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Policymaking by Proposal: How Agencies Are Transforming Industry Investment Long before Rules Can Be Tested in Court

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INTRODUCTION

In June 2015, electric power utilities won final victory in a four-year battle: the United States Supreme Court struck down the Environmental Protection Agency's (EPA) mercury emissions rule from power plants under the Clean Air Act, in *Michigan v. EPA*.[1] The Court held that EPA should have considered the cost of regulating before deciding it was "appropriate and necessary" to regulate mercury emissions from power plants under the Clean Air Act.[2] And the victory may have felt sweet because it vindicated arguments that the power industry had been insisting on since the rule was proposed in March 2011.

But the victory was ultimately empty: utilities had already begun upgrading or closing down coal plants to ensure they could meet the now-invalidated standards.[3] These steps would be costly to reverse. Adding insult to injury, senior EPA official Janet McCabe filed an official blog post designed to "explain EPA policy," noting that, regardless of the utilities' win in court, "many plants have already installed controls and technologies to reduce their mercury emissions."[4] EPA's spokeswoman, Melissa Harrison, was even more blunt: "EPA is disappointed that the Court did not uphold the rule, but

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1 Michigan v. Envtl. Prot. Agency, 135 S. Ct. 2699, 2712 (2015).

2 *Id.* at 2707–08.

3 Patrick Ambrosio, *Supreme Court MATS Decision Unlikely To Affect Power Company Compliance Plans*, BLOOMBERG BNA (Apr. 14, 2015), http://www.bna.com/supreme-court-mats-n17179925278/.

4 Janet McCabe, *In Perspective: the Supreme Court's Mercury and Air Toxics Rule Decision*, EPA CONNECT: THE OFFICIAL BLOG OF THE EPA LEADERSHIP (June 30, 2105, 10:34 AM), https://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/.

this rule was issued more than three years ago, investments have been made and most plants are already well on their way to compliance."[5]

In the meantime, EPA had proposed yet another controversial rule designed to encourage existing coal plants to retire, known as the "Clean Power Plan."[6] Why would a utility invest in re-opening a coal plant with yet another rule on the table that could force it to close? Even if an agency's rules are likely to be reversed eventually, reinforcing proposals can effectively set the agenda for industry investment—a business would have to be foolhardy to invest in facilities that the federal government was looking to forbid.[7] This article documents this phenomenon, labeling it "policymaking by proposal."

Over the past years, several trends in administrative law and investment patterns have worked together to boost policymaking by proposal. As congressional lawmaking has declined, the executive has pursued increasingly aggressive modes of making policy without Congress.[8] Policymaking by proposal is just one facet of this general trend.

At the same time, judicial minimalism in administrative law has given agencies even more power to set the agenda for industry while repeated appeals work their way through the courts.[9] In *Michigan v. EPA*, even though EPA had not "considered" the costs of its mercury rule, it had "estimated" the costs and benefits of the rule and, controversially, estimated that the benefits of its rule were greater than the costs.[10] The Court, however, declined to say whether EPA's controversial estimate was valid; because the agency had

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[5] Jeff McMahon, *Nearly All U.S. Coal Plants Now Comply With The EPA Mercury Rule That Was Shot Down By Supreme Court*, FORBES (July 10, 2016), http://www.forbes.com/sites/jeffmcmahon/2016/07/10/nearly-all-coal-plants-now-comply-with-the-epa-mercury-rule-that-supreme-court-shot-down/#75918d66f56b.

[6] Envtl. Prot. Agency, Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1,430, 1,430 (Jan. 8, 2014) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98).

[7] This effect is so strong that some utilities are holding off on investment in fossil fuel industries that might be favored by the new Trump administration based on the danger that the *next* administration will adopt contrary regulations punishing fossil fuel investments. Emily Holden, *Utilities See Demise of Climate Rule, Still Cut CO2*, E&E NEWS CLIMATEWIRE (Feb. 15, 2017), http://www.eenews.net/climatewire/stories/1060050087 (reporting on a speech made by the Chairman of the Arkansas Public Service Commission, Tim Thomas, who said that "even if President Trump's EPA rescinds the [Clean Power Plan], the next administration will pursue much stricter climate standards. . . . [So] utilities in Arkansas are still focused on cutting carbon").

[8] For more examples of how the executive is pushing to expand the power of the administrative state while avoiding traditional checks in Congress and the Court, see Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501, 502 (2015).

[9] *See, e.g.*, Kate Sheppard, *EPA Chief Says She's Not Worried About Supreme Court Mercury Ruling*, HUFFINGTON POST (July 7, 2015), http://www.huffingtonpost.com/2015/07/07/gina-mccarthy-supreme-court-mercury_n_7746034.html; Ken Silverstein, *Supreme Court's Mercury Ruling Unlikely To Remove The Heat On Coal*, FORBES (July 1, 2015), http://www.forbes.com/sites/kensilverstein/2015/07/01/supreme-courts-mercury-ruling-unlikely-to-remove-the-heat-on-coal/print/.

[10] Michigan v. Envtl. Prot. Agency, 135 S. Ct. 2699, 2721 (2015) (Kagan, J., dissenting).

not yet considered its estimate, the Court technically did not need to say whether the estimate was valid in order to strike down the rule.[11] Predictably, EPA has responded to the Court's ruling by relying on its estimate that the rule's benefits exceed its costs.[12] It will take another year for the D.C. Circuit to decide whether EPA's estimate is lawful, and yet another year for the Supreme Court to address the issue, if it chooses to do so.[13] So if the Supreme Court ultimately rejects the mercury rule proposed in March 2011, it is very unlikely that industry petitioners will know before 2018.

Furthermore, some of the industries currently in regulators' crosshairs are particularly susceptible to policymaking by proposal. Nowhere is this more evident than among power utilities in states with regulated rates, where utilities can and must petition boards to approve rate hikes that will pay for the investments that they make to comply with new agency proposals. Take the example of a state-regulated power utility considering whether to invest $3 million dollars in a pollution control technology such as activated carbon injection that would, in practice, be required to comply with an EPA proposed rule for mercury emissions.[14] The utility can bring a rate case with the state utility board, asking to raise customer rates to cover the $3 million dollar outlay for the technology required to comply. A rate case may damage the company's public relations and use precious political capital, but it ensures that the utility's increased costs are passed on to consumers.

Alternatively, a utility could put off the upgrade and fight the rule in the comment process and eventually in court—but if it loses, it could face serious penalties that it would not be able to recover in a rate case. As a result, regulated-rate industries will almost always invest for compliance even when they intend to fight a proposed rule. In fact, economic theory suggests that regulated utilities should, if anything, invest more than would be socially desirable in environmental upgrades.[15] So long as their state ratemaking boards will

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[11] *Id.* at 2711.

[12] Envtl. Prot. Agency, Supplemental Finding That It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units, 81 Fed. Reg. 24,420 (Apr. 25, 2016) (to be codified at 40 C.F.R. pt. 63).

[13] Murray Energy Corp. filed a petition to have the D.C. Circuit review the EPA's April 2016 Supplemental Findings in July 2016. Statement of Issues to be Raised by Petitioner, Murray Energy Corp. v. Envtl. Prot. Agency (D.C. Cir. July 25, 2016) (No. 16-1127). *See also* White Stallion Energy Ctr. v. Envtl. Prot. Agency, 748 F.3d 1222 (D.C. Cir. 2014) (per curiam), *rev'd sub nom.* Michigan v. Envtl. Prot. Agency, 135 S. Ct. 2699 (2015). And, in the meantime since the Supreme Court's reversal of *White Stallion Energy Ctr*, the D.C. Circuit has remanded the invalidated rule without vacatur, so it remains in effect. White Stallion Energy Ctr, No. 12-1100, 2015 WL 11051103, at *1 (D.C. Cir., Dec. 15, 2015) ("ORDERED that the proceeding be remanded to EPA without vacatur of the Mercury and Air Toxics Standards final rule.").

[14] U.S. GAO, GAO-10-47, CLEAN AIR ACT: MERCURY CONTROL TECHNOLOGIES AT COAL-FIRED POWER PLANTS HAVE ACHIEVED SUBSTANTIAL EMISSION REDUCTIONS 14 (equipping carbon injection system averaged $3.6 million, ranging from $1.2 million to $6.2 million (cost in 2008 dollars)).

[15] It is conventional wisdom among economists that, despite the political downsides of pushing for regulated rate increases, regulated industries systematically over invest in capital to expand the investment

approve investments in new environmental controls, utilities should be happy to invest in any and all new proposals for pollution control. Certainly, by the time that these industries can overturn a regulatory initiative in court they will have no incentive to unwind previously approved investments, since they will already have had their higher pricing approved.[16]

Agencies also increase the power of their proposals by pushing the date of compliance earlier and the date that the rule can be challenged later. For example, when EPA proposed its Clean Power Plan greenhouse gas rules for the years 2020 to 2030,[17] it proposed that two thirds of the reduction take place in the very first year, 2020.[18] How could electric utilities achieve two thirds of that reduction in the first year of the standard? Easy: EPA assumed that utilities would begin shutting down coal power plants immediately, shutting down 11 GigaWatts of coal electricity by 2016, six years before the rule

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on which they can receive their designated return. *E.g.*, Léon Courville, *Regulation and Efficiency in the Electric Utility Industry*, 5 BELL J. ECON. & MGMT. SCI. 53, 53–54 (1974); Jim Rossi, *The Political Economy of Energy and Its Implications for Climate Change Legislation*, 84 TULANE L. REV. 379, 383–84 (2009); Robert M. Spann, *Rate of Return Regulation and Efficiency in Production: An Empirical Test of the Averch-Johnson Thesis*, 5 BELL J. ECON. & MGMT. SCI. 38, 38–39 (1974). With a mandated rate of return on investments, the only way that regulated industry can increase profit is by investing more. Rossi, *supra*. Thus capital investments in new equipment for environmental compliance are great opportunities to increase company profits. Douglas N. Jones & Richard A. Tybout, *Environmental Regulation and Electric Utility Regulation: Compatibility and Conflict*, 14 B.C. ENVTL. AFF. L. REV. 31, 44 (1986) ("Other things being equal, and with a rate of return at least as high as utility stockholders could otherwise earn, the utility has an interest in adding to property, as long as regulators include that property in the rate base . . . . This fact makes any investment that the regulatory commissions find 'used and useful' for power generation, including pollution control equipment, more attractive to the utility. Environmental agencies and other parties of similar interest should take this incentive situation into account." (footnotes omitted)).

16 In fact, some utility lawyers hinted that, given the uncertainty this would create for investments already begun, it might be better for the rule to simply remain in place. Gavin Bade, *What the Supreme Court MATS Ruling Means for Utilities and the EPA Clean Power Plan*, UTILITY DIVE (July 2, 2015), http://www.utilitydive.com/news/what-the-supreme-court-mats-ruling-means-for-utilities-and-the-epa-clean-po/401707/.

17 Envtl. Prot. Agency, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830, 34,839 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60). This timeline is necessary to meet the promises the U.S. is giving other countries in climate negotiations. Daniel Cohan, *New Report Shows Importance of Clean Power Plan*, THE HILL (May 23, 2016), http://thehill.com/blogs/pundits-blog/energy-environment/280868-new-report-shows-importance-of-clean-power-plan (U.S. emissions may stop falling "in the absence of the Clean Power Plan . . . [according to] scenarios modeled by the Energy Information Administration (EIA) . . . [which] predict that power plant carbon dioxide emissions would be 20 percent lower with the Clean Power Plan than without it."); Joel Kirkland, *Paris Talks: Obama's A-Team Touts Clean Power Plan's Enforceability*, ENERGYWIRE (Dec. 7, 2015), http://www.eenews.net/stories/1060029064 ("EPA's Clean Power Plan to cut emissions across the electricity sector is a core policy piece supporting the U.S. commitment ahead of the Paris talks . . . .").

18 Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. at 34,936.

came into effect.[19] That is, EPA assumed industry had already begun investing in new infrastructure to meet its demands: installing more renewable generation, more electric transmission to transport wind and solar resources to demand centers, more natural gas fired power plants, and more gas pipelines. Additionally, EPA pushed back the date the rule could be challenged by delaying publication of the final rule until the end of October 2015.[20] If the challenge to the Clean Power Plan had progressed at the same rate as the challenge to EPA's mercury rule, industry would have been able to obtain a Supreme Court decision by February 2018—years after utilities would have had to make investments to comply.[21] Of course, EPA's efforts at policymaking by proposal were frustrated by an unprecedented stay from the Supreme Court, which stayed the rule until it could be challenged in the D.C. Circuit.[22] However, the Supreme Court has never before stayed an agency rule before it had been evaluated by the lower courts, and there is little reason to think that the Court alone can police agencies' abuse of their power to set the agenda for industry investment.[23]

Finally, these problems are exacerbated by the increasing lead times necessary for investment, a long-term trend in the United States driven by

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19 *See* Resp't's Reply to Appl. for Immediate Stay of Final Agency Action at 153a–56a, West Virginia v. Envtl. Prot. Agency (2016) (Nos. 15A773, 15A776, 15A778, 15A787, & 15A793) (Decl. of Stephen Schwartz). *See also* Pet'rs' Appl. for Immediate Stay of Final Agency Action at 20, 20 n.5, West Virginia v. Envtl. Prot. Agency (2016) (Nos. 15A773, 15A776, 15A778, 15A787, & 15A793) (Decl. of Karen Harbert). The average coal plant can produce 228 MegaWatts of power, so this would correspond to about 48 average coal plants. U.S. ENERGY INFO. ADMIN., 27 GIGAWATTS OF COAL-FIRED CAPACITY TO RETIRE OVER NEXT FIVE YEARS (2012) http://www.eia.gov/todayinenergy/detail.php?id=7290 ("Another 13 coal-fired units with generating capacities of 200 MW or greater are expected to retire in 2015—this is close to the average size of all coal units existing in 2011 (228 MW).").

