Rupturing the Air Consensus

The administration's deregulatory actions ignore our society's shared vision, for half a century, that there should be constant environmental improvement. The Trump EPA instead is turning on its head the legal, political, and practical history of the Clean Air Act

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TO paraphrase Dr. Martin Luther King Jr., for 55 years the arc of the Clean Air Act has bent toward steadily improving air quality and public health—until this trend was abruptly shattered on January 20 by the arrival as president for the second time of Donald J. Trump. Within weeks, his appointee as EPA administrator, Lee Zeldin, propounded an action agenda for the agency designed to arrest and even reverse the nation's history of clean air progress

On March 12, EPA announced a list of air pollution standards for "reconsideration" that includes new greenhouse gas standards for the power, oil and gas, and on-road sectors. The list also covers air toxics emissions limits for the power sector, the chemical manufacturing sector, and a range of other industries. Additionally, the agency is challenging the actions required of it and others by the Clean Air Act to curb interstate air pollution transport and regional haze. Finally, of special concern is the fact that EPA will train its cross-hairs on the National Ambient Air Quality Standards, which benchmark needed improvements under the CAA in reducing concentrations of six "criteria" pollutants. One of the act's regulation-created NAAQS addresses fine particulate matter—the deadliest air pollutant, responsible for more than one hundred thousand deaths annually; PM has been singled out for special reconsideration by the agency.

The March 12 announcement disregards EPA's statutory public health and environmental obligations and the mandates placed on the agency by the Supreme Court. Instead, Zeldin says EPA will be "driving a dagger straight into the heart of the climate change religion to drive down cost of living for American families, unleash American energy, bring auto jobs back to the U.S. and more."

Simultaneously, the new administrator began the degradation of key segments of EPA's foundational rulemaking capacity, by virtually eliminating the Office of Research and Development. ORD's toxicologists, health specialists, and other scientists work at the epicenter of EPA's research expertise, central, for example, to generating chemical risk assessments needed to set protective standards for chemical and ambient air pollution exposures. On the issue of the NAAQS, the office's experts author the science and policy assessments critical to informing the administrator's statutory mandate to determine every five years whether to retain or strengthen these health-based standards for each criteria pollutant.

Zeldin also dismissed the members of the Clean Air Science Advisory Committee, who had been selected by his predecessor for their expertise to provide complementary, independent scientific and technical advice—especially on NAAQS reviews. To top off his agenda, Zeldin announced a proposal to cut 55 percent from EPA's budget going forward, with commensurate reductions in staffing and programs.

By summer, the reconsideration process yielded proposals to repeal the 2024 greenhouse gas emissions standards for fossil fuel power plants as well as the 2024 air toxics standards for coal-fired power plants. Also slated for abolishment were all of EPA's greenhouse gas

emissions standards, for model years past and future, for automobiles and trucks. And of central importance, EPA moved to reverse its seminal 2009 determination, on which the tailpipe standards were premised, that GHGs pose a threat to public health or the environment. This Endangerment Finding by the Obama EPA that the agency now seeks to reverse had followed the Supreme Court's 2007 decision in *Massachusetts v. EPA* that carbon dioxide meets the CAA's definition of "air pollutant" and that EPA must respond to petitions seeking a determination as to whether GHGs posed a threat to human health and the environment.

The sweep of EPA's deregulatory agenda remains breathtaking on its own terms—and this is especially so for the sheer breadth and thoroughness of the March 12 CAA announcement. But what makes it even more breathtaking is the whiplash abruptness in threatening more than five decades of environmental progress, as well as its signaling of the administration's willingness to contest what for Americans has long functioned as a public understanding in support of continual progress in improving air quality and almost as strong support for addressing climate change. Above all, the combined effect of repealing or weakening air regulations that Zeldin's deregulatory project encompasses, and the approach he has taken to doing so, threaten to shred the fabric of the legislation that Congress and the courts carefully spun.

