



# **ENVIRONMENTAL PROTECTION IN THE TRUMP ERA**

**American Bar Association,  
Section of Civil Rights and Social Justice  
Environmental Law Institute**

---

**Spring 2018**

# Environmental Protection in the Trump Era

Spring 2018

---



The Environmental Law Institute (ELI) makes law work for people, places, and the planet. Since 1969, ELI has played a pivotal role in shaping the fields of environmental law, policy, and management, domestically and abroad. Today, in our fifth decade, we are an internationally recognized, nonpartisan research and education center working to strengthen environmental protection by improving law and governance worldwide.

ELI staff contributing to this paper include Senior Attorneys Jay Austin, Tobie Bernstein, and James M. McElfish, Jr., Staff Attorney Cynthia Harris, Visiting Attorney Scott Badenoch, and former Public Interest Law Fellow Benjamin Solomon-Schwartz. The authors thank Thien Chau, Madison Peticca, and Christopher Ibrahim for their assistance with research. Funding for research and drafting was provided by the Walton Family Foundation and the American Bar Association, Section of Civil Rights and Social Justice.

**Stephen J. Wermiel**

Chair, Section of Civil Rights and Social  
Justice Publishing Committee  
American Bar Association  
American University  
Washington College of Law

**Tanya N. Terrell**

Director, Section of Civil Rights and  
Social Justice  
American Bar Association

**Sally Small Inada**

Editor & Consultant, Section of Civil Rights  
and Social Justice  
American Bar Association

**Paula Shapiro**

Associate Director, Section of Civil Rights and  
Social Justice  
American Bar Association

Design by Davonne Flanagan. Cover photo by Joyce N. Boghosian, (from Flickr), licensed under CC BY-SA 2.0.

Environmental Protection in the Trump Era.

© 2018 American Bar Association and Environmental Law Institute®, Washington, D.C.  
All rights reserved.

# Preface

This book was prepared by the Environmental Law Institute (ELI) to aid understanding of the *legal mechanisms* that the White House, federal agencies, and Congress are using to change the regulatory approach to environmental, natural resources, and health and safety protections. It attempts to answer these questions: What are the pathways and potential impacts of these ongoing regulatory changes? What are the opportunities for the public and other stakeholders to engage relative to these initiatives?

The book is organized in a series of short chapters, addressing specific legal tools or pathways that could be used to change existing environmental protections. They assume the reader has some familiarity with the federal regulatory landscape, but no particular legal or technical background. Each chapter describes the applicable procedures, discusses key features of each procedure, and identifies categories or specific examples of current and potential areas where action may be taken. The examples are not all-inclusive, but illustrative of how each process might be used, both now and in the future. The information about them is current through February 15, 2018; however, some material reflects key actions taken later where this changed results or conclusions. The chapters also highlight opportunities for public engagement. Finally, a [Glossary](#) explains key terms, institutions, and acronyms.

Our focus is on the more immediate changes we have seen (and actions we might expect to see), including lesser-known or more arcane legal mechanisms that have the potential to effect long-term change in environmental protection. We discuss some legislative initiatives that would affect specific agency rules or rulemaking and enforcement generally, but do not attempt to catalog all the substantive bills that may get introduced. Given enough time, Congress, with support from the president, could target even more ambitious changes to existing environmental laws; but the likelihood of this will depend on the status of the Senate filibuster and on other political considerations that are beyond our scope here.

The book does not seek to prioritize issues, yet some overarching themes do emerge that will likely receive attention moving forward. Notably, in light of changes in the federal approach, the role of the states has already become more prominent in relation to climate change, environmental health, and other issues. State legislators and agency officials will likely play an increasingly important role in developing their own durable policies and programs, and responding to any federal attempts to preempt state regulation. And citizen action may emerge as an even more important part of the accountability system if the federal government's role in environmental regulation is reduced.

# Contents

---

- Chapter 1:** How Executive Actions Can Shape Environmental Law
- Chapter 2:** What the “Two-for-One” Executive Order on Regulation Means for Environmental Law
- Chapter 3:** How Congress Can Override Environmental Regulation
- Chapter 4:** “Fast-Tracking” Pipelines, the Border Wall, and Other Infrastructure Projects
- Chapter 5:** Reviewing, Revising, or Revoking Protection of National Monuments
- Chapter 6:** Increasing Offshore Drilling for Oil and Gas
- Chapter 7:** Withdrawing From the Paris Agreement on Climate Change
- Chapter 8:** Delaying, Reversing, or Weakening Existing Environmental Regulations
- Chapter 9:** Cutting Enforcement of Environmental Law
- Chapter 10:** Cutting Funding for Environmental Protection
- Chapter 11:** Preventing States From Enacting and Enforcing Their Own Laws
- Chapter 12:** Creating New Roadblocks for Future Regulation
- Chapter 13:** Environmental Justice in the Trump Era



# How Executive Actions Can Shape Environmental Law

All presidential administrations employ a variety of executive orders and other executive actions, which serve important organizational, symbolic, and policy purposes. However, **this presidential power is limited:**

- it consists of directives to the executive branch;
- it must be in accordance with the law; and
- its exercise is subject to modification or reversal by a successor president.