20 Envtl. Prot. Agency, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60); Andrew Childers, *EPA Expects to Publish Clean Power Plan in October*, BLOOMBERG, (Sept. 2, 2015), http://www.bna.com/epa-expects-publish-n17179935454/.

21 *Michigan v. EPA* was decided 40 months after the mercury rule was published. Envtl. Prot. Agency, National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9,304, 9,304 (Feb. 16, 2012) (to be codified at 40 C.F.R. pts. 60, 63).

22 West Virginia v. Envtl. Prot. Agency, 136 S. Ct. 1000, 1000 (2016) ("The [EPA's] 'Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,' 80 Fed, Reg. 64,662 . . . is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for a writ of certiorari, if such writ is sought.").

23 JOSHUA LINN, ET AL., RESOURCES FOR THE FUTURE, RF DP16-21, AN ECONOMIC ASSESSMENT OF THE SUPREME COURT'S STAY OF THE CLEAN POWER PLAN AND IMPLICATIONS FOR THE FUTURE 2 (2016) ("To our knowledge, the Supreme Court has never before acted to freeze implementation of a regulation after a federal appeals court has declined to do so and before the appeals court has completed its evaluation of the merits of challenges to the rule.").

several factors. First, procedural requirements, such as the environmental impact statements required by the National Environmental Policy Act, require increasingly time-consuming reviews that slow down investment.[24] Second, increasingly powerful local opposition to development, led by "not-in-my-backyard" or "NIMBY" groups, has stymied a wide range of construction projects from environmentally sensitive facilities,[25] to energy transport,[26] to even seemingly innocuous projects such as new housing.[27] Developers facing these extended timelines must take account of agency rules that may come into force before they can complete construction.

This article proceeds as follows. Part I documents three more areas where the administration has repeatedly used proposals designed to require substantial changes in industry investment: the Renewable Fuel Standard, new air pollution standards for power plants, and regulations of health insurance providers that must have their rates approved long before they are implemented. Part II considers how policymaking by proposal is changing the rulemaking process: pushing agencies to use the proposal as a not-quite-realistic opening bid rather than a middle-of-the-road preview of the final rule, and pushing industry to find innovative ways to attack the legitimacy of agency proposals. Part III acknowledges that agencies are unlikely to abandon this tactic and suggests ways that other stakeholders—such as courts, state policymakers, and Congress—can restore the balance of power in the administrative state. Specifically, this final part suggests that state utility

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24 Bradley C. Karkkainen, *Toward A Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 918–19 (2002) (alterations in the original) (citations omitted) ("[T]he typical [Environmental Impact Statement] runs to hundreds of pages in length, and is costly and time consuming to produce. A recent study for the Federal Highway Administration . . . found that on average an [Environmental Impact Statement] required 3.6 years to complete, with some taking as long as twelve years. And the average completion time actually grew longer over the thirty-year period of the survey, from 2.2 years in the 1970s to 5 years in the 1990s. The consequence of open ended information production requirements enforceable through relatively easy access to judicial review, then, is that the effective standard for the *quantity* of information that must be produced in an [Environmental Impact Statement] is set extremely high, and the process is painfully slow and costly.").

25 Barak D. Richman & Christopher Boerner, *A Transaction Cost Economizing Approach to Regulation: Understanding the NIMBY Problem and Improving Regulatory Responses*, 23 YALE J. REG. 29, 32 (2006) ("Since the mid-1970s, . . . the NIMBY problem in the United States has become more than a common nuisance . . . . For solid and hazardous waste facilities, the siting problem has become so acute that some scholars have suggested that the 'NIMBY' syndrome is perhaps better characterized as 'BANANA'—'Build Absolutely Nothing Anywhere Near Anything'").

26 James W. Coleman, *Importing Energy, Exporting Regulation*, 83 FORDHAM L. REV. 1357, 1377–78 (2014).

27 Timothy B. Lee, *NIMBYs are Costing the US Economy Billions*, VOX, (Jan. 22, 2015), http://www.vox.com/2014/7/15/5901041/nimbys-are-costing-the-us-economy-billions (citing Chang-Tai Hsieh & Enrico Moretti, *Why Do Cities Matter? Local Growth and Aggregate Growth* 2–3 (Nat'l Bureau of Econ. Research, Working Paper No. 21154, (2015)). *See also* Jason Furman, Chairman, Council of Econ. Advisors, Remarks at the Urban Inst.: Barriers to Shared Growth: The Case of Land Use Regulation and Economic Rents 3 (Nov. 20, 2015), https://www.whitehouse.gov/sites/default/files/page/files/20151120_barriers_shared_growth_land_use_regulation_and_economic_rents.pdf.

boards treat federal agency proposals with more skepticism when approving regulated utility investments, that courts strike down rules that do not leave adequate time for compliance, and that Congress create a procedure that allows industry to automatically stay a rule if it is willing to post a significant bond to support its prediction that the rule will ultimately be struck down.

I. REGULATION BY THREAT: HOW AGENCIES USE AGGRESSIVE PROPOSED RULES TO DRIVE INDUSTRY INVESTMENT

EPA's mercury rule and the Clean Power Plan are just two of many examples of proposed rules used to drive industry investments. This section documents three more examples that are currently salient: two more from EPA—new source performance standards for greenhouse gas emissions from coal power plants and the Renewable Fuel Standard for ethanol content of motor fuels—and new health care rules under the Affordable Care Act.[28] It concludes by considering how these examples fit into other policymaking alternatives designed to evade judicial review, such as direct final rulemaking, exercises of enforcement discretion, or cases of deliberate inaction or delay like the repeated delays in decisions on the proposed Keystone XL pipeline and the Dakota Access pipelines.

A. *New Source Performance Standards for Greenhouse Gas Emissions from New Fossil-Fuel-Fired Power Plants*

Perhaps the best example of the economic power of proposals is EPA's source performance standard for new coal power plants, which was first announced in 2010,[29] proposed in 2012,[30] and then withdrawn and re-proposed

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28 Envtl. Prot. Agency, Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017, 80 Fed. Reg. 33,100, 33,100 (proposed June 10, 2015) (to be codified at 40 C.F.R. pt. 80); Envtl. Prot. Agency, Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1,430, 1,430 (proposed Jan. 8, 2014) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98); Dep't of Health & Human Servs., Certain Preventive Services under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,501 (proposed Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147).

29 Envtl. Prot. Agency, Proposed Settlement Agreement, Clean Air Act Citizen Suit, 75 Fed. Reg. 82,392, 82,392 (proposed Dec. 30, 2010) (announcing proposed settlement agreement, addressing greenhouse gas emissions standards for power plants).

30 Envtl. Prot. Agency, Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, 77 Fed. Reg. 22,392, 22,392 (proposed Apr. 13, 2012) (to be codified at 40 C.F.R. pt. 60).

in 2014.[31] EPA published the final rule in late 2015.[32] New source performance standards adopted under Clean Air Act § 111(b), are uniquely suited to policymaking by proposal because these standards, once finalized, apply to any source built or modified after the date upon which the standard was proposed.[33] Thus, once a rule is proposed, it is foolhardy to build a source that does not comply with the proposal, because the source will be retroactively forbidden unless the rule is changed before it is finalized.

EPA designed its proposals to threaten any realistic proposal for a new or modified coal power plant with legal ruin. The initial 2012 proposal was for a 1,000 lb CO_2/MWh standard, which could only be achieved by carbon capture and storage, a technology that is not economically viable in the absence of massive government support.[34] EPA then withdrew the rule in 2014, and proposed an only slightly more reasonable standard of 1,100 lb CO_2/MWh, a standard that would require partial carbon capture and storage, again going beyond anything that was commercially feasible.[35] EPA would have had a hard time defending either of these standards in court; the Clean Air Act requires the administrator to set a standard based on "adequately demonstrated" technology—and unsubsidized carbon capture and storage has not been commercially demonstrated.[36] Despite this shaky legal basis, few investors would relish the prospect of building a power plant that would be retroactively unlawful under the proposal as soon as EPA finalized its rule—doing so would mean that the only way the investment would have a hope of paying off is if the courts invalidated the final rule.

The EPA itself seemed to realize its initial proposals were too aggressive: the final rule sets a 1,400 lb CO_2/MWh standard for new sources and a

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31 Envtl. Prot. Agency, Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. at 1,430.

32 Entl. Prot. Agency, Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510, 64,510 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98).

33 *See* Clean Air Act, Pub. L. No. 91-604 § 111(b) (Dec. 31, 1970) (codified as amended at 42 U.S.C. § 7411(a)(2) (2012)).

34 Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, 77 Fed. Reg. at 22,394. *See also, e.g.*, Jennie C. Stephens, *Carbon Capture and Storage: A Controversial Climate Mitigation Approach*, 50 INT'L SPECTATOR 74, 80 (2015).

35 Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. at, 1,433. *See also* Stephens, *supra* note 34, at 80.

36 42 U.S.C. § 7411(a)(1). *See also* Stephens, *supra* note 34, at 80.

1,800-2,000 lb CO_2/MWh standard for modified sources.[37] But in the meantime, EPA's proposals effectively ensured that investors would not consider building—or even modifying—a coal power plant in the United States.[38]

B. *The Renewable Fuel Standard*

Another area where EPA has relied on proposals rather than finalizing rules that it must defend in court is the Renewable Fuel Standard,[39] which indirectly requires oil companies to blend a specified proportion of renewable fuels like ethanol into the fuels they sell.[40] The Renewable Fuel Standard is somewhat unusual because instead of directly requiring that transportation fuels contain a specified percentage of renewable fuel, it mandates that a minimum volume of renewable fuel be sold in the United States each year.[41] EPA must make a rule each year that sets a required percentage of renewable

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[37] Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,512. The EPA was likely also concerned that a court decision striking down its new source performance standards would endanger its Clean Power Plan, which is dependent on these standards.

[38] DANIEL YERGIN, THE QUEST: ENERGY, SECURITY, AND THE REMAKING OF THE MODERN WORLD 401 (2012) ("Electric power is a classically long-term business. A power plant built today may be operating 60 to 70 years from now. It is also . . . the most capital-intensive major industry in the United States. Fully 10 percent of all capital investment in the United States is embedded in the power plants, transmission lines, substations, poles, and wires that altogether make up the power infrastructure.").

[39] 42 U.S.C. § 7545(o)(2) (2012).

[40] The text of 42 U.S.C. § 7545(o)(2) simply directs EPA to "ensure that" Americans consume specified volumes of gallons of ethanol between 2006 and 2022, but to implement the standard, EPA predicts how much fuel will be sold each year and then mandates a percentage of ethanol that it believes will ensure sale of the billions of gallons required by the statute.