What can be called the Clean Air Consensus that Zeldin is seeking to defy climaxed in the 1990 Clean Air Act Amendments, and included a Republican president, George H. W. Bush, who had staked his election campaign on a promise to pass ambitious new air quality legislation, a Democratic Senate majority leader, and an overwhelming bipartisan majority in both houses. The Senate tally on final passage was 89-11; in the House it was 401-21. These majorities would seem to reflect members' calculus, in both parties, that identifying themselves with meaningful, continual progress in protecting and improving air quality was at least politically essential.

The yes votes, moreover, were not frivolous or merely convenient. Preceding them were months of torturous legislative negotiations, conducted under the joint leadership of senior White House staff and their key congressional counterparts, of both parties. All of this was preceded by a decade of polarizing debate about the difficult implementation experience of the act's 1977 amendments and, most intensely, about whether sulfur dioxide emissions emitted by power plants were responsible for acid rain creating forest die-back widely observed in the eastern half of the United States and the "death" of freshwater streams and lakes in the Rocky Mountain West and parts of the East. So numerous, far-reaching, impactful, and contentious were the provisions of the 1990 legislation that the negotiations eventually elicited the individual participation of almost every senator. Accompanying and following the many rounds of negotiations were the 12 weeks of Senate "floor time" during which members introduced, debated, and voted on proposed amendment after proposed amendment, many of which addressed either technical details or major policy and political conflicts embedded in the legislation, or both. In the wake of this necessarily informative process, the chances are high that most members' votes in favor carried at least a modicum of conviction and commitment, beyond just transitory political expedience.

In fact, the 1990 amendments' sweep, ambition, and potential cost, which was the object of continuous anxious scrutiny during the legislative process, were politically viable only thanks to the White House negotiators' unrelenting—and reassuring— insistence that the price tag of the legislation never exceed a politically sustainable dollar amount, which they constantly monitored, and because members' votes reflected a broad-based public demand supporting prioritizing the consensus on continual progress on clean air.

In the following decades, including through the first Trump administration as well as the Clinton, George W. Bush, and Obama administrations, the federal government, the states, and the courts institutionalized the national consensus prioritizing continual progress in improving air quality. EPA assiduously—if not always quickly enough without the prodding of citizen suits—implemented the act via the promulgation of myriad emissions standards, including periodic updates of technology-based standards, along with NAAQS revisions and the panoply of measures needed to support or compel states to carry out their obligations in service of meeting the air quality standards. EPA's deft implementation of the then innovative Acid Rain Program achieved the promised 10 million ton reductions in power plant sulfur dioxide emissions at far below projected costs.

THE 1990 amendments to the Clean Air Act touch virtually every sector of the economy and affect myriad businesses and firms. Deep in the fabric of the law are two interwoven strands. Separately, and in combination, they operationalize the priority of public health and environmental protection.

SIDEBAR

There Could Be a Silver Lining in a Repeal

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"If EPA succeeds in its claim that greenhouse gases are not air pollutants, then the preemption provision appears not to bar states from issuing their own greenhouse gas standards"

The legal basis for repealing EPA's Endangerment Finding is dubious. The scientific basis is preposterous. But there may be a silver lining for states if the Trump administration carries through with its proposal despite its legal and scientific weakness. The administration's arguments for the repeal, if successful, would give states strong legal grounds to regulate greenhouse gases from cars and trucks.

The legal and scientific underpinnings of the administration's proposed repeal are largely a rehash of Justice Scalia's dissent in *Massachusetts v. EPA*. That court held that greenhouse gases are air pollutants under the Clean Air Act and that the EPA administrator must determine whether, when emitted from motor vehicles, they endanger public health and welfare. After the decision, the agency issued its Endangerment Finding and began regulating greenhouse gases from cars, trucks, power plants, and other polluters.

Despite the Supreme Court's holding, here is the language EPA now uses as its primary justification for repealing the Endangerment Finding:

"Section 202(a) is best read as authorizing the agency to regulate air pollutant emissions that cause or contribute to air pollution that endangers public health or welfare through local or regional exposure.

"Put another way, we propose that the air pollutants identified in CAA Section 202 and throughout relevant provisions of the CAA are those that cause or contribute to air pollution for which the air pollution itself, through local or regional exposure to humans and the environment, endangers public health or welfare.

"The 'air pollution' addressed in the Endangerment Finding is different in kind."

