

Endangerment in dangerous times

Sean H. Donahue

Sean H. Donahue is a partner at Donahue, Goldberg & Herzog, a public law litigation firm. Before co-founding the firm 20 years ago, he worked at the Justice Department and taught environmental law. Donahue is co-counsel for plaintiffs in *Environmental Defense Fund v. Wright*, No. 25-CV-12249 (D. Mass), a challenge to the Department of Energy Climate Working Group report on which EPA relies in the proposed repeal of the greenhouse-gas Endangerment Finding.

Administrator Lee Zeldin has [proposed to rescind](#) the Environmental Protection Agency's (EPA) foundational 2009 finding under Clean Air Act section 202 that motor vehicle greenhouse gas (GHG) emissions contribute to air pollution that endangers public health and welfare, and to repeal every motor vehicle GHG emissions standard ever issued. There are many good overviews, such as [this one](#).

In my view: EPA's proposal lays out two tracks for repeal. The first is a set of statutory arguments, including that the term "pollutant" should, in the context of vehicle emissions, be limited to regional or local contaminants, that the 2009 finding impermissibly separated the endangerment determination from vehicle emission standard-setting, and that GHG control presents a "major question" that exceeds EPA's statutory authority. As an alternative basis, relying on a revisionist climate science report commissioned by Energy Secretary Chris Wright, EPA proposes to find that extant climate science is insufficiently "reliable" to support an endangerment finding.

The first Trump administration considered revisiting the Endangerment Finding and opted not to; indeed, it even promulgated new (albeit deliberately unambitious) GHG regulations for vehicles and power plants predicated on endangerment findings. But the Trump II proposal goes big. The preamble often reads as if EPA's mission were not to save society from the burdens of pollution, but from those of pollution control. Absent this time are temporizing arguments like those of the George W. Bush administration—that climate change is better addressed through targeted federal legislation or international agreements. This administration, in stark contrast, believes GHG regulation is either futile or affirmatively harmful.

EPA's rescission proposal faces severe evidentiary, statutory, and precedential obstacles

If finalized, the administration's proposal is likely to face a challenging road on judicial review.

Perhaps the largest obstacle is the stubborn fact that climate change, driven mainly by fossil fuel combustion, is real, harmful to human health and welfare, and getting more severe. The 2009 Endangerment Finding was supported by what the D.C. Circuit then termed an "ocean" of evidence, and the evidence has grown even more definitive since. Basic markers—including atmospheric GHG concentrations, global average surface temperatures, and average sea level—have increased substantially since 2009. The tools used to understand climate change are now more refined, and scientific assessments have made increasingly categorical findings on anthropogenic causation of climate change and dangers to the public. Observed impacts are more

severe; the most recent National Climate Assessment says: “The effects of human-caused climate change are already far-reaching and worsening across every region of the United States.”

The proposal’s alternative rationale is sketchy on substance and procedure, relying on a report commissioned by a political appointee who handpicked his own experts, and developed without normal (or any) public scrutiny or peer review, or any recourse to EPA’s considerable in-house scientific expertise. The administration’s decision to attack mainstream climate science in this manner undermines the credibility of the entire repeal effort.

The proposal also faces high hurdles on the law. It doesn’t explicitly deny the vitality of *Massachusetts v. EPA* but is hard to square with the decision’s treatment of the Act’s broad “pollutant” definition and its reading of section 202. The same is true for *Coalition for Responsible Regulation v. EPA*, in which the D.C. Circuit upheld the 2009 finding, rejecting arguments uncannily like those in the current EPA proposal. Notably, the Supreme Court denied cert petitions attacking the D.C. Circuit’s endangerment rulings. Both *Massachusetts* and *Coalition* read section 202 as mandating a science-based endangerment inquiry that does not contemplate the sorts of provisos and policy-based offramps that the current proposal seeks to introduce.

Both decisions, too, were decided as matters of plain statutory text. As such, the rulings do not seem especially vulnerable under the Supreme Court’s new approaches to statutory interpretation. Indeed, *Loper Bright* emphasized the potency of statutory stare decisis—in a context (prior cases relying on the “Step II” reasonableness prong of *Chevron*) less compelling than what will apply to the key endangerment-finding precedents.

EPA’s effort to splice in statutory limitations that would exclude GHGs as pollutants in the contexts that matter most (such as regulating emissions from cars and trucks) is in tension not only with *Massachusetts*, but with the plain statutory text: The Act specifies that effects on “climate” and “weather” are part of the public “welfare” EPA must protect, language that *Massachusetts* expressly acknowledged.

The administrative history is quite adverse too. The administration’s stance contradicts interpretations and findings of every administration since 2009 (including, as noted, Trump I). There has now been 15 years of reliance on EPA’s authority to regulate vehicle GHG emissions; vast sums have been invested, industry and state plans devised, and many judicial, administrative, and legislative decision actions have been based upon that settled understanding. In some instances (as in *West Virginia v. EPA*), opponents have capitalized on concerns that regulation would be too novel, disruptive, and costly. But GHG regulation of motor vehicles has been in effect now for 15 years—the sky has not fallen, and the auto industry thrived, embracing clean cars as the way forward. This time, the deregulators may be more easily seen as the true threats to industry stability.

Rulemaking under a cloud of governmental intimidation

But if the administration’s proposal seems ill-fated according to the standard tale of the administrative-law tape, the outcome cannot be assumed.

In an epigram still [prominently displayed on EPA's website](#), Administrator Zeldin described the proposed endangerment repeal as a way of putting a “dagger straight into the heart of the climate change religion.” Such statements might seem inconsistent with the doctrine that decision-makers may not prejudge matters that remain subject to public notice and comment. But Zeldin is a sophisticated political actor. Maybe he's reading the moment right, and norms of open-mindedness, or respect for differing views, are now just quaint relics? In the Year Zero that began with Trump's second inauguration, a peremptory executive declaration that climate change is a hoax might suffice. I don't believe this approach will work. But it makes me nervous that the administration evidently believes it may.

I also worry about the influence the administration's proclivity for retribution will have on the administrative and judicial processes. The Trump administration has ferociously attacked civil society: law firms, universities, opposing-party officials, private companies, and other rival sources of authority and knowledge. It has specifically banned references to climate, shuttered climate offices, pulled down public climate reports, and is fast disabling the government's ability to collect climate data. The civil service whose expertise is the basis implementing statutes like Clean Air Act section 202 is being derided and decimated.

These conditions are not (to say the least) optimal for an open public deliberation. Among the factors that likely persuaded the EPA not to go down the repeal path in the first Trump term were a diversity of voices counseling that repeal was unwise—including industry and conservative voices concerned that undoing the Endangerment Finding were scientifically implausible and could undermine regulatory stability.

The administration's regular use of the full powers of the federal government (and then some) to punish even private actors for expressing disfavored views seems likely to deter organizations and individuals from venturing to oppose the Endangerment Finding repeal this time around. Our ability to avoid a terrible misstep on climate may depend in part on standing against strongman tactics that are the antithesis of reasoned decision-making.