[41] For a fuller explanation of the Renewable Fuel Standard see James W. Coleman, *How Cheap is Corporate Talk? Comparing Companies' Comments On Regulations With Their Securities Disclosures*, 40 Harv. Envtl. L. Rev. 47, 56–65 (2016). Mandating purchase of a particular fuel is arguably a more severe government intervention in free markets than a simple mandate that fuel sold meet a particular standard for including biofuel . *See* Peter J. Smith, *Federalism,* Lochner*, and the Individual Mandate*, 91 B.U. L. Rev. 1723, 1744 (2011) ("After all, as Randy Barnett has explained, government mandates to purchase—or to engage in other behavior—are, when viewed from the standpoint of individual liberty, simply 'more onerous than either economic regulations or prohibitions.'" (quoting Randy E. Barnett, *Obamacare's Individual Mandate is a Dangerous New Federal Power*, Washington Examiner (Feb. 15, 2011), http://washingtonexaminer.com/opinion/opeds/2011/02/obamacares-individual-mandate-dangerous-new-federal-power)). *See also* David B. Rivkin, Jr., Lee A. Casey & Jack M. Balkin, *A Healthy Debate: The Constitutionality of an Individual Mandate*, 158 U. PA. L. REV. ONLINE 93, 101 (2009) (Rivkin and Casey arguing that a mandate to purchase health insurance is "congressional trickery" that "is bad for our democracy's health" because "[i]f Congress can mandate the purchase of health care insurance, it can similarly impose, under the Commerce Clause guise, an infinite array of other mandates, ranging from health club memberships to a requirement to consume a given quantity of fruits and vegetables annually.").

fuel for transportation fuels like gasoline and diesel.[42] EPA uses an estimate of how much fuel of all kinds will be sold in the United States and then mandates that fuel providers sell a percentage of renewable fuel that would ensure that the required volume of renewable fuel is sold.[43]

Congress directed EPA to set the annual standard each year one month before the start of the year in which it would apply.[44] EPA however, has often ignored these deadlines, finalizing rules after their effective date and requiring companies to comply retroactively. For example, the final rule for 2010, which also included some requirements for 2008 and 2009, was not published until March 26, 2010.[45] The 2011 and 2012 rules were only a few weeks late,[46] but the 2013 rule was not finalized until August 2013,[47] and the 2014 rule was so late that EPA decided to just roll it into the 2015 rulemaking.[48] Then, after further delay, EPA rolled both rules out in the 2016 rulemaking.[49]

As a practical matter, oil companies have been forced to comply with the proposed rules in anticipation of EPA later finalizing rules that are somewhat similar. But without a final rule, the oil industry has few options for

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42 Envtl. Prot. Agency, Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program, 72 Fed. Reg. 23,900, 23,903 (May 1, 2007) (to be codified at 40 C.F.R. pt. 80) ("In order to ensure the use of the total renewable fuel volume specified for each year, the Agency must set a standard for each year representing the amount of renewable fuel that each refiner, blender, or importer must use, expressed as a percentage of gasoline sold or introduced into commerce. This yearly percentage standard is to be set at a level that will ensure that the total renewable fuel volumes shown in Table I.B-1 will be used based on gasoline volume projections provided by the Energy Information Administration (EIA).").

43 *Id.*

44 42 U.S.C. § 7545(o)(3)(B)(i) (2012) ("Not later than November 30 of each of calendar years 2005 through 2021, based on the estimate provided under subparagraph (A), the Administrator of the [EPA] shall determine and publish in the Federal Register, with respect to the following calendar year, the renewable fuel obligation that ensures that the requirements of paragraph (2) are met.").

45 Envtl. Prot. Agency, Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 75 Fed. Reg. 14,670, 14,675, 14,877–78 (March 26, 2010) (to be codified at 40 C.F.R. pt. 80).

46 Envtl. Prot. Agency, Regulation of Fuels and Fuel Additives: 2011 Renewable Fuel Standards, 75 Fed. Reg. 76,790, 76,791–92 (Dec. 9, 2010) (to be codified at 40 C.F.R. pt. 80); Envtl. Prot. Agency, Regulation of Fuels and Fuel Additives: 2012 Renewable Fuel Standards, 77 Fed. Reg. 1,320, 1,321 (Jan. 9, 2012) (to be codified at 40 C.F.R. pt. 80).

47 Envtl. Prot. Agency, Regulation of Fuels and Fuel Additives: 2013 Renewable Fuel Standards, 78 Fed. Reg. 49,794, 49,795 (Aug. 15, 2013) (to be codified at 40 C.F.R. pt. 80).

48 Envtl. Prot. Agency, Delay in Issuing 2014 Standards for the Renewable Fuel Standard Program, 79 Fed. Reg. 73,007, 73,008 (Dec. 9, 2014).

49 *Id.* at 73,007–08 (delaying standards on basis that "[t]he proposal has generated significant comment and controversy, particularly about how volumes should be set in light of lower gasoline consumption than had been forecast at the time that the Energy Independence and Security Act was enacted, and whether and on what basis the statutory volumes should be waived" and highlighting commenters' "concerns regarding the proposal's ability to ensure continued progress towards achieving the volumes of renewable fuel targeted by the statute"); Envtl. Prot. Agency, Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017, 80 Fed. Reg. 33,100, 33,101 (proposed June 10, 2015) (to be codified at 40 C.F.R. pt. 80).

recourse in the courts.[50] And, on the one occasion that the oil companies challenged EPA's later-issued rulemakings as retroactive regulation, the D.C. Circuit held that retroactive rulemaking was reasonable and allowed by statute.[51] As a result, EPA has again found it more convenient to rely on proposed rules to set its agenda, rather than finalizing rules that could be challenged in court.

C. *Health Care*

Although changes to health care plans do not require the lead-time necessary for investment decisions in the energy industry, they can present similar issues because of federal and state rules that mandate publication and review of health care plans long before they are implemented.[52] As in the energy industry, regulators are increasingly capitalizing on this necessary lead-time by requiring companies to comply with controversial regulations before those regulations can be tested in court.

For this reason, before the Supreme Court ruled on the constitutionality of the Affordable Care Act ("ACA") in 2012, several companies committed to maintain some of the Act's key provisions even if the Court struck it down.[53] Specifically, companies said they would still offer coverage to parents' children up to age twenty-six and would provide free preventative care regardless of the Court's decision.[54] This decision is not surprising because, like regulated utilities, these insurers had already received approval for higher rates from state regulators that reflected the ACA's changes.[55] Once these higher rates had been approved, there was little time or incentive to go back and lower rates even if the court determined that these coverages were

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50 *See, e.g.*, Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PENN. L. REV. 923, 951–54 (2008) ("Federal courts generally have extremely limited jurisdiction to 'compel agency action unlawfully withheld or unreasonably delayed' under section 706(1) of the [Administrative Procedure Act].") (citation omitted).

51 Nat'l Petrochemical & Refiners Ass'n v. Envtl. Prot. Agency, 630 F. 3d 145, 162-66 (D.C. Cir. 2010) ("[A]ny primary retroactive effects were implicitly authorized . . . and EPA reasonably balanced any retroactive effects against the benefits of applying the . . . regulations to the full calendar year.").

52 Dep't of Health & Human Servs., Rate Increase Disclosure and Review, 76 Fed. Reg. 29,964, 29,964 (May 23, 2011) (to be codified at 45 C.F.R. pt. 154). *See also, e.g.*, ALA. CODE § 27-2-17(c) (2016); ALASKA STAT. § 21.51.405(b) (2015); ARIZ. REV. STAT. ANN. § 20-143(b) (2016); ARK. CODE. ANN. § 23-79-109(b)(1) (2016).

53 Lewis Krauskopf, *U.S. Health Plans to Keep Some Reforms, However Court Rules*, REUTERS (Jun. 11, 2012), http://www.reuters.com/article/us-unitedhealthgroup-reform-idUSBRE85A03Y20120611.

54 *Id.*

55 *Cf.* Jacquie Lee & Jayne O'Donnell, *Regulators Approve Higher Health Premiums to Strengthen Obamacare Insurers*, USA TODAY (Oct. 19, 2016), http://usat.ly/2eq0qLK; Brad Tuttle, *8 States Where Obamacare Rates Are Rising by at Least 30%*, TIME: MONEY (Oct. 18, 2016), http://time.com/money/4535394/obamacare-plan-premium-price-increases-2017-states/.

not required, especially given the limited competition in most states' insurance markets.

Even when the government knew that ACA provisions might be in danger from the courts, it took steps to ensure that companies could not backtrack on their preparation to comply. For example, the government knew courts might hold that the contraceptive mandate, a provision of the ACA, violated the Religious Freedom and Restoration Act of 1993,[56] as the Supreme Court ultimately decided in *Burwell v. Hobby Lobby*.[57] In the confusion before the Supreme Court's decision, some objecting religious organizations prepared to comply until the courts ruled, while other organizations refused to comply.[58] As religious organizations struggled with this decision, the Department of Health and Human Services issued a bulletin that offered a safe harbor from enforcement for one year, but only to religious organizations that had not already complied with the contraception mandate, effectively preventing companies that had reluctantly complied from benefiting from the safe harbor.[59]

D. *Policymaking by Proposal and Other Methods of Avoiding Judicial Review*

Policymaking by proposal can be thought of as one component of a larger trend toward executive workarounds to a hostile congress, which has variously been described as "Adhocracy,"[60] "Kludgeocracy,"[61] or simply, "Administrative Law Without Congress."[62] In that sense, it is of a piece with other policies designed to leverage executive power to influence private decisions without any of the broader political acceptance implied by legislation

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56 Religious Freedom Restoration Act, Pub. L. No. 103-141 107 Stat. 1488 (November 16, 1993) (codified as amended at 42 U.S.C. §§ 2000bb (2012)).

57 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014) (holding that the Department of Health and Human Services could not force closely held corporations to provide insurance coverage for methods of birth control that violated their sincerely held religious beliefs, as it violated the Religious Freedom Restoration Act).

58 Sara Elisabeth Smith, The Women's Preventative Services Provision of the ACA and For-Profit Corporations: Must They Comply? 9–16 (May 2014) (unpublished manuscript) (on file with Seton Hall Univ., Law School Student Scholarship, Paper No. 581), http://scholarship.shu.edu/student_scholarship/581 (detailing the status of varied organizations bringing lawsuits against the contraceptive mandate before the Supreme Court's decision).

59 Dep't of Health & Human Servs., Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,502–03 & 16,502 n.5 (proposed Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147).

60 PHILIP A. WALLACH, TO THE EDGE: LEGALITY, LEGITIMACY, AND THE RESPONSES TO THE 2008 FINANCIAL CRISIS 119 (2015).

61 Steven M. Teles, *Kludgeocracy in America*, 17 NAT'L AFF. 97, 97 (2013).

62 Greve & Parrish, *supra* note 8, at 501.

that has won congressional support after standing up to the public scrutiny and committee procedures generally followed by the House and Senate.

As with policymaking by proposal, these policies are disproportionately aimed at industries with long investment timelines, particularly the energy industry. Three examples in the energy industry will illustrate the diverse forms in which the administration is now seeking to influence industry investment without using either new statutes or finalized regulations: (1) explicit and tacit commitments not to enforce laws against energy sources favored by government policy, such as wind power generators;[63] (2) extreme legislative proposals, such as President Obama's proposed $10 per barrel oil tax;[64] and (3) unprecedented use of executive authority to punish energy projects such as the Keystone XL and Dakota Access pipelines.[65]

Shortly after President Obama took office in 2009, his new administration moved to boost wind power by giving generators five-year "take" permits, which allowed them to harm or kill eagles if it was unavoidable.[66] These wind generators might otherwise have faced stiff penalties under the Bald and Golden Eagle Protection Act.[67] In 2013, the Fish and Wildlife Service extended the permit term to thirty years, and seemingly softened the "unavoidable" standard by promising, instead, that "[a]daptive management" would "offset predicted detrimental impacts to eagles throughout the [30-year] life of the permit."[68]

These thirty-year permits, of course, encourage investment in wind power, providing certainty for facilities that are usually assessed on a 20-year timeline.[69] At the same time, the permits undercut the protections of the Bald and Golden Eagle Protection Act passed by Congress and signed by President Roosevelt in 1940. The American Bird Conservancy and other plaintiffs challenged the rule that authorized the permits in federal court, and the court struck down the rule on the basis that the agency had not sufficiently studied

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63 *See, e.g.*, Dep't of the Interior, Eagle Permits; Take Necessary to Protect Interests in Particular Localities [sic], 74 Fed. Reg. 46,836, 46,863 (Sep. 11, 2009) (to be codified at 50 C.F.R. pts. 13, 22) (declining to enforce a licensing requirement to protect eagles' flight paths against wind power generators).

64 *See, e.g.*, Press Release, The White House, Office of the Press Secretary, Fact Sheet: President Obama's 21st Century Clean Transportation System (Feb. 4, 2016), https://www.whitehouse.gov/the-press-office/2016/02/04/fact-sheet-president-obamas-21st-century-clean-transportation-system.

65 *See, e.g.*, DEP'T OF STATE, RECORD OF DECISION AND NATIONAL INTEREST DETERMINATION: TRANSCANADA KEYSTONE XL PIPELINE, L.P. APPLICATION FOR PRESIDENTIAL PERMIT 28–30 (2015).

66 Eagle Permits; Take Necessary to Protect Interests in Particular Localities [sic], 74 Fed. Reg. at 46,836.

67 Bald and Golden Eagle Protection Act, Pub. L. No. 87-884, 76 Stat. 1246 (Oct. 24, 1962) (codified as amended at 16 U.S.C. §§ 668, 668d (2012)).

68 Dep't of the Interior, Eagle Permits; Changes in the Regulations Governing Eagle Permitting, 78 Fed. Reg. 73,704, 73,704, 73,708 (Dec. 9, 2013) (to be codified at 50 C.F.R. pts. 13, 22).

