consider the comments, the failure to post them publicly would improperly prevent the public from examining information material to the proceeding.

Second, the failure to publish the CWG Report comments violates the Clean Air Act, which requires EPA to place all written comments in the rulemaking docket. *See* 42 U.S.C. § 7607(d)(4)(B)(i). One purpose of the comment process is to allow "a genuine interchange" between the public and the agency. *Connecticut Light & Power Co. v. Nuclear Regul. Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982) ("To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport."); *see also Ohio v. EPA*, 603 U.S. 279, 293–94 (2024) (holding that EPA's failure to provide a "reasoned response" to states' comments meant that EPA failed to supply "a satisfactory explanation for its action") (internal citations omitted); *Ass'n of Data Processing Serv. Org., Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984) ("[A]t least the most critical factual material that is used to support the agency's position on review must have been made public in the proceeding and exposed to refutation."). As stated by DOE, the CWG Report "was published . . . as part of the U.S. Environmental Protection Agency's (EPA) proposed rule repealing the 2009 Endangerment Finding."[40] And, again, EPA relied on it as a basis for rescission of the 2009 Endangerment Finding and assured commenters that "[i]nterested parties may review and comment on the updated version of the CWG draft report for consideration." 90 Fed. Reg. at 36,292 n.10. Therefore, comments on the CWG Report are functionally comments on the Proposal, and commenters (including the States and Local Governments) need the opportunity to review and respond to those comments. The failure to make those comments publicly available violates the Clean Air Act by preventing a genuine interchange between the public and the agencies on key information on which the Proposal relies.

Lastly, the failure to publish comments on the CWG Report is contrary to the E-Government Act of 2002, which generally requires public comments to be "ma[de] publicly available online to the extent practicable." Pub. L. No. 107-347, § 206(d)(2), 116 Stat 2899, 2916 (2002); *see also* Exec. Order 13,563, 76 Fed. Reg. 3821, 3821–22 (Jan. 21, 2011) (directing agencies to provide "timely online access" to relevant materials in rulemaking proceedings). EPA

[40] DOE, *Department of Energy Issues Report Evaluating Impact of Greenhouse Gasses on U.S. Climate, Invites Public Comment* (July 29, 2025), https://perma.cc/MU67-7JJ6. EPA's failure to timely post all comments on the Proposal similarly violates the Clean Air Act. EPA received 568,193 comments on the Proposal, but, as of the date of this filing, EPA has only posted 27,760 comments to Regulations.gov—less than five percent of all comments received. U.S. Env't Protection Agency, Rulemaking Docket: Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards, https://www.regulations.gov/document/EPA-HQ-OAR-2025-0194-0093.

and DOE each have a standard practice of publishing comments received on Regulations.gov.[41] Because DOE chose to go through notice and comment, the agency should comply with the E-Government Act's requirements for notice and comment, consistent with EPA and DOE agency practice. Publishing the CWG Report comments would not be impracticable, and the failure to do so is therefore inconsistent with the Act.

For these reasons, in addition to those described in our September 22, 2025, comments, EPA cannot rely on the CWG Report.

VI. The Federal Vacancies Reform Act Bars Jeffrey Clark from Exercising the Duties of the OIRA Administrator, Including Review of EPA's Finalization of the Proposal and Accompanying RIA.

EPA should withdraw the Proposal for the additional reason that OIRA duties related to this proceeding have been and continue to be performed by and under the supervision of Jeffrey Bossert Clark, who is serving as Acting OIRA Administrator in violation of the Federal Vacancies Reform Act (FVRA). The OIRA Administrator plays a significant role in the review and finalization of agencies' proposed regulations and accompanying RIAs; as such, Clark's unlawful service taints the entirety of the rulemaking process for EPA's Proposal.

The OIRA Administrator is an officer of the United States that must be appointed by the President with the advice and consent of the Senate.[42] Under FVRA, Congress provided "the exclusive means for temporarily authorizing an acting official to perform the functions and duties" of vacant positions that would otherwise require presidential appointment and Senate confirmation. *See* 5 U.S.C. § 3347(a).[43] If someone seeking to serve as an acting official fails to satisfy FVRA's criteria while performing "any function or duty of a vacant office," then that action "shall have no force or effect." *See id.* § 3348(d)(1).