And here is language from the Scalia dissent: "Regulating the buildup of CO_2 and other greenhouse gases in the upper reaches of the atmosphere, which is alleged to be causing global climate change, is not akin to regulating the concentration of some substance that is polluting the air."

Lest it seems odd to rely on a dissenting opinion to upend major climate policy, the administration's aim seems clear: to get the Court to overturn its most important climate precedent. And if the Court obliges—something that seems plausible, given that no one from the original majority remains on the bench—the federal government will lose its most potent regulatory power to cut greenhouse gases.

But the federal government's loss may be the states' gain. The CAA has, since the mid-1960s, preempted states from regulating emissions from cars and trucks. Section 209 is the relevant provision: "No state or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." California can set its own standards provided it receives a waiver from EPA and meets certain conditions. But the preemption provision applies to standards relating to the control of emissions "subject to this part," which is the part of the Clean Air Act that applies to "Motor Vehicle Emission and Fuel Standards." And California only needs a waiver for standards covering pollutants that can actually be regulated under the CAA. If EPA succeeds in its claim that greenhouse gases are not air pollutants, then the preemption provision appears not to bar states from issuing their own greenhouse gas standards, nor does California appear to need a waiver to regulate.

Opponents of state regulation may argue that the preemption ban applies to motor vehicles or engines subject to this part, not to emissions subject to this part. Or that Congress contemplated single national standards with an exception for California (something the statute doesn't actually say). But if Congress didn't intend the act to cover greenhouse gases, as the administration argues, then it's hard to believe Congress intended to preempt states and localities from regulating them. Repeal of the finding could, ironically, provide states with authority they've never had before.

First, the act closely tethers its provisions to scientific developments and technological innovation. It mandates that EPA address research advances in expanding understanding of the impact of pollution on public health, necessarily extending the agency's empowerment. It similarly mandates that as technology advances, EPA follow a prescribed schedule in reviewing and updating standards. The science and technology developments drive ever more protective public health measures, and that's on purpose, according to Congress. Second, in operationalizing the act, its language includes a number of provisions designed to maximize emissions reductions, especially of hazardous air pollutants.

The federal courts have recognized the statute's empowerment of the agency to the full extent necessary to deliver air quality results

The federal courts, meanwhile, recognized and repeatedly emphasized the statute's empowerment of the agency to the full extent necessary to deliver air quality results and also ratified Congress's choice of prescriptive approaches to maximize available reductions. In *Massachusetts,* the Supreme Court captured the essential strand that expansively bound EPA's remit to the continual advancement of science when it ruled that greenhouse gases "fit well within the Clean Air Act's capacious definition of 'air pollutant'" and that the agency has the authority to regulate these pollutants if they endanger public health or welfare. Writing for the majority, Justice Stevens explained the Congress's awareness that only through enacting a statute that was sufficiently elastic could such a law authorize and even require EPA to incorporate scientific progress into the actions necessary to ongoing air quality, public health, and environmental improvement.

"While the Congress that drafted Section 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming," Stevens wrote for the majority, "they did understand that without regulatory flexibility, changing circumstances and *scientific developments* would soon render the Clean Air Act obsolete. The broad language of Section 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence." [emphasis added].

Stevens's analysis is typical of judicial interpretations that underscored the importance of reading the act as dynamic—to ensure the continued vitality of the statute and protect it from becoming out of date in the wake of ongoing advances in scientific understanding. Thus, even though the *Massachusetts* majority acknowledged that Congress did not specifically contemplate applying the Clean Air Act to greenhouse gas emissions, the Court rejected the George W. Bush EPA's static reading of the statute such as would deny the authority and obligations the act provided for the agency. Instead, the Court held that the CAA requires EPA to treat GHGs as air pollutants to determine whether they presented a threat to public health or the environment, and if so, to use the tools Congress granted the agency to regulate such pollution.

The act's, and the courts', demand of mastery by the agency of advances in science and technology in order to meet legal mandates created a virtuous circle of EPA career staff expertise—on which the agency's performance depended—while at the same time fostering the expansion of that expertise. Trump's perversely ambitious goal of dramatically shrinking EPA's career staff expertise and almost halving the agency's budget disrupts that circle.