69 DEP'T OF ENERGY, WIND VISION: A NEW ERA FOR WIND POWER IN THE UNITED STATES 72, 106 (2015) ("A wind plant is typically repowered at the end of its useful life, and most original equipment manufacturers certify turbines for a 20-year lifetime.").

the environmental impact of the permit.[70] The court noted that the agency's primary justification for the rule seemed to be simply that the wind power "industry has indicated that it desires a longer permit."[71] But, as in other policymaking-by-proposal contexts, the announced policy may be more important than whether the rule is ultimately upheld by the courts. Ultimately, if the federal government is determined not to prosecute those who violate the Eagle Protection Act, no one else will, because the Act does not have a citizen suit provision.[72] And the administration quickly moved to again finalize the rule, this time with an accompanying environmental impact statement.[73]

President Obama's February 2016 proposal for a $10 tax on each barrel of oil is another policy proposal designed to impact investment.[74] Like the administration's proposed rules,[75] the very unlikelihood of achieving the proposal seems to have encouraged the administration to make a radical opening bid.[76] Between July 2014 and January 2016, oil prices fell from over $100 per barrel to under $30 per barrel.[77] The collapse of oil prices, of course, meant that gasoline and heating oil consumers would find an oil-tax-induced price hike more affordable than they would at a time of high oil prices. But the converse is true for oil producers: low oil prices already had many on the verge of bankruptcy.[78] A $10 tax on $30 oil would ensure that these companies went bankrupt, and some saw a danger that these oil producers could take the global economy with them.

In the aftermath of the financial crisis, oil producers were one of very few investments that promised a reasonable profit in the North American

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70 Shearwater v. Ashe, No. 14-CV-02830-LHK, 2015 WL 4747881, at *25–26 (N.D. Cal. Aug. 11, 2015).

71 *Id.* at 5.

72 16 U.S.C. § 668b (2012) (providing only for government prosecution, per citation to 16 U.S.C. § 706 (2012)).

73 Dep't of the Interior, Eagle Permits; Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests, 81 Fed. Reg. 91,494, 91,494 (Dec. 16, 2016); *see generally* DEP'T OF THE INTERIOR, FISH AND WILDLIFE SERV., PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT FOR THE EAGLE RULE REVISION (Dec. 2016), https://www.fws.gov/migratorybirds/pdf/management/FINAL-PEIS-Permits-to-Incidentally-Take-Eagles.pdf.

74 *See* Fact Sheet: President Obama's 21st Century Clean Transportation System, *supra* note 64.

75 See *supra* notes 6, 17, 28–30, 49 and accompanying text.

76 Congress has repeatedly rejected calls from President Obama for a higher gasoline tax. *E.g.*, Ed Leefeldt, *Why Obama's Oil Tax Hasn't Got a Chance*, CBS MONEYWATCH (Feb. 9, 2016), https://cbsnews.com/news/why-obamas-oil-tax-hasnt-got-a-chance.

77 *Share Markets Slide as Oil Price Falls Below $30*, BBC (Jan. 15, 2016), http://www.bbc.com/news/business-35320923.

78 Matt Egan, *U.S. Oil Bankruptcies Spike 379%*, CNN MONEY (Feb. 11, 2016), http://money.cnn.com/2016/02/11/investing/oil-prices-bankruptcies-spike/; Claire Zillman, *One-Third of Oil Companies Could Go Bankrupt this Year*, FORTUNE (Feb. 16, 2016), http://fortune.com/2016/02/16/oil-companies-bankrupt/.

economy.[79] As a result, United States banks are now heavily invested in oil producers.[80] In fact, banks are now so dependent on oil investments that even a major oil importer like the United States may have been *harmed* by the oil price collapse—that is, markets seem to think that the losses and uncertainty caused by bankrupt oil producers might outweigh the theoretically larger benefits that consumers receive from lower fossil fuel prices.[81] In theory, global markets should also benefit when energy inputs to the economy become cheaper, but so far lower oil prices have not had that effect. Financial markets are pricing-in the risk that a huge wave of defaults in the oil industry might threaten major banks and thus, the global economy.[82]

With oil producers on the brink of a fall that could take down the global economy, it seems unwise to push them over the edge by adding a one-third tax to their production. But again, when government actors pursue policymaking by proposal, the proposals need not be reasonable themselves—instead they are designed to nudge industry investments in the government's preferred direction. In this case, the administration wanted to tap the brakes on investment in the oil industry. It is nearly inconceivable that it would actually like to adopt its $10/barrel tax. Even President Obama's Secretary of Energy refused to defend the size of the $10 per barrel tax when asked about it publicly.[83]

The United States' Department of State's treatment of the Keystone XL pipeline proposed by the Canadian company TransCanada again seemed aimed more at influencing industry investment than establishing a coherent policy. TransCanada submitted its original application for a permit to build

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79 *See* Christine Idzelis & Craig Torres, *Fed Bubble Bursts in $550 Billion of Energy Debt: Credit Markets*, BLOOMBERG (Dec. 11, 2014), http://www.bloomberg.com/news/articles/2014-12-11/fed-bubble-bursts-in-550-billion-of-energy-debt-credit-markets ("Since early 2010, energy producers have raised $550 billion of new bonds and loans as the Federal Reserve held borrowing costs near zero . . . .").

80 *E.g.*, *id.*; Rachel Louise Ensign, *Banks Face New Headache on Oil Loans*, WALL ST. J. (April 12, 2016), http://www.wsj.com/articles/banks-face-massive-new-headache-on-oil-loans-1460453401.

81 *See* Binyamin Appelbaum, *Lower Oil Prices Are Not Bringing Economic Gains*, N.Y. TIMES, Jan. 22, 2016, at A1.

82 Mark Harrington, *Oil Credit Crunch Could be Worse Than the Housing Crisis*, CNBC (Jan. 14, 2016), http://www.cnbc.com/2016/01/14/oil-credit-crunch-could-be-worse-than-the-housing-crisis-commentary.html; John Melloy, *Could Oil Collapse Cause Next Credit Crisis?*, CNBC (Nov. 28, 2014), http://www.cnbc.com/2014/11/28/could-oil-collapse-cause-next-credit-crisis.html ("Everyone could suffer if the collapse triggers a wave of defaults through the high-yield debt market, and in turn, hits stocks. The first to fall: the banks that were last hit by the housing crisis."); Jordan Weissmann, *Two Ways That Low Oil Prices Are Very Clearly Hurting the Economy*, SLATE (Jan. 21, 2016), http://www.slate.com/blogs/moneybox/2016/01/21/one_way_that_low_oil_prices_are_very_clearly_hurting_the_economy.html ("[D]ownstream effects are why some investors are nervous that an oil recession could balloon into an actual recession, especially as the industry continues to retrench this year.")

83 James Osborne, *Energy Secretary Faces Tough Crowd on Oil Tax*, HOUS. CHRON. (Feb. 24, 2016), http://fuelfix.com/blog/2016/02/24/energy-secretary-faces-tough-crowd-on-oil-tax (when asked about the $10 per barrel proposal "Moniz looked momentarily stunned before grinning at the audience and saying, 'this is going to be a classic answering a different question answer'").

the pipeline in September 2008. The original application was for a pipeline to carry up to 830,000 barrels of crude oil per day from Hardisty, Alberta to Port Arthur, Louisiana on the United States Gulf Coast.[84] Because the pipeline crossed the border between the United States and Canada, standing executive orders required that it receive a permit from the president.[85] Purely domestic pipelines do not require a presidential permit and can be approved with a generic environmental analysis that does not include a full, individualized environmental impact statement.[86]

The United States Department of State considered the application for more than seven years before finally rejecting it in November 2015, but the announced process changed several times over the course of the review.[87] In summer 2013, President Obama announced that he would not approve the pipeline if it increased greenhouse gas emissions in Canada by enabling faster oil production.[88] This was a significant shift for the federal government, which had previously declared that environmental reviews of pipeline projects should focus on the pipeline itself, rather than how it might affect upstream oil production or downstream oil consumption.[89] The Department of

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84 DEP'T OF STATE, RECORD OF DECISION AND NATIONAL INTEREST DETERMINATION: TRANSCANADA KEYSTONE XL PIPELINE, L.P. APPLICATION FOR PRESIDENTIAL PERMIT 2 (2015).

85 Exec. Order No. 13,337, 69 Fed. Reg. 25,299 (May 5, 2004); Exec. Order No. 11,423, 33 Fed. Reg. 11,741 (Aug. 20, 1968).

86 *See generally* U.S. ARMY CORPS OF ENG'RS, DECISION DOCUMENT, NATIONWIDE PERMIT (2012), www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP_12_2012.pdf. *See also* Sierra Club v. U.S. Army Corps of Eng'rs, 990 F. Supp. 2d 9, 17, 26 n.13 (D.D.C. 2013) (denying motion for preliminary injunction against domestic crude oil pipeline because it, unlike Keystone XL, is "an entirely domestic oil pipeline").

87 *See* DEP'T OF STATE, RECORD OF DECISION AND NATIONAL INTEREST DETERMINATION: TRANSCANADA KEYSTONE XL PIPELINE, L.P. APPLICATION FOR PRESIDENTIAL PERMIT 32 (2015).

88 President Barack Obama, Remarks by the President on Climate Change at Georgetown Univ. (June 25, 2013), http://www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change (stating that Keystone XL crude pipeline would not be approved if it would "significantly exacerbate the problem of carbon pollution"); James W. Coleman, *Obama Climate Speech Sets New Standard for Keystone Pipeline*, ENERGY L. PROF. BLOG (July 15, 2013), http://www.energylawprof.com/?p=62.

89 In 2009, the year after TransCanada's filed its application for Keystone XL, President Obama's administration successfully defended the Bush administration's approval of the original Keystone pipeline—a smaller pipeline from Hardisty, Alberta to Patoka, Illinois—convincing a court that its decisions was unreviewable despite the failure to consider upstream and downstream emissions. Nat. Res. Defense Council v. U.S. Dep't of State, 658 F. Supp. 2d 105, 113 (D.D.C. 2009). In that case, the federal government had also explained the reasons that it would not consider emissions in other countries. In full disclosure, when I was in private practice, I represented TransCanada as an intervener in this lawsuit. *See also* DEP'T OF STATE, SCOPING SUMMARY FOR THE KEYSTONE PIPELINE PROJECT, ENVIRONMENTAL IMPACT STATEMENT 18 tbl.2 (2006) ("The [Draft Environmental Impact Statement] addresses the reasonably foreseeable environmental impacts of the construction and operation of the proposed Keystone Pipeline within the United States and is limited to the pipeline which is a transportation system. The scope of the [Environmental Impact Statement] is necessarily limited to the scope of the proposed project and does not extend to the supply of crude oil to the transportation system or the operation of refineries that are supplied

State executed this new mandate, concluding that the pipeline was "unlikely to significantly impact the rate of extraction in the oil sands," and thus unlikely to increase greenhouse gas emissions.[90] In fact, it concluded that rejecting the pipeline would actually lead to higher greenhouse gas emissions, because if all new oil pipelines were blocked, then oil would likely travel by rail, which would lead to higher greenhouse gas emissions than pipeline transport.[91] Nevertheless, Secretary of State John Kerry denied the permit because, despite this conclusion, the pipeline was "*perceived* as enabling further [greenhouse gas] emissions globally."[92]

Changing the rules five years into a permit application might seem like an archetypal example of haphazard and incoherent policymaking. So too, the decision to make the decision on the basis of perception rather than the years of analysis that were an ostensible justification for the delay. But this back and forth can also be seen as an extremely effective method of influencing industry investment: in this case, freezing investment in crude oil transport, while all sides waited to see if this massive pipeline would be approved. As the State Department found, *rejecting* the pipeline would likely have triggered other new pipeline projects or expanded transport of oil by railroad cars.[93] By contrast, *delaying* a decision on the pipeline created continuing uncertainty for alternative investments. Keystone XL's capacity of 830,000 barrels per day could carry nearly one quarter of Western Canada's oil production.[94] Had it been approved in a timely fashion, the market for transportation from Western Canada would have been saturated for years,

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by it. Further, as provided in Executive Order 12114, 'Environmental Effects Abroad of Major Federal Actions,' Jan. 4, 1979, a federal agency is directed to consider extra-territorial environmental impacts only in limited circumstances not applicable here. Possible impacts of the construction or operation of the Keystone Pipeline in Canada are properly the subject of review by appropriate Canadian governmental entities.").

90 DEPT' OF STATE, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE KEYSTONE XL PROJECT: EXECUTIVE SUMMARY ES-16 (Jan., 2014).

91 *Id.* at ES-34, ES-34 tbl.ES-6. The State Department also acknowledged that if global oil prices fell significantly (*e.g.*, West Texas Intermediate under $75 a barrel), then rejecting the pipeline could decrease greenhouse gas emissions because "higher transportation costs could have a substantial impact on oil sands production levels." *Id.* at ES-12.

92 Dep't of State, Record of Decision and National Interest Determination: TransCanada Keystone XL Pipeline, L.P. Application for Presidential Permit 29 (2015) (emphasis added).