The current Acting OIRA Administrator, Jeffrey Clark, does not and has never satisfied the criteria under FVRA and thus has no authority to exercise the functions or duties of that office.[44] Under FVRA, there are three categories of government employees who may temporarily serve as acting officers: (1) "the first assistant to the office," (2) someone who has already been

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[41] *See* EPA, *Commenting on EPA Dockets*, https://perma.cc/FX73-EJYR; DOE, *How to Participate or Comment*, https://perma.cc/B38S-XF9V.

[42] Under the 1980 Paperwork Reduction Act (PRA), the OIRA Administrator was appointed by the OMB Director. In 1986, however, Congress amended the law to require the President to appoint the OIRA Administrator, by and with the advice and consent of the Senate. Pub. L. No. 99-500, § 813, 100 Stat. 1783–336 (1986); *see also* MEGHAN M. STUESSY ET AL., CONG. RESEARCH SERV., R48546, THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS (OIRA): OVERVIEW AND MAJOR RESPONSIBILITIES 6 (May 27, 2025).

[43] *See also* VALERIE C. BRANNON, CONG. RESEARCH SERV., R44997, THE VACANCIES ACT: A LEGAL OVERVIEW 2 (Jan. 27, 2025).

[44] Clark has signed numerous official memoranda as OIRA's "Acting Administrator." *See, e.g.*, Memorandum from Jeffrey Bossert Clark, Sr., Acting Adm'r, Off. of Info. and Regul. Affairs, to Regul. Pol'y Officers at Dep'ts and Agencies and Managing and Exec. Dirs. of Comm'ns and Bds., Streamlining the Review of Deregulatory Actions (Oct. 21, 2025) (M-25-36), https://perma.cc/8J3J-CF64.

Presidentially nominated and Senate-confirmed for another position, or (3) a senior officer or employee of the agency who was in that position for at least "90 days" in the year preceding the date of the former officer's resignation. *See id.* § 3345(a)(1). Clark, who, prior to joining OIRA, worked as a Senior Fellow and Director of a private think tank in Washington D.C.,[45] began serving as the "Acting OIRA Administrator" on March 3, 2025.[46] President Trump has not formally nominated anyone to serve as OIRA Administrator, including Clark.

In response to recent allegations that Clark is unlawfully serving as Acting OIRA Administrator in violation of FVRA, OMB Director Vought said that he designated Clark as "first assistant" to the associate administrator on February 12, 2025, but OMB has not provided public evidence of such a designation.[47] Furthermore, under FVRA, "first assistant" is a term of art.[48] OIRA has consistently stated, and the Government Accountability Office has affirmed, that the "first assistant" in the absence of an appointed OIRA Administrator is the Deputy Administrator at the time the vacancy occurred.[49] Thus Dominic Mancini, not Jeffrey Clark, was the proper "first assistant" and Acting Administrator under FVRA when the OIRA Administrator office became vacant, and Clark has been unlawfully exercising the functions and duties of that office since he assumed the office in March, 2025.[50]

Even if Clark *did* satisfy one of the three criteria under FVRA (he does not), he has exceeded the amount of time one may temporarily serve as an acting officer. Under FVRA, a person may serve "for no longer than 210 days beginning on the date the vacancy occurs." *See* 5 U.S.C. § 3346(a)(1). That period is extended to 300 days during a presidential transition. *Id.* § 3349a. OMB spokesperson Rachel Cauley confirmed that the 300-day grace period expired on November 18, 2025.[51] Thus, even if Clark were properly designated as "first assistant" under FVRA—a factual impossibility because Dominic Mancini, not Jeffrey Clark, was serving as Deputy Administrator when the vacancy occurred—Clark is now barred from exercising the functions and duties of the OIRA Administrator.

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[45] Jeff Clark & Anthony Licata, *Brief: On the Article II Recess Appointments Clause* (Nov. 17, 2024), https://perma.cc/XPE2-9ZT4 ("Jeffrey Clark is a Senior Fellow and Director of Litigation for the Center for Renewing America").

[46] Kevin Bogardus, *Watchdog weighs lawsuit against White House regs boss*, E&ENEWSPM (Nov. 18, 2025), https://www.eenews.net/articles/watchdog-weighs-lawsuit-against-white-house-regs-boss/.

[47] *Id.*

[48] BRANNON, *supra* note 43, at 10–11.