FOLLOWING the high court's direction, in 2009 the Obama EPA determined that greenhouse gases pose a threat to human health and the environment. Between 2010 and 2024, the agency issued a succession of GHG emissions standards for cars and trucks, oil and gas operations, and power plants. The Endangerment Finding and subsequent vehicle rules were upheld by the federal courts, with the Supreme Court recently declining to stay the agency's most recent Clean Air Act climate rules. At no time during this period did the high court show any inclination to revisit let alone reverse *Massachusetts.*

The Court also embraced as a matter of law the centrality of the Clean Air Act's mission to deliver continually ongoing improvement in air quality when, on the strength of a brief, tersely worded statutory directive, it upheld the ambitious and elaborate Cross-State Air Pollution Rule. In *EPA v. EME Homer City Generation*, decided in 2014, the Court found the Obama EPA had reasonably promulgated CSAPR after determining that several upwind states had failed in their obligation to effectuate reductions in local pollution that impaired air quality in downwind jurisdictions. On the strength of a provision that did little more than mandate reductions in upwind states that "contribute sig-

nificantly" to downwind air quality problems, the Court read the statute to authorize the agency to fashion a program ambitious enough to solve the problem fully. Even though the statute was dead silent on both method and means, the Court endorsed the elaborate "significant contribution" test EPA invented—and the equally elaborate multistate cap-and-trade program the agency built to cover power plants in more than 20 upwind states. The Obama plan would reduce the total amount of nitrogen oxide emissions and sulfur dioxide emissions that the agency had determined was necessary to eliminate the upwind states' significant contributions to downwind jurisdictions' inability to meet the ozone and fine particle NAAQS.

The courts just as seamlessly suborned the primacy of pollution control and public health protection reflected in the 1990 act's aggressive, essentially maximal approach to control of hazardous air pollutants. The act affords little flexibility to EPA in setting emissions standards lest the full measure of available reductions not be achieved. It was the judiciary that upheld the agency's responsibility to meet the Congress's ambition for widespread dissemination of state-of-the-art pollution control technology, even when EPA itself sought to avoid putting heavy burdens on sources. Intending to offer sources compliance flexibility, EPA's brick kiln Maximum Achievable Control Technology air toxics rule allowed pollution sources to choose from among three emissions limits, expressed in different measurement units, all of which the agency had defined as representing the top-performing sources, as required by the CAA. The D.C. Circuit held that while EPA could choose the proper unit of measurement, its "discretion [did] not extend to defining several different 'best' metrics within the same category and allowing emitters to comply with the most favorable standard." The agency thus could not vitiate the Clean Air Consensus or the explicit statutory mandate favoring maximum reduction by contradicting the statute's clear language inducing dissemination of the most advanced pollution-control technology.

While EPA itself, plus states and localities and the courts, were reinforcing and expanding the operating and legal architecture of the national understanding embodied in the Clean Air Act, more overtly political actors continued to be guided, or at least constrained by, the bipartisan politics that shaped and perpetuated the consensus. During the administration of George W. Bush, EPA, more or less on its own motion, promulgated, and publicly promoted, two major CAA regulatory programs to reduce power plant emissions—the Clean Air Interstate Rule and the Clean Air Mercury Rule. Both programs were ambitious, and the agency and the administration invested ingenuity and resourcefulness, as well as political capital, in promulgating and publicizing both programs. The D.C. Circuit ultimately overturned both rules, but, tellingly, CSAPR and MATS, the two regulations promulgated by the Obama EPA, both incorporated core elements of both Bush EPA rules.

In his first term, Trump's EPA weakened regulations on power plants and passenger car GHG emissions rather than abolishing them

EVEN Trump's first-term EPA modulated its evident deregulatory ambitions; it replaced, albeit with substantially weakening revisions, existing regulations on power plants and passenger car GHG emissions rather than abolishing them. But in the president's second term, in what Lee Zeldin on March 12 called the "greatest day of deregulation in American history," the administrator unveiled an agenda that is historically unique when measured against all that has preceded it. It may well succeed, ultimately, when eventually the D.C. Circuit or, more likely, the Supreme Court, reversing or departing from current precedents, upholds the repeal or gutting of the existing Clean Air Act regulations targeted in the agency's deregulatory announcement. Certainly, the current Supreme Court has already issued rulings that have entailed either explicitly undoing a precedent, as in the 2024 *Loper Bright* reversal of *Chevron,* or introducing new concepts, like the major questions doctrine from the 2022 decision in *West Virginia V. EPA*—all tailored to constrain the power of regulatory agencies like EPA. Thus, the administration's deregulatory ambitions could survive if it turns out that the Supreme Court is willing to cooperate—perhaps to advance its own agenda, already underway for some time, to narrow the agency's powers.