93 FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE KEYSTONE XL PROJECT, *supra* note 90, at ES-34 tbl.ES-6.

94 In 2015, Western Canada produced 3.68 million barrels of oil per day. CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS, CRUDE OIL: FORECAST, MARKETS & TRANSPORTATION ii (2016).

making investment in rail transport unwise.[95] So delay, unlike either approval or rejection, was particularly likely to stymie investment in oil transport.[96]

The Obama administration pursued these policies effectively on other pipelines as well.[97] The controversy over the Dakota Access pipeline is a prime example. In July 2016, the United States Army Corps of Engineers approved construction of the Dakota Access pipeline from North Dakota to Illinois, finding that approving hundreds of crossings over federal waters and land would have "no significant impact" on the environment.[98] That decision was challenged by the Standing Rock Sioux Tribe, which is opposed to the pipeline, and defended by the government and the pipeline company. The D.C. District Court denied the tribe's motion for a preliminary injunction, ruling that the Army Corps's decision to approve the pipeline had likely complied with the law.[99] Just moments after the court issued its decision clearing the pipeline for construction, however, the Army Corps of Engineers, the Department of Justice, and the Department of Interior jointly announced that the pipeline would be halted, and that the Army Corps would reconsider its previous decisions, shocking both proponents and opponents of the pipeline.[100]

In December 2016, the Army Corps of Engineers ultimately decided to deny the pipeline company an easement to cross the Missouri River to allow time to perform a full environmental impact statement that would consider

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95 Total existing capacity is four million barrels per day, with current production around four million barrels per day. Western Canada is not projected to reach 4.8 million barrels per day until 2030. *Id.* at ii, 23.

96 S. Joel Carlson, Understanding Government And Railroad Strategy For Crude Oil Transportation In North America 96–97 (June 2014) (unpublished M.S. Thesis, Mass. Inst. Tech.) ("[R]ailroads should be cautious about making investments for routes where they would be in direct competition with pipelines. . . . [A]ny hesitation by the railroads in transporting crude oil is partly as a result of the uncertainty over pipeline approval. From the perspective of President Obama, . . . this uncertainty may be desirable in terms of slowing down possible production expansion in the oil sands . . . .").

97 *See, e.g.*, *Obama's Trans-Alaska Oil Assault*, WALL ST. J. (Jan. 26, 2015), https://www.wsj.com/articles/obamas-trans-alaska-oil-assault-1422319740. Some have suggested that by varying the stringency of NEPA reviews, the administration could approximate the effect of a pollution tax on investment. Sarah E. Light, *NEPA's Footprint: Information Disclosure as a Quasi-Carbon Tax on Agencies*, 87 TUL. L. REV. 511, 517 (2013) (recommending this approach).

98 Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16-1534 (JEB), 2016 WL 4734356, at *15 (D.D.C. Sept. 9, 2016). Such approvals are routine under a nationwide permit decision issued by the U.S. Army Corps of Engineers. U.S. ARMY CORPS OF ENG'RS, *supra* note 86, at 12.

99 *Standing Rock Sioux Tribe*, 2016 WL 4734356, at *1.

100 *Id.* at *26; Jack Healy & John Schwartz, *U.S. Suspends Construction on Part of North Dakota Pipeline*, N.Y. TIMES, Sept. 10, 2016, at A1 (noting that opponents considered the "news . . . a stunning development," while proponents found the move "deeply troubling [as it] could have a long-lasting chilling effect on private infrastructure development in the United States").

the environmental and cultural impacts of the pipeline crossing.[101] This reversal was particularly suprising because the government's decision reiterated that it had already approved the pipeline crossing and stood by its earlier finding, adopted after notice and comment, that the pipeline had "no significant impact" on the environment.[102] The new Army Corps' memo did not explain how the government could perform a full environmental impact statement if, as it continued to insist, the pipeline crossing had no significant impact.[103] Nor did this four-page memo identify or explain what in its previous twelve-hundred page environmental assessment could be expanded or approved upon.[104] Although, the Army Corps reversal was subsequently re-reversed by the incoming administration,[105] the outgoing administration did its best to make this return difficult by, in addition to the Army Corps memo, simultaneously releasing a memo from the solicitor of the Department of the Interior, which heavily criticized the Army Corps "no significant impact" finding.[106] However shocking, these sudden course reversals are part and parcel of the federal government's increasing adeptness at influencing industry investment through executive actions and shifting standards that can promote, delay, or frustrate industry investment.[107]

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101 Memorandum from Jo-Ellen Darcy, Assistant Secretary of the Army, to the Commander of the U.S. Army Corps of Eng'rs, Proposed Dakota Access Pipeline Crossing at Lake Oahe, North Dakota 3–4 (Dec. 2, 2016), https://www.army.mil/e2/c/downloads/459011.pdf.

102 *Id.* at 1, 4 ("On July 25, 2016, the U.S. Army Corps of Engineers (Corps) granted a permission to applicant Dakota Access, L.L.C. under Section 14 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 408 (Section 408 permission), for a proposed crossing of Lake Oahe, a Corps project on the Missouri River . . . . The Section 408 permission was accompanied by an Environmental Assessment, as contemplated under the National Environmental Policy Act (NEPA), 42 U.S.C. §4321–4335, and its implement regulations. . . . The Environmental Assessment included a finding that granting the Section 408 permission for the proposed crossing of Lake Oahe did not constittue a major Federal action that would have significant environmental impacts. . . . [T] his decision does not alter the Army's position that the Corps' prior reviews and actions have comported with legal requirements.").

103 *Id.*

104 *Id. See* U.S. ARMY CORPS OF ENG'RS, ENVIRONMENTAL ASSESSMENT: DAKOTA ACCESS PIPELINE PROJECT CROSSINGS OF FLOWAGE EASEMENTS AND FEDERAL LANDS (2016), http://cdm16021.contentdm.oclc.org/cdm/ref/collection/p16021coll7/id/2801.

105 U.S. DEPT. OF THE ARMY, EASEMENT FOR FUEL CARRYING PIPELINE RIGHT-OF-WAY LOCATED ON LAKE OAHE PROJECT, MORTON AND EMMONS COUNTIES, NORTH DAKOTA (Feb. 8, 2017), http://www.eenews.net/assets/2017/02/09/document_ew_04.pdf. This re-reversal from the Army Corps was made in response to direction from the new administration. Presidential Memorandum Regarding Construction of the Dakota Access Pipeline, WHITEHOUSE.GOV (Jan. 24, 2017), https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-dakota-access-pipeline.

106 Memorandum from Hilary Tompkins, Solicitor of the U.S. Dept. of the Interior to Secretary of the Army Corp. of Eng'rs regarding Tribal Treaty and Environmental Statutory Implications of the Dakota Access Pipeline (Dec. 4, 2016), http://www.energylawprof.com/wp-content/uploads/2017/02/dakota-access-solicitor-memo.pdf.

107 Indeed, the Dakota Access case is eerily similar to the Federal Energy Regulatory Commission's treatment of an Oregon facility for liquefied natural gas which was first approved, and then denied the

II. HOW POLICYMAKING BY PROPOSAL IS TRANSFORMING NOTICE-AND-COMMENT RULEMAKING

Policymaking by proposal is changing the way that regulators and industry approach notice-and-comment rulemaking. It creates different, and in some ways, unusual incentives for all parties that are transforming the familiar informal rulemaking process. It is already inducing regulators to treat rule proposals more as an opening bid with industry, as opposed to a good faith attempt to detail what the final rule will likely say. And it is encouraging industry to find ways to attack the legitimacy of regulatory initiatives long before a rule can be finalized or brought to court. Together these changes undermine the credibility of the notice-and-comment rulemaking system that is the foundation of the modern administrative state.

A. *Proposed Rule as Opening Bid*

When the point of a proposal is to influence industry investment, the agency's approach to notice-and-comment rulemaking changes. For one thing, an agency hoping to finalize stringent regulations will often propose regulations that are even more stringent than its ideal end target.[108] If industry hopes to resist a rule, it will, to the extent possible, move only part of the way toward compliance so that, if necessary, it can speed up investments to fully comply. If an agency proposes a rule that is significantly more stringent than the rule that it ultimately adopts, however, industry may end up close to the finalized rule. This partial move toward compliance with an unrealistically

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necessary permit to build a pipeline to bring gas to the facility for export. Jordan Cove Energy Project, L.P., 154 FERC ¶ 61,190 (Mar. 11, 2016) (denying application for certificate and Section 3 authorization). *See also* Jonathan Crawford & Naureen Malik, *U.S. Rejects Multibillion-Dollar Jordan Cove Gas Export Plan*, BLOOMBERG (Mar. 11, 2016), https://www.bloomberg.com/news/articles/2016-03-11/u-s-rejects-veresen-s-5-3-billion-jordan-cove-gas-export-plan.

In another area, the same pattern can be seen in the Obama administration's treatment treatment of the proposal for storing nuclear waste at Yucca Mountain in Nevada. The Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (1983) (codified as amended at 42 U.S.C. § 10101 *et seq.*), established a process for determining sites for storing nuclear waste. Since 1987 the focus of that process has been, by Congressional designation, Yucca Mountain in Nevada. Bruce R. Huber, *Checks, Balances, and Nuclear Waste*, 49 ARIZ. ST. L.J. (forthcoming 2017) (manuscript at 19–20), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2820706. But the Obama administration, while unable to alter these statutes has made killing the project a key goal. *Id.* at 21–24. Toward this end it has adopted a wide range of tactics including cutting off all funding for implementing the process and withdrawing the Department of Energy's siting application with the Nuclear Regulatory Commission. *Id.* Remarkably, the government asked that the application be withdrawn with prejudice. *Id.* at 20. Finally, when the Nuclear Regulatory Commission appeared deadlocked, which would prevent this withdrawal, its chair, who had been appointed by President Obama simply refused to report the deadlock, leaving the application in limbo. *Id.* For a full review of the remarkable Yucca Mountain story, see *Id.* at 19–24.

108 *See supra* notes 34–38 and accompanying text.

stringent proposal creates three benefits for the agency. First, it moves industry more quickly toward compliance with a more reasonable final rule. Second, industry will have little reason to resist a rule with which it is already complying. Third, industry that is in compliance may actually end up supporting the agency's final rule as an advantage over competitors that have lagged behind in investing toward compliance.

Furthermore, although one might expect an agency to begin cautiously when promulgating a rule with a tenuous legal basis, an agency that has internalized the incentives of policymaking-by-proposal will actually make its proposal more aggressive precisely when the rule is most likely to be struck down by the courts. This counterintuitive incentive occurs because industry will discount the threat from a regulation that may well be struck down in court. So industry will only make limited investments to move toward compliance: hedging its bets so it does not invest too much toward complying with a rule that could be struck down, but also making enough investments that it will be able to comply if the rule is upheld. If an agency proposal is sufficiently aggressive, an industry will have to make significant investments to give it any hope of compliance, even if it believes the rule is likely to be struck down by the courts. Thus when the legal foundation for a regulatory initiative is in doubt, agencies have an incentive to propose more stringent rules to ensure that even a doubtful industry invests toward compliance. An aggressive proposal based on a tenuous legal theory is the agency's way of telling industry, "you've gotta ask yourself one question: 'Do I feel lucky?' Well, do you, punk?"[109]

Thus, policymaking by proposal encourages agencies to treat proposed rules as simply an opening bid. This is especially apparent in EPA's new source performance standards for greenhouse gases from power plants and its Clean Power Plan. EPA's gradual walk back of its new source performance standards is dramatic: a proposal for 1,000 lb CO_2/MWh in 2012, followed by a new proposal of 1,100 lb CO_2/MWh in 2014, leading to a final

109 DIRTY HARRY (Warner Bros. 1971).

rule at 1,400-2,000 lb CO_2/MWh in 2015.[110] The Clean Power Plan has exhibited the same dynamic: the agency initially proposed that states demonstrate compliance by 2020;[111] in the final rule, EPA settled for 2022.[112]

B. *Attacking the Legitimacy of Agency Proposals*

Companies under the threat of stringent proposals are looking for faster ways to attack the legitimacy of agency policies than the traditional process of waiting for the agency to publish the final rule and then waiting for the courts to address an industry challenge. Nowhere is this more apparent than the coal industry's response to EPA's Clean Power Plan. The coal industry and coal states filed two separate motions for stays even before the final Clean Power Plan has been published: one after the proposal was published and one after EPA posted a pre-publication version of its final rule.[113] The D.C. Circuit rejected both motions.[114]

Industry can also attack agency proposals outside the courts. In the wake of the Clean Power Plan, some utility representatives stated flatly that the rule would not be finalized as proposed.[115] Finally, if an industry thinks that it can make a sufficiently compelling case that the proposal is invalid, it may

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110 Envtl. Prot. Agency, Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510, 64,658 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98); Envtl. Prot. Agency, Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1,430, 1,433 (proposed Jan. 8, 2014) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98); Envtl. Prot. Agency, Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, 77 Fed. Reg. 22,392, 22,394 (proposed Apr. 13, 2012) (to be codified at 40 C.F.R. pt. 60).