[49] U.S. GOV'T ACCOUNTABILITY OFF., DECISION B-333857, VIOLATION OF THE TIME LIMIT IMPOSED BY THE FEDERAL VACANCIES REFORM ACT OF 1998: ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS 3 n.7 (Apr. 18, 2022) ("OMB stated that the Deputy Administrator is the most senior career position reporting directly to the Administrator, and the agency has long recognized the position as the first assistant to the Administrator.").

[50] *Dominic Mancini, Deputy Administrator, OMB's OIRA*, CDO.gov, https://perma.cc/FJ76-946J ("Dominic Mancini serves as the permanent Deputy Administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA)").

[51] Bogardus, *supra* note 46.

OIRA's failure to lawfully perform its important duties in reviewing and finalizing the Proposal and any final rule undermines the legal integrity of EPA's rulemaking process and the requisite interagency review. For example, under Executive Order 12,866, the OIRA Administrator is tasked with providing "meaningful guidance and oversight" to ensure each agency's regulatory actions "are consistent with applicable law, the President's priorities . . . [and] do not conflict with the policies or actions of another agency." 58 Fed. Reg. 51,735, 51,742 (Oct. 4, 1993). The order also subjects OIRA to explicit transparency requirements "to ensure greater openness, accessibility, and accountability in the regulatory review process," including the disclosure of all "substantive communications between OIRA personnel and persons not employed by the executive branch" and "all documents exchanged between OIRA and the [rulemaking] agency" during OIRA's review. *Id* at 51,742–43. President Trump has also tasked OIRA with additional oversight of agency rulemaking via Executive Order. These mandates include review of all agencies' proposed and final significant regulatory actions "to ensure Presidential supervision and control of the entire executive branch," Exec. Order 14,215, 90 Fed. Reg. 10,447, 10,447 (Feb. 24, 2025), and consultation with agency heads to "develop a Unified Regulatory Agenda that seeks to rescind or modify" regulations identified as inconsistent with law and Administration policy, Exec. Order 14,219, 90 Fed. Reg. 10,583, 10,583 (Feb. 25, 2025). OIRA also coordinates the interagency review process for such economically significant rules.[52] Given the States and Local Governments' concerns herein, including the external authorship of a portion of the RIA, it is essential that such duties are lawfully performed by a FVRA-compliant officer. Accordingly, the Proposal must be withdrawn. At a minimum, EPA must disclose any work that Jeffrey Clark performed while unlawfully serving as Acting OIRA Administrator related to the Proposal or forthcoming final rule and declare such work to have "no force or effect" consistent with the plain text requirements of FVRA.

VII. The New Information Set Forth in This Comment Confirms that EPA Prejudged the Outcome of this Proceeding and that Its Proposed Rationales, and the Entire Notice-and-Comment Process, Are Pretextual.

As detailed in the September 22, 2025, comments of many of the States and Local Governments,[53] Administrator Zeldin has demonstrated an "unalterably closed mind on matters critical to the disposition of th[is] proceeding," and therefore EPA must withdraw this current Proposal and begin a new rulemaking process untainted by the Administrator's prejudgment. *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980); *see also Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830, 847 (E.D. Cal. 2008). Similarly, the States and Local Governments have established that EPA failed to offer "genuine justifications . . . that can be scrutinized by courts and the interested public," *Dep't of Commerce v. New York*, 588 U.S. 752, 785 (2019), and instead presented "contrived"—i.e., pretextual—explanations that are "incongruent with . . . the agency's priorities and decisionmaking process," *id.* at 784–85.[54] Much of the new information detailed above, as well

[52] *See* MEGHAN M. STUESSY ET AL., *supra* note 42, at 9; *see also* CURTIS W. COPELAND, CONG. RESEARCH SERV., RL32397, FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS (Mar. 21, 2011).

[53] AGO ENDANGERMENT COMMENTS, *supra* note 1, at 191–95.

[54] *Id.* at 195–97.

as recent statements by Administrator Zeldin, provides additional support for the States and Local Governments' argument that the Proposal and this proceeding are prejudged and pretextual and reaffirms that the Proposal must be withdrawn.

First, the preparation of Appendix B by an outside party—Casey Mulligan—who has clearly and repeatedly stated his position on a disputed methodological question confirms prejudgment and pretext. *See supra* section III. Just as the decisionmakers knew what they wanted DOE's Climate Working Group to say,[55] they knew what they wanted the RIA to say—and who would say it in a manner aligned with their policy goals. Mulligan's apparent role in this rulemaking further confirms this Administration's prejudged and pretextual approach to this proceeding.