Regardless of future outcomes, Zeldin is attacking the core attributes of the Clean Air Act itself, ranging from its public health and environmental protection purpose, to its mandatory reflection of scientific and technological progress, to its delivery of ongo-

ing improvement in air quality, all codified in the statute and long since actualized by the agency, the states, and the courts—and all part of the Clean Air Consensus.

Perhaps even more disturbing is that the rules on the EPA hit list are responsible for constant improvements measurable in dollars and health benefits. Between 1970 and 2020, the six criteria pollutants in combination dropped 78 percent. Fine particle concentrations have dropped by 41 percent and ozone smog by 32 percent. People living in once heavily polluted cities like New York, Philadelphia, and Los Angeles have seen tangible and continuous air quality gains throughout this period. But in his March 12 deregulatory announcement, Zeldin redefined EPA's mission as elevating over these gains a mission framed instead around energy production, jobs, and the economy. "The cost of living for American families will decrease. It will be more affordable to purchase a car, heat homes, and operate a business. It will be more affordable to bring manufacturing into local communities while individuals widely benefit from the tangible economic impacts."

Today, repeal of GHG standards for utilities and vehicles would bring about a complete rupture of the Clean Air Consensus dating back half a century

Zeldin thus has put America on notice that the main order of business for his EPA will be weakening or removing air pollution and climate standards and no longer finding more of the ways needed to harness science and technology to improve air quality and address climate change. Compounding the abjectness of the administrator's renunciation of his agency's air quality and climate missions, as mandated by statute, rule, and court decisions, is ignorance of the well-established economic performance of the Clean Air Act: the U.S. economy has grown dramatically over the course of the decades during which pollution levels have fallen equally dramatically. During the 50-year period up to 2020, while air pollution improved markedly—and while industry, states, and municipalities met numerous EPA mandates in other areas, including water pollution and waste management—GDP grew nearly 20 times over.

In choosing among his first targets for repeal the Endangerment Finding and EPA's two foundational GHG rules—the 2024 Carbon Pollution Standards for power plants and the 2024 tail-pipe GHG emission standards for vehicles—Zeldin amplified the signal of how thorough, all-encompassing, and drastic is his undertaking to subvert entirely the legacy of the Clean Air Act. The arguments EPA presented in last summer's proposals to repeal those rules and the Endangerment Finding amplified that signal even more shrilly. It is time to take notice.

The power plant repeal proposal operates by defying the plain language of the CAA and offering instead a set of improbable arguments that when applied to power plant GHG emissions effectively defeat EPA's legal authority to apply Section 111 of the Clean Air Act to power plant GHG emissions. The proposal does this by positing that pollution from a sector is subject to regulation only if it is emitted at "significant" levels. EPA then applies a quantitative-threshold test, which the U.S. power sector's GHGs, although voluminous, do not meet once they're measured against total global emissions. If even so high-emitting a sector as electricity generation flunks the threshold test, then by definition no other stationary source sector can pass it either.

Indeed, in separately proposing under Section 202(a) to rescind the Endangerment Finding and thus the legal basis for the vehicle GHG standards, past, current, and future, EPA offers among several alternative arguments (e.g., a a reading of Section 209(a) and, in effect, of *Massachusetts*, roughly analogous to its threshold-test approach in the proposed power plant repeal) a parsing of the vehicle sector into multiple separate classes. Each separate class by itself is then treated as emitting GHGs in quantities that don't rise to a level that presents a threat to public health and the environment.

Were EPA's preferred legal approach presented in these proposals to be adopted by the federal courts, the Clean Air Act's GHG authority would be permanently disabled, or at least nearly impossible for a successor administration to resurrect.