111 Envtl. Prot. Agency, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830, 34,837 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

112 Envtl. Prot. Agency, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,667 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

113 Gavin Bade, *Federal Court Refuses to Stay EPA's Clean Power Plan*, UTILITY DIVE (Sept. 10, 2015), http://www.utilitydive.com/news/federal-court-refuses-to-stay-epas-clean-power-plan/405387/.

114 *In re* Murray Energy Corp, 788 F.3d 330, 339–40 (D.D.C. 2015). Industry was also able to enlist friendly states in attacking the Clean Power Plan proposal, with some affirmatively declaring that they would prohibit compliance with the plan. Devin Henry, *Oklahoma Takes Aim at Climate Plan*, THE HILL (Apr. 30, 2015), http://thehill.com/policy/energy-environment/240696-oklahoma-takes-aim-at-climate-plan ("[Governor] Fallin's order prohibits the state's Department of Environmental Quality from writing a strategy to reduce carbon emissions under the Clean Power Plan.").

115 Rich Heidorn Jr., *Former EPA Official: Clean Power Plan Won't Survive*, RTO INSIDER (Oct. 19, 2015), https://www.rtoinsider.com/former-epa-official-clean-power-plan-18582/ ("Former Environmental Protection Agency official Jeff Holmstead says he hasn't made predictions on how the courts will rule on previous environmental rules affecting the electric industry." But he also notes that "there are right now almost certainly five justices that would vote to overturn it.").

take the normally risky step of declaring its intention to ignore the proposal and count on the courts to strike down the final rule.

III. RESISTING POLICYMAKING BY PROPOSAL

As the administrative state continues growing and the executive looks for ways to increase its power in the absence of congressional action, there is little prospect that agencies will voluntarily turn away from policymaking by proposal. What can other actors do to restore the balance of power and the traditional function of notice-and-comment rulemaking? State policymakers will have to treat agency proposals with more skepticism and should not necessarily approve regulated utility investments toward compliance when it is not clear that the proposed rule will be finalized as proposed or enforceable after review in the courts. Courts must strike down rules as arbitrary and capricious when they do not leave adequate time for compliance or base their estimates of cost on the assumption that industry will make investments before it has had an opportunity to test the rules in court. Finally, Congress should create a supplemental procedure, in addition to the normal process of petitioning for review of agency rules and seeking to have them stayed, that allows industry to post a significant bond in return for an automatic stay of an agency rule.

A. *State Policymakers Should Treat EPA Proposals with More Skepticism*

As a matter of tradition and convenience, state policymakers generally presume that federal proposals will both be finalized in a form similar to the agency's proposal and approved by the courts. So when regulated-rate utilities ask permission to make investments to ensure they can comply with a proposal, utility boards are inclined to approve them. Similarly, when a federal agency proposal will require a state agency to alter state environmental regulations, state regulators generally comply.

In a world of policymaking by proposal, these usual practices should be questioned. State utility regulators should be suspicious of investments in environmental control designed to comply with rules that have not yet been approved by the courts. After all, utilities have every incentive to seek approval of big investments toward compliance with forthcoming rules, because those investments, if approved will mean more profits from ratepayers in the form of higher electricity bills.[116]

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116 *See* Douglas N. Jones & Richard A. Tybout, *Environmental Regulation and Electric Utility Regulation: Compatibility and Conflict*, 14 B.C. ENVTL. AFF. 31, 44 (1986); Jim Rossi, *The Political Economy of Energy and Its Implications for Climate Change Legislation*, 84 TULANE L. REV. 379, 410 (2009).

For example, the Clean Power Plan would require approval of major investments by power companies in natural gas power and supply, in electric transmission, in energy efficiency, and in renewable power.[117] State boards should not rubber stamp rate increases to pay for these investments without a serious inquiry into whether the Clean Power Plan will actually stand up in court. Similarly, the Clean Power Plan pushes states to operate cap-and-trade systems for greenhouse gas emissions from the power sector to ensure compliance.[118] Even if states feel they must adopt their own cap-and-trade plan to comply, they should make sure their plan does not entrench laws or monetary interests that will prevent a timely transition away from the scheme if the new administration withdraws EPA's rule or it is invalidated by the courts.[119]

More broadly, states should reassess their procedures for determining whether federal agency proposals 1) offer a fair preview of the rules that will ultimately be finalized by agencies and 2) are likely to be upheld in court. State utility boards should not approve investments that unduly harm consumers if they are made solely to comply with anticipated rules that are, in fact, likely never to be finalized as proposed or enforceable in court.[120]

B. *Courts Should Strike Down Rules That Do Not Leave Adequate Time for Compliance*

Courts can also play a part in ensuring that policymaking by proposal does not provide an end run around the procedures designed to constrain the administrative state. They should strike down regulations premised on the assumption that industry will begin investing to comply as soon as the rule is proposed. It is arbitrary and capricious for regulators to put industry in a situation in which it must comply with a regulation that it believes to be legally flawed without an opportunity to test it in court. Policymaking by proposal

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117 Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,804–05.

118 Will Oremus, *Obama's Climate Plan Is Basically Cap and Trade*, SLATE MONEYBOX (Aug. 4, 2015), http://www.slate.com/blogs/moneybox/2015/08/04/clean_power_plan_obama_s_climate_plan_is_cap_and_trade_after_all.html. *See also* Karen Palmer & Anthony Paul, *A Primer on Comprehensive Policy Options for States to Comply with the Clean Power Plan*, 5 (Resources for the Future Discussion Paper No. DP 15-15, 2015), http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-DP-15-15.pdf.

119 Jones & Tybout, *supra* note 116, at 44 ("Other things being equal, and with a rate of return at least as high as utility stockholders could otherwise earn, the utility has an interest in adding to property, as long as regulators include that property in the rate base . . . . This fact makes any investment that the regulatory commissions find 'used and useful' for power generation, including pollution control equipment, more attractive to the utility. Environmental agencies and other parties of similar interest should take this incentive situation into account.") (footnotes omitted).

120 Of course, if the state independently believes the that the federal proposal is wise as a matter of policy, it should approve these investments—the key question is what to do when state and federal policy choices conflict.

undercuts the purposes of the Administrative Procedure Act notice-and-comment rulemaking—whether one views those as informing the agency,[121] or increasing the legitimacy of bureaucratically imposed rules, [122] or merely creating a record on important issues for judicial review. [123]

Agencies that use proposals rather than final rules to set an agenda for industry investment forfeit the information benefits that the notice-and-comment process can provide because the proposal is adopted before there is any opportunity to take comment.[124] Courts and scholars have been sensitive to the danger of *fait accompli* rulemaking in which an agency is unwilling to adapt its proposal to valid criticisms because it has already committed to finalizing the rule as proposed,[125] whether because of pledges to other stakeholders,[126] previous promises to parallel international regulations,[127] or settlement agreements with courts.[128] But even *fait accompli* rulemaking provides a theoretical opportunity to change the agency's mind during the notice-and-comment process. In contrast, industry lacks even this level of input into proposed rules that are designed to transform industry investment.

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121 Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 403 (1985) ("An invitation to submit comments stimulates outsiders to furnish data and other inputs, providing a source of low-cost information to agency decisionmakers. A rule is likely to be a better product if its drafters must consider seriously alternatives that they might have overlooked or take account of practical problems that otherwise would crop up only after a rule goes into effect."); Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1780–82 (2007); Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213, 218 (1996) ("In addition to opening a major source of information to the agency, notice and comment also bring to bear on the agency powerful forces for rational decisionmaking—the objective eye of the scholar, the critical eye of the public, and the challenging eye of interested parties."); Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 761–63 (2006).

122 *See* Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L. J. 522, 525 (1989) (explaining argument that aggressive judicial review of agency action can improve legitimacy of administrative action).

123 E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492–93 (1992).

124 *E.g.*, MCI Telecomm. Corp. v. Fed. Commc'n Comm'n, 57 F.3d 1136, 1141 (D.C. Cir. 1995) (Notice and comment is designed "to assure that the 'agency will have before it the facts and information relevant to a particular administrative problem'" (quoting Nat'l Ass'n of Home Health Agencies v. Schweiker, 69 F.2d 932, 949 (D.C. Cir. 1982)).

125 Ass'n of Nat'l Advertisers, Inc. v. Fed. Trade Comm'n, 627 F.2d 1151, 1170 (D.C. Cir. 1979) (Agency member should be disqualified if "there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding.").

126 Bill Vlasic, *U.S. Sets High Long-Term Fuel Efficiency Rules for Automakers*, N.Y. TIMES, Aug. 28, 2012, at B1. *See generally* Ian C. Graig, *Business–Government Collaboration, in Rulemaking: Regulating Carbon Emissions from Motor Vehicles*, *in* PROBLEM SOLVING WITH THE PRIVATE SECTOR: A PUBLIC SOLUTIONS HANDBOOK 35, 35–62 (Daniel E. Bromberg ed., 2016).

127 David Zaring, *Sovereignty Mismatch and the New Administrative Law*, 91 WASH. U. L. REV. 59, 80–82 (2013).

128 Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*, 16 U. PA. J. CONST. L. 637, 645 (2014). *But see* Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 1001–02 (2003).

Policymaking by proposal spends down the credibility of the administrative state. Technocratic agencies, composed of political appointees and career bureaucrats, operate at a level removed from voter control. The vast literature that nevertheless defends the democratic legitimacy and utilitarian desirability of the administrative state is often premised on the countervailing constraints that agencies face.[129] For instance, unlike legislators, they must explain their decisions by responding to significant counterarguments.[130] Additionally, their continuity across successive presidential administrations gives them an inherent interest in the stability of agency policy.[131] But agency *proposals* do not have to take into account counterarguments. And when agencies use unrealistically aggressive proposals to drive investment, the uncertainty created by these rules forfeits the benefits of stability than agency rulemaking could otherwise provide.[132] Furthermore, when agency proposals grow less realistic in an attempt to push industry investment in a preferred direction, and when industry responds with new steps to try to pre-emptively discredit agency proposals, both trends tend to undermine trust in agency expertise and the notice-and-comment procedure that is the backbone of the administrative state.

Even those who take a skeptical view of the informational and legitimating benefits of notice-and-comment rulemaking can acknowledge that those procedures, at the very least, should create a record for judicial review, which would highlight the key legal and factual debates that a court will need to resolve to uphold or strike down the final rule.[133] But policymaking by proposal systematically undercuts this purpose as well by encouraging aggressive and early proposals that often present different questions than the questions presented by the more modest final rules. For example, EPA's initial proposal for coal power plant new source performance standards, which set a commercially unviable standard of 1,000 lb CO_2/MWh in 2012, presented fundamentally different legal issues than its more defensible 2015 final rule, which set a 1,400-2,000 lb CO_2/MWh standard.[134]

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129 *MCI Telecomm. Corp.* 57 F.3d at 1141 (Notice and comment is designed "'to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.'" (quoting *Nat'l Assn of Home Health Agencies*, 690 F.2d at 949)).

130 *See* WILLIAM A. NISKANEN, JR., *Bureaucracy and Representative* Government, *in* BUREAUCRACY AND PUBLIC ECONOMICS 3, 24–28 (1996); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971). For more on the significant costs of regulatory uncertainty, see generally Ben Bernanke, *Irreversibility, Uncertainty, and Cyclical Investment,* 98 Q. J. ECON. 85 (1983); Nick Bloom, et al., *Uncertainty and Investment Dynamics*, 74 REV. ECON. STUD. 391 (2007).

131 Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1043–44 (2006).

132 *See supra* notes 108–115 and accompanying text.

133 *See* Elliot *supra* note 123, at 1492–93.

134 Envtl. Prot. Agency, Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510,

Similarly, EPA's final Clean Power Plan relied on entirely different legal rationales than its initial proposal. Recall that EPA's ostensible authority for the plan is an authority to set "procedure" for states to develop a "plan" for setting standards for fossil fuel power plants that have already been built.[135] Nevertheless, EPA's proposal asserted that it could actually prescribe standards lower than those existing plants could possibly achieve.[136] It argued that, instead, states should simply stop running some of these plants, and suggested that states could mandate installation of additional renewable power[137] and could encourage their consumers to use less power.[138] These rationales both suggested that an obscure section of the Clean Air Act had radically changed the balance of federal and state power in energy policy: due to a rarely-used section of the Clean Air Act, EPA had the authority to prescribe the mix of power sources that states could use and curtail the power use of state consumers. In contrast, EPA's final rule maintained its insistence that it could set standards below what individual power plants could achieve, but offered an entirely different rationale.[139] It no longer claimed that it could ask states to make their consumers consume less power;[140] and it no longer made specific projections about how much renewable power each state could mandate, instead estimating the overall percentage of renewable power that each of the three national energy grids could incorporate.[141] As a result, the final

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64,658 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60); Envtl. Prot. Agency, Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, 77 Fed. Reg. 22,392, 22,394 (proposed Apr. 13, 2012) (to be codified at 40 C.F.R. pt. 60).

135 42 U.S.C. § 7411(d)(1) (2012) ("The Administrator shall prescribe regulations which shall establish a procedure . . . under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance".).