Second, as described *supra* Section IV, EPA continued to work on the Proposal during the lapse in appropriations, contrary to the agency's public-facing contingency plan (last updated September 2, 2025),[56] and while agency experts on the relevant topics were furloughed. That selective funding further demonstrates that the rule serves a specific and prejudged policy goal—slashing greenhouse gas regulations as quickly as possible. And the furloughing of technical and scientific staff, but not political leadership, shows the Rule's purported reliance on technical and scientific rationales is pretextual, and the process of receiving and reviewing comments a farce.

Third, Administrator Zeldin has continued to make statements and take actions after the close of the public comment period that demonstrate he is "unable to" and indeed will not "consider meaningfully" the evidence presented in [this] rulemaking. *Ass'n of Nat'l Advertisers*, 627 F.2d at 1170. For example, just one day after close of the public comment period, Administrator Zeldin opined on X that "The Green New Scam is DEAD in the United States."[57] One day later, reporting revealed that "[i]nternal agency notes and presentation slides" showed that Administrator Zeldin was "rac[ing] ahead without analysis" on the rulemaking.[58] And the very next day, Administrator Zeldin declared on X that "Americans' eyes are wide open to the climate change con job where left-wing policies get advanced that purposefully suffocate our economy, and bankroll well connected Dems."[59]

More recently, Administrator Zeldin ranted about EPA's preordained approach to this proceeding with Breitbart news on November 10, 2025. In his words:

> Section 202(a) of the Clean Air Act doesn't say to regulate carbon dioxide, it doesn't say methane, it doesn't reference the greenhouse gases, it doesn't talk about combatting global climate change, and it certainly doesn't talk about mental leaps where they say carbon dioxide when mixed with a bunch of other well-mixed gases

[55] *Id.* at 106–15.

[56] *See* EPA CONTINGENCY PLAN, *supra* note 28, at 4.

[57] Lee Zeldin (@epaleezeldin), X (Sept. 23, 2025, 11:30 AM), https://perma.cc/R3X2-AHTN.

[58] Jean Chemnick, *Internal docs: Zeldin races ahead without analysis in endangerment rollback*, E&E NEWS: CLIMATEWIRE (Sept. 24, 2025), https://subscriber.politicopro.com/article/eenews/2025/09/24/internal-docs-zeldin-races-ahead-without-analysis-in-endangerment-rollback-00576610.

[59] Lee Zeldin (@epaleezeldin), X (Sept. 25, 2025, 8:29 AM), https://perma.cc/C82Y-KZLN.

> some not even admitted from light-, medium- and heavy-duty vehicles in order to combat global climate change well then that causes an endangerment to public health and welfare inside of the United States when the agency had always been looking at local and regional impacts. If you, for those of you in this room, this is a smart room, if you're familiar with section 202 of the Clean Air Act and you're familiar with how EPA has operated, you probably just counted about five different mental leaps, so we're going to follow the plain language of the law and if you want the federal government to be regulating the heck out of greenhouse gas emissions, it's very easy you go right down the road to the United States Congress, you go contact your house member, you go contact your senator and you ask for them to amend section 202 of the Clean Air Act and then you put it in the law and then we follow the law, we're going to follow our statutory obligations, it's a wild concept that's upsetting a lot of people, but we're not going to be apologetic about it, we're proudly fulfilling this agenda. That is the Trump mandate. . . . We are going to be issuing a final decision immediately.[60]

In short, the record of prejudgment and pretext continues to mount, fatally tainting this rulemaking process and requiring withdrawal of the Proposal in full.

[60] *Breitbart News hosts a policy event with Environment Protection Agency Administrator Lee Zeldin on Monday, November 10*, BREITBART NEWS, at 29:00 to 31:30 (Nov. 10, 2025), https://www.breitbart.com/politics/2025/11/10/watch-live-breitbart-news-holds-a-policy-event-with-epa-administrator-lee-zeldin/.

VIII. Conclusion

For the foregoing reasons, the States and Local Governments reemphasize their strong opposition to the Proposal. As described herein, new information confirms that the Proposal is arbitrary and capricious and unlawful and must be withdrawn.

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