THE pending repeal proposals of greenhouse gas emissions standards for power plants and vehicles, together with the other regulations tipped for "reconsideration" on the EPA hit list, would bring about a complete rupture of the Clean Air Consensus. It would deflect the arc of progress that has characterized the Clean Air Act and what it has achieved over the course of 55 years, and in particular in the wake of its 1990 reauthorization. That these actions and the arguments made to support

them fly in the face of the *Massachusetts* Court's mandate to the agency is particularly telling beyond just reflecting the administration's implacable opposition to climate policy. Both the reasoning and the result of the majority opinion in that 2007 Supreme Court case amount to an exquisite and culminating distillation of the fundamental characteristics of the act. The Court embraced the statute's commitment to assimilating progress in science and technology into its statutory fabric. The result was the addition of a new pollutant into the ambit of the act and the practical extension of EPA's remit for the sake of protecting the public from a newly understood environmental threat.

By acting to directly contradict that reasoning and erase that result, the Trump EPA's new proposals reflect a devastating project. Even if the federal courts cooperate in making his goals part of the new agency mandate, EPA's vacuity and radicalism are already revealed by the fact that the only arguments available to support the repeal proposals are legally implausible and scientifically outlandish. The majority of the legal reasoning offered in support of the proposed withdrawal of the Endangerment Finding has already been considered and rejected by, or already precluded by, the D.C. Circuit—which in 2012 upheld both the finding and the subsequent vehicle GHG standards—or the *Massachusetts* majority. Those that invoke the text of the statute either abuse the plain language or blatantly misstate its meaning.

Although the GHG rules repeal proposal purports not to challenge the ever-strengthening scientific consensus on climate change and provide solely a retrospective critique of the agency's reasoning in supporting the original finding, it ignores the fact that just three years ago the agency issued a substantially reasoned denial of petitions for reconsideration of the finding. The climate science report issued by the Department of Energy on the same day to accompany the EPA repeal proposal includes flat-out wrong assertions about a wide range of the predicted and observed effects of climate change and depends on completely ignoring the massive body of peer-reviewed literature supporting the consensus that human action is contributing to an unfolding disaster. Within hours of the DOE report's publication, scientists who were cited publicly asserted that the report misused their studies.

A reawakened consensus promises a recreation of an air quality and climate action regime after the present administration has left the scene

Finally, Zeldin's promises that his deregulatory actions would "lower costs for Americans" and "bring auto jobs back" are belied by both his own agency's analysis and that of the Energy Information Administration. The regulatory impact analysis shows, under its two most likely and realistic scenarios, repealing the vehicle GHG standards would result in a net cost of $260 billion between 2027 and 2055 in one case and $350 billion in net costs in the other. Because less-efficient vehicles create more demand for fuel, EIA projects both gasoline price increases and a nearly half a million jobs lost by 2035 resulting from the repeal.

THE many contradictions between the administrator's specious economic promises and the agency's and the EIA's own analyses—along with the repeal proposals' tortured and destructive legal reasoning and perverse science—speak to the blind fervor with which Zeldin is mounting an all-consuming attack on the Clean Air Consensus and the system of air quality and climate protections built by, and in operation since, Congress enacted the Clean Air Act in 1970 and reauthorized it twice. Yet, even if the deregulatory project succeeds on its own terms it will have left nothing in place of the emissions standards it will have destroyed. That seems to be the point, in fact: to elicit agreement from the courts to new interpretations of the Clean Air Act that erase EPA's legal authority to regulate GHG emissions and to halt the application of other provisions so as to arrest further progress in cleaning up the air. Creating a vacuum, though, is the opposite of creating a legacy. The Trump administration can't unilaterally undo the Clean Air Consensus, which has popular support.

Indeed, in the case of climate change and overall air quality, the very fact of persistent and growing ill effects are more likely than not to refire the crucible of the American public's demand for protection from air pollution in which the consensus was forged and which buoyed decades of progress in improving air quality and, more recently, in confronting climate change. That reawakened consensus promises a recreation of an air quality and climate protection action regime after the present administration has left the scene. ❧