136 *See* discussion *supra* Section I.A.

137 EPA set this standard for each state by reference to the percentage of renewable power. *See* Envtl. Prot. Agency, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830, 34,867 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

138 *Id.* at 34,849.

139 *See* discussion *supra* Section I.A.

140 *See* Envtl. Prot. Agency, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,667 (finalizing the three building blocks that went into the proposed rule, not including the energy efficiency block); Press Release, Envtl. Prot. Agency, Clean Power Plan: Key Changes and Improvements, From Proposal to Final 3 https://www.epa.gov/sites/production/files/2015-08/documents/fs-cpp-key-changes.pdf (last visited Nov. 6, 2016) ("The final BSER focuses on supply-side measures that reduce emissions from power plants, and does not rely on demand-side energy efficiency (EE) as a building block.").

141 Envtl. Prot. Agency, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,667.

rule presented very different legal questions that would have to be hashed out for the first time in court.[142]

To ensure that policymaking by proposal does not undercut the goals of notice-and-comment regulation, courts should invalidate regulations that do not leave adequate time for industry to make investments and comply *after* the rule is finalized. Rules that do not provide enough time for industry to comply are "arbitrary and capricious" under the Administrative Procedure Act because they depend on the arbitrary power of the proposed rule rather than on the independent force of a final rule adopted after agency deliberation.[143] Just as it is arbitrary and capricious to demand compliance with a rule if the agency has "entirely failed to consider an important aspect of the problem" or material comments,[144] so too it is arbitrary and capricious to expect industry to invest toward compliance with a rule before the agency has considered *any* public comments on the rule.[145]

Even when it is technically possible for industry to comply with regulations from the date of the final rule, waiting for the final rule may raise the cost of compliance. As a result, an agency also should not be allowed to assume, for purposes of its cost benefit analysis, that industry will begin investing before the rule is finalized. Otherwise, upon finalization, the agency can simply say that industry should have previously invested in modifications to meet the proposed standard, so if it failed to do so, it can now comply by shutting down. A cost-benefit analysis that assumes that industry will begin investing toward compliance as soon as the rule is proposed is a cost-benefit analysis that assumes that the industry does not believe the agency could change course in response to comment. And if the agency knows that its proposed rules will economically punish any company that does not move immediately toward compliance, it will lead to the same credibility-destroying cycle of unrealistically aggressive proposals and pre-emptive efforts to discredit these proposals by targeted industries.[146]

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142 For instance, rather than requiring states to mandate a percentage of renewable power, the final rule may require sources to invest in renewable energy credits and renewable power sources in different states and require states to monitor these investments—a fundamentally different potential impingement on state energy authority. *Id.* at 64,727.

143 5 U.S.C. § 706(2)(A) (2012).

144 Motor Vehicle Mfrs. Assn. of the United States v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973) (Lack of agency consideration of a comment "becomes of concern" when it is "significant enough to step over a threshold requirement of materiality").

145 Thus, like "hard look" review or the "logical outgrowth" doctrine, this standard grows out of the "arbitrary and capricious" standard rather than the minimum procedural requirements specified in 5 U.S.C. § 553 (2012), which only requires that a proposal be published 30 days before a rule's effective date and does not explicitly require any congruence between the rule proposal and the final rule. *See* William H. Rodgers, Jr., *A Hard Look at* Vermont Yankee*: Environmental Law Under Close Scrutiny*, 67 GEO L. J. 699, 704–08 (1979) (explaining the development of "hard look" review and how it goes well beyond text of APA's procedural provisions).

146 See *supra* notes 108–115 and accompanying text.

A separate question is how courts should treat *final* rules that demand immediate investment toward compliance, even though legal challenges to the rule may take years to resolve. Immediately effective rules are not inherently arbitrary and capricious.[147] After all, most rules are never challenged in court.[148] On the other hand, regulations that impose particularly high costs or operate in particularly contentious areas are much more likely to be challenged.[149] But even in these areas, courts should not automatically find it arbitrary and capricious for the agency to make its rule immediately effective. Regulators typically propose rules with estimated benefits in excess of their costs, and if those estimations are accurate, then from a utilitarian perspective, final regulations should go into effect as soon as possible.[150] If an agency finalizes a rule after faithful adherence to notice-and-comment procedure, the normal judicial standards for a stay of the agency regulation are appropriate. Under existing law, courts only issue a stay—an injunction that prevents enforcement of the regulation during the time that the case is litigated—if they determine that the petitioner "is likely to succeed on the merits, . . . is likely to suffer irreparable harm in the absence of preliminary relief," and "that the balance of equities tips in his favor, and that an injunction is in the public

147 David R. Woodward & Ronald M. Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 ADMIN. L. REV. 329, 332–35 (1979) (discussing presumptions of validity, regularity, and correctness).

148 MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE FEDERAL REGISTER 1 (Oct. 4, 2016) ("[T]he number of final rules published each year is generally in the range of 2,500-4,500, according to the Office of the Federal Register.").

149 Cary Coglianese, *Litigating within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 L. & SOC. REV. 735, 742 (1996) ("For the years 1988-90, 13 of the 28 significant and major hazardous waste rules EPA issued ended up getting challenged in court."). While there are 2,500-4,500 final rules published each year, there are only about 200-350 "significant" and 30-75 "economically significant" rules. Reg Stats, Regulatory Studies Center, Geo. Wash. Univ., https://regulatorystudies.columbian.gwu.edu/reg-stats (last visited Nov. 6, 2016). Significant rules are those that may "'create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order'" while economically significant rules are those that "'have an annual effect on the economy of $100 million or more'" or other adverse impact. *Id.* (quoting Exec. Order No. 12,866, 3 C.F.R. § 6 (1994)).

150 Cass R. Sunstein, *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, 114 COLUM. L. REV. 167, 171 (2014) ("[I]n the Administration's first three years, the net benefits of economically significant regulations under President Obama exceeded $91 billion, more than twenty-five times the corresponding figure under President George W. Bush, and more than six times the corresponding figure under President Clinton.") (footnote omitted). *See also* Michael A. Livermore & Richard L. Revesz, *Rethinking Health-Based Environmental Standards*, 89 N.Y.U. L. REV. 1184, 1211–17 (2014) (analyzing the net benefits of several recent air pollution rules).

interest" weighing the petitioner's likelihood of success and the balance of harms.[151]

On the other hand, courts should be wary of final agency rules that have the hallmarks of policymaking by proposal: questionable legal basis combined with overly aggressive proposals and attempts to insulate the rule from early judicial review. Arguably, the Supreme Court's recent decision to stay implementation of the Clean Power Plan is a sign that courts are beginning to watch out for agency proposals following this pattern.[152]

C. *Congress Should Adopt Legislation That Reins in Policymaking by Proposal*

Congress should pass legislation to strengthen the APA by explicitly specifying that agencies must leave sufficient lead-time for industry to comply with the rule once it is finalized. Congress should also adopt legislation that allows an automatic stay of rulemaking during judicial review if the petitioners that challenge the rule are willing to post a bond sufficient to ensure that industry would only invoke the stay when it is reasonably confident that the courts will ultimately determine that the rule is unlawful.

Rather than relying solely on courts to police the expanded use of policymaking by proposal through interpretation of the APA, Congress could provide legislation to rein it in. Congress should amend the APA, which provides the procedure for notice-and-comment rulemaking, to provide that the agency must leave sufficient time from the date the rule becomes final to the date that the rule demands compliance for industry to make the necessary investments.[153] And Congress should add a section specifying that any economic impact assessment or cost-benefit assessment that is required by provisions such as Executive Order 12,866[154] or Clean Air Act § 317[155] may not

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151 Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). Thus it is only when the agency has attempted to side-step the APA process by pushing industry to invest toward compliance before the process is complete, that the APA itself is violated. For a guide to seeking preliminary relief in the context of an environmental rules, see John D. Leshy, *Interlocutory Injunctive Relief in Environmental Cases: A Primer for the Practitioner*, 6 ECOL. L. Q. 639 (1977). See also Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L. J. 291, 319 n.118 (2003) (citing Mobil Oil Corp. v. Fed. Power Comm'n, 417 U.S. 283, 311–12 (1974)).

152 West Virginia v. Envtl. Prot. Agency, 136 S. Ct. 1000, 1000 (2016) (order granting stay of final EPA rule).

153 The easiest way to do this may be simply to define the words "effective date" to mean "the earliest date from which industry would reasonably need to begin seeking approvals, investing, or spending money to comply with the rule." *See* Administrative Procedure Act, 5 U.S.C. § 553(d) (2012).

154 Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

155 42 U.S.C. § 7617 (2012). These twin rules, of course, parallel the suggestions for interpreting courts above.

assume that industry begins to invest toward compliance before the rule is finalized.

Congress should also adopt legislation that allows industries to automatically stay application of a rule if they are willing to post a substantial bond that would be forfeited if they are not ultimately successful in challenging the rule. This would be particularly effective in combating the most egregious examples of policymaking by proposal, which set particularly aggressive standards to compensate for the flimsy legal basis for the rule.[156] At the same time, it would not hold up run-of-the-mill rules that courts are likely to uphold. In those cases, industry would be unlikely to risk a bond on a long-shot legal challenge. The only rules that would be held up by such a procedure would be ones that threatened significant economic harm, and which industry sincerely believes to be unlikely to be upheld by the courts.

This procedure would be a helpful supplement to current stay procedures, because current stay procedures require the courts to do their own weighing of the costs and benefits of a rule in an expedited setting.[157] Courts must determine whether the plaintiffs' likelihood of success and the economic harm that they will experience in the absence of a stay outweighs the social benefits of leaving the rule in place.[158] This kind of balancing of complex harms that regulation can cause or prevent is exactly the kind of exercise that courts prefer to leave to agencies.[159] This leaves courts in the uncomfortable position of taking the agency's word on the benefits and costs of its own regulation or accepting the contrary submissions of industry, which has its own bias. Given that courts typically defer to the government's expertise in calculating these costs and benefits of regulation, it is especially hard to convince a court to make an independent estimate of these costs and benefits in an expedited stay proceeding.[160] The great advantage of a bond requirement is that it would not be dependent on court's questioning the agency in its area of expertise; instead it would encourage industry's own honest assessment of its cost of compliance and the merits of its suit. Industry would only post a bond if it judged the economic harm from the rule to be large and the likelihood of overturning it to be high. Thus, instead of forcing a court to judge between the self-serving estimates of the agency and industry about the costs of the rule and its likelihood of being struck down, the bond procedure would

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156 *See supra* notes 34–36, 108–112 and accompanying text.

157 *See, e.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (requiring courts to balance equities and determine if a stay is in the public interest).

158 *See, e.g., id.*

159 *E.g.*, Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984) (principle of deference to administrative interpretations).

160 Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 115 MICH. L. REV. (forthcoming 2017) (manuscript at 27), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2808848 (surveying studies on how often agencies win in published circuit decisions, which tend to include the most serious challenges to agency rules, and reporting that rules are upheld somewhere from 68% to 77% of the time).

provide a signal of industry's honest prognosis of the harm from the rule and its legal case against the rule.

If Congress provided an automatic stay option, the bond requirement should be set at a substantial but flat rate for administrative simplicity and to avoid gaming the system. As a matter of theory, the bond should be calculated to compensate for the harm imposed by delaying the rule, so that the rule would be stayed only if the economic harm from a rule, weighted by the forward-looking probability that it would later be invalidated, outweighed the harm of delaying the environmental benefits of the rule. The problem with following this theoretical approach—that is, calculating a bond for each separate rule on the basis of its environmental benefits—is that the best judge of those benefits would probably be the agency. But as one of the litigants in any stay hearing, the agency would have every incentive to inflate this number to make the automatic stay unachievable. In theory, a court could make an independent judgment on the appropriate size of the bond after taking evidence, but this would just reintroduce the administrative and evidentiary difficulties of deciding such a central dispute on an expedited basis.

Instead, Congress should set a flat bond amount that industry would need to post to receive an automatic stay of regulation. The appropriate size of the bond would naturally be a subject for extended study, but something over $1 million would likely be appropriate.

As a starting point, the most common standard for a "major" rule is one that imposes a cost of $100 million or more on the economy. Under the Congressional Review Act, an agency must give Congress a report on a final rule anytime that the Administrator of the Office of Information and Regulatory Affairs finds it will have "an annual effect on the economy of $100 million or more," cause "a major increase in costs or prices," or have other "significant adverse effects."[161] Proposed legislation, such as the REINS Act, which would require an up-or-down vote from Congress on major rules, have also used this $100 million dollar threshold.[162] Other, more aggressive proposals have suggested further limits, such as an automatic stay for regulations with costs over $1 billion dollars.[163]

If "major" rules would have an impact of $100 million dollars on the economy, then industry should have to post a bond of (and potentially forfeit) more than one million dollars to automatically stay a rule pending litigation. As noted, litigation could take several years to resolve, and if the challenge ultimately proved to be meritless, the automatic stay would forfeit millions

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161 5 U.S.C. §§ 801, 804(2) (2012).

162 Regulations from the Executive in Need of Scrutiny Act of 2017, H.R. 26, 115th Cong. § 3 (2017) (proposing to amend 5 U.S.C. ch. 8 to require Congressional approval for rule to take effect if the Office of Information and Regulatory Affairs finds it will have "an annual cost on the economy of $100 million or more," cause "a major increase in costs or prices," or have other "significant adverse effects" on the economy).

163 *See, e.g.*, Require Evaluation before Implementing Executive Wishlists Act of 2015, H.R. 3438, 114th Cong. § 2 (2015) (proposing an amendment to 5 U.S.C. to require an agency to postpone implementation of a rule with a cost of at least $1 billion pending judicial review).

of dollars of environmental benefits. Of course, the rule would still eventually go into effect, but delaying the rule on the basis of a legal objection that was ultimately determined to be without merit would mean adding years of industrial pollution that could have been avoided. For this reason, proposals for an automatic stay of very costly rules are unwise and unlikely to be adopted. Although it might seem like common sense to take a bit more time before adopting rules that are particularly costly to the economy, these costly rules are generally adopted because they have particularly massive benefits.[164] Thus, delaying implementation of expensive rules, although it would put off outsize costs, would also put off outsize health benefits. Instead, rules should only be delayed if there is some objective sign that the rule is very likely to be found unlawful.

A requirement to post a substantial bond for an automatic stay would ensure that it would only be invoked if petitioners believed they had a very strong chance of success and that the operation of the rule would cause serious economic harm. Theory might suggest a bond in the tens of millions of dollars—a reasonable price to pay to delay operation of a rule that might have an impact of hundreds of millions of dollars. But the number should probably be significantly lower because suits against government regulation pose a severe collective action problem for at least two reasons. First, as in all litigation, there are temptations to free-ride on the efforts of other interested parties.[165] Second, the parties that are most harmed by environmental regulations are the diverse consumers that pay more for products as a result of these regulations; economists who analyze the incidence of regulatory burdens say that the vast majority of compliance costs are passed on to consumers who usually cannot sue to protect their interests.[166] In fact, when the costs of regulation falls mainly on regulated utilities, the utilities may pass on nearly the

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164 *See* Livermore & Revesz, *supra* note 150, at 1239–47 (showing that extremely expensive Clean Air Act rules generally have much larger estimated benefits; expected costs for rules for lead, sulfur dioxide, particulate matter, and sulfur dioxide emissions range from $150 million to $8.8 billion while expected benefits range from $370 million to $37 billion).

165 *See* David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 847–62 (2002) (explaining why lawsuits by multiple plaintiffs against a single defendant present a collective action problem). *See also* David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 561, 564 n.15 (1987). Industries typically try to mitigate these incentives to free-ride using trade associations that represent the industry as a whole. *See, e.g.*, James W. Coleman, *How Cheap is Corporate Talk? Comparing Companies' Comments On Regulations With Their Securities Disclosures*, 40 HARV. ENVTL. L. REV. 47, 61 (2016) (listing oil and ethanol industry trade associations). However, individual companies still face a free-rider problem in funding these common organizations: each company would prefer that all the other companies fund efforts on their collective behalf.

166 NICOLE V. CRAIN ET AL., SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS 14 (2010) ("The report uses various methods to determine how the costs of regulations are distributed: between businesses and individuals, among sectors of the U.S. economy, and among businesses of different sizes. . . . The difference between the initial incidence and how costs are ultimately divided depends on the demand and supply elasticities in the respective

full cost of regulation to consumers.[167] As noted, many of these utilities may actually favor more stringent regulation that allows them to raise rates.[168] A more reasonable bond would probably be in the range of ten million dollars—several multiples of the cost of a single lawsuit[169]—so that automatic stays would only rarely be sought but not entirely out of reach in the case of an expensive rule of very dubious legality.[170] Over time, this bond requirement could be modified to ensure that it was not used too often or too rarely.

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product and input markets. The final incidence of the federal regulatory burden is likely to differ from the initial incidence of costs."); Ian W.H. Parry et al., *The Incidence of Pollution Control Policies* 32, (Resources for the Future, Working Paper No. RFF DP 05-24, June 2005), http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-DP-05-24.pdf 23 ("Empirical studies on the extent to which the costs of environmental policies are passed forward into higher prices of consumer products would be extremely valuable; at present, empirical analyses typically assume 100% pass-through based on the assumption of competitive, constant returns production.") (footnote omitted). *See also* Don Fullerton & Gilbert E. Metcalf, *Tax Incidence, in* HANDBOOK OF PUBLIC ECONOMICS 1787, 1789 (A.J. Auerbach & M. Feldstein eds., 2004) (explaining the concept of "incidence" in the more traditional context of taxation, which is to "determine how the burden of a particular tax is allocated among consumers through higher product prices, workers through a lower wage rate, or other factors of production through lower rates of return to those factors").

167 See discussion *supra* Section III.A and *supra* notes 14–16 and accompanying text.

168 See discussion *supra* Section III.A and *supra* notes 14–16 and accompanying text.

169 A single lawsuit against a government regulation might cost significantly less than $1 million for each party, although it often involves several parties pooling funds. Neena Satija et al., *Texas vs. the Feds — A Look at the Lawsuits*, TEX. TRIB. (Jul. 27, 2016), https://www.texastribune.org/2016/07/27/texas-federal-government-lawsuits/ (noting that Texas challenged federal government regulations in 43 lawsuits, many of them involving other state or industry partners and that Attorney General, Ken Paxton, "provided cost estimates for 39 of those cases, which as of mid-2016 totaled about $5.9 million," or about $150,000 per lawsuit). Thus, a requirement to post a multi-million-dollar bond would be significantly more costly than a typical lawsuit.

170 For comparison, the most heavily regulated industries, such as electric utilities and oil and gas spend about $100 million per year on lobbying the government about pending legislation. Thus, forfeiting a $10 million bond due to an unsuccessful challenge would, at a stroke, add 10% to this annual budget. *Lobbying: Top Industries*, CTR. FOR RESPONSIVE POLITICS, https://www.opensecrets.org/lobby/ (last visited Nov. 6, 2016) (the industry spent $3,386,870,031 from 1998-2016) (showing spending of $2,129,331,100 and $1,847,455,425, respectively from 1998-2016, making them the third and sixth highest spending industries). *See also* Patrick McLaughlin, & Oliver Sherouse, *The McLaughlin-Sherouse List: The 10 Most-Regulated Industries of 2014*, MERCATUS CTR., GEO. MASON UNIV. (Jan 21, 2016), http://mercatus.org/publication/mclaughlin-sherouse-list-10-most-regulated-industries-2014 (finding that the most regulated industries, as measured by restrictive language in 2014 regulations are petroleum and coal products manufacturing and electric power generation, transmission, and distribution); Omar Al-Ubaydli & Patrick A. McLaughlin, *RegData: Numerical Database on Industry-Specific Regulations for All US Industries and Federal Regulations, 1997–2012*, 5–6 (Mercatus Ctr., Geo. Mason. Univ., Working Paper, 2014) (explaining methodology for the Most-Regulated Industries of 2014 study). Across all industries, about $3 billion is spent on lobbying per year. *Lobbying: Overview*, CTR. FOR RESPONSIVE POLITICS, https://www.opensecrets.org/lobby/ (last visited Nov. 6, 2016). But, that sum is divided up over several industries. The pharmaceuticals industry spends the most at about $182 million per year. *Lobbying: Top Industries*, *supra* (the pharmaceuticals industry spent $3,455,321,774 from 1998-2016). In terms of individual organization, one towers above all others: the U.S. Chamber of Commerce. It spends over $60 million per year, which is three times more than any other organization. *Lobbying: Top Spenders*,

The option to secure an automatic stay with a bond has a further advantage over automatic stay options that are predicated on the cost of regulation: the cost of a regulation, like its benefits, is measured by the agency for purposes of the review process. In other words, rules only hit the threshold for more stringent review when the agency declares that they do. Historically, agencies have been trusted to provide accurate estimates of the cost of regulation, but that norm has also begun to erode in the case of salient rules fraught with political considerations. For example, in 2009 and 2010, EPA first expanded its Clean Air Act regulations to cover greenhouse gases, a move that the Supreme Court and commentators labeled "the single largest expansion in the scope of the [Act] in its history."[171] But, the EPA claimed that its regulations had no economic cost at all to any industry; in fact, it claimed that the regulations provided economic benefits to industry, because it claimed that the only alternative to its regulations was to impose even more stringent regulations.[172] The Supreme Court brushed aside this argument, but it provides a preview of ways that agencies may increasingly try to manipulate cost estimates to avoid heightened procedural requirements.[173] By contrast, a bond-for-stay rule would not be frustrated by an agency's self-serving claims about the cost of the rule; if industry thinks the rule will be particularly costly and will be overturned in court, it can post the bond and gain the time to challenge it in court.

CTR. FOR RESPONSIVE POLITICS, https://www.opensecrets.org/lobby/ (last visited Nov. 6, 2016) (U.S. Chamber spent $1,277,435,680 from 1998-2016, which is about $67,233,457 per year, and 3.43 times the next highest spender, the National Association of Realtors, which spent $372,664,930 in the same period). A typical large trade association spends much less per year. National Association of Manufacturers Lobbying Totals, *National Assn of Manufacturers: Lobbying Totals, 1998-2016*, CTR. FOR RESPONSIVE POLITICS, https://www.opensecrets.org/lobby/ (last visited Nov. 6, 2016) (spending approximately $12M each year from 2010 through 2015, with substantially higher amounts in 2008 ($29M) and 2009 ($27M)). Over the same time period, the company with the greatest lobbying expenditures was General Electric, spending $342,000,000 from 1998-2016, or $18,000,000 per year. *Lobbying: Top Spenders*, *supra*.
In recent years, big companies in the United States with the most regulatory exposure only spend around $10M per year on lobbying. *E.g.*, *Southern Co.: Lobbying Totals, 1998-2016*, CTR. FOR RESPONSIVE POLITICS, https://www.opensecrets.org/lobby/ (last visited Nov. 6, 2016) (spending approximately $13M each year from 2005 through 2015); *Exxon Mobil: Lobbying Totals, 1998-2016* , CTR. FOR RESPONSIVE POLITICS, https://www.opensecrets.org/lobby/ (last visited Nov. 6, 2016) (spending approximately $12M each year from 2010 through 2015, with substantially higher amounts in 2008 ($29M) and 2009 ($27M)).

171 Util. Air Regulatory Grp. v. Envtl. Prot. Agency, 134 S. Ct. 2427, 2436 (2014) (quotation omitted).

172 The EPA originally established a 100-250 tons per year threshold for pollution emission to trigger a permitting requirement, but then created a separate threshold of 100,000 tons per year for greenhouse gasses, which the EPA newly classified as pollutants. Because the tailoring of the rule relaxed pre-existing requirements, the appellate court found there was no injury. *Id.* at 2444–45. For an explanation of these standards, see James W. Coleman, *Unilateral Climate Regulation*, 38 HARV. ENVTL. L. REV. 83, 116 & nn. 120-121 (2014) (describing "first U.S. federal controls on greenhouse gas emissions from stationary sources like refineries, factories, and power plants").

173 *Id.* at 2445.

Of course, if industry can post a bond for an automatic stay, and agencies are seeking to influence industry investment before courts can address their rules, agencies will seek ways to avoid an automatic stay. Agencies will continue to use alternatives to notice-and-comment rulemaking such as guidance documents, direct final rules, and other creative approaches. But the courts are accustomed to policing these methods of avoiding the notice-and-comment process. Agencies may also try to break a single regulatory push into multiple rules to force industry to pay a higher price if it wants a stay of an entire agency initiative.[174] To combat this stratagem, Congress should provide that a single bond can be used to stay a group of rules so long as a court determines that they are part of the same regulatory initiative.

CONCLUSION

Agencies are increasingly relying on proposals to drive industry investment. When industry must make long-term capital investments even before a rule is finalized, judicial review of final rules is futile. Policymaking by proposal is undermining the traditional function of notice-and-comment rulemaking. When the proposal rather than the final rule is driving policy, policy is dictated by a document that has not benefited from the notice and comment process. But most perversely, policymaking by proposal encourages agencies to promulgate the most aggressive proposals when they have the shakiest legal authority, a recipe for uncertainty as industry considers how much to invest in meeting aggressive targets that are likely to be struck down by the courts. When policymakers deliberately create uncertainty and construct aggressive agendas on a flimsy legal basis, they destroy economic value and spend down the credibility of the administrative state. State policymakers, courts, and Congress should act to restore the balance of power in notice and comment rulemaking, discourage agencies from relying on overly aggressive proposals, and ensure that notice and comment rulemaking serves its purpose.

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[174] *See e.g.*, *id.* at 2436–38 (describing how EPA used four inter-locking rules to add greenhouse gases to its stationary source permitting program).