Several Obama Administration presidential actions on environment and climate change have been revoked, and the Trump Administration has used multiple executive orders to further its own deregulatory agenda.



## Process.

Presidents issue executive orders, proclamations, memoranda, and other instruments ranging widely in their purpose and effect, from internal management directives to sweeping changes in federal policy to exercises of military command. In the environmental and natural resources field, these actions might be implemented in several ways: by the White House itself; through the Council on Environmental Quality (CEQ), EPA, or the Department of the Interior; or via interagency coordination.

Except in the unusual case where Congress has authorized the president to make decisions having legal effect, **executive orders are not lawmaking in the usual sense**. Rather, they are directives to be followed within the executive branch, by virtue of the president's inherent power to appoint or remove agency heads and other officials. But to bind government agencies and withstand judicial review, **executive orders must be consistent with and operate within the limits of applicable law**.

An executive order can be revoked or modified:

- by the president who issued it or a successor president;
- by an act of Congress, if the president was acting on authority granted by Congress; or
- by a court ruling that the order was illegal or unconstitutional.



## Discussion.

Especially in times of political gridlock, the idea of making sweeping changes “with the stroke of a pen” can be appealing. **presidents do advance some substantive policy goals through their**

## Areas to Watch

- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (1994) ([see Chapter 13](#));
- Executive Order 13547, Stewardship of the Ocean, Our Coasts, and the Great Lakes (2010);
- Executive Order 13693, Planning for Federal Sustainability in the Next Decade (2015).

**orders** affecting agencies’ structure, statutory interpretations, enforcement priorities, or contracting and procurement. But it is equally **easy for a successor administration to alter or reverse these policies**, and such changes routinely occur with a change of parties.

A new administration typically also takes executive action to temporarily freeze still-pending agency rules, but longer or indefinite delays may be subject to challenge in court.<sup>1</sup> **Executive orders cannot unilaterally revoke an agency rule that is already on the books**, but they may direct the agency to begin the process of reviewing the rule and revising or withdrawing it through a subsequent rulemaking ([see Chapter 8](#)).



## Opportunities for Public Engagement.

Minimal. Executive orders are developed by White House staff and approved by the president. Congress rarely intervenes, and any resulting legislation would be subject to a presidential veto. The legality of some executive orders may be challenged in court; but the revocation of existing orders is unlikely to provide a basis for a lawsuit, nor is it clear who would have standing to sue.



## Trump Administration Actions Taken.

- Presidential Memorandum on “Regulatory Freeze Pending Review” (Jan. 20, 2017);
- Executive Order 13766, Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, and Presidential Memoranda Regarding Construction of the Keystone and Dakota Access Pipelines (Jan. 24) ([see Chapter 4](#));
- Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs (Jan. 30) ([see Chapter 2](#));
- Executive Order 13777, Enforcing the Regulatory Reform Agenda (Feb. 24) ([see Chapter 2](#));
- Executive Order 13778, Reviewing the “Waters of the United States” Rule (Feb. 28) ([see Chapter 8](#));
- Executive Order 13783, Promoting Energy Independence and Economic Growth (Mar. 28) ([see Chapter 8](#));
- Executive Order 13792, Review of Designations Under the Antiquities Act (Apr. 26) ([see Chapter 5](#));
- Executive Order 13795, Implementing an America-First Offshore Energy Strategy (Apr. 28) ([see Chapter 6](#));
- Executive Order 13805, Establishing a Presidential Advisory Council on Infrastructure (July 19) ([see Chapter 4](#));
- Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure (Aug. 15) ([see Chapter 4](#)).



## Obama Administration Actions Overturned.

- Executive Order 13653, Preparing the United States for the Impacts of Climate Change (2013);
- Executive Order 13690, Establishing a Federal Flood Risk Management Standard (2015);

---

1. E.g., *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 26-28 (D.D.C. 2012).

- Presidential Memorandum on Power Sector Carbon Pollution Standards (2013);
- President’s Climate Action Plan (2013);
- CEQ Guidance on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews (2016).

*Social Cost of Carbon.* As part of Executive Order 13783 on “Promoting Energy Independence and Economic Growth,” the Trump Administration also changed direction on calculating the “social cost of carbon,” which the Obama Administration had adopted as a component of its cost-benefit analyses. An interagency working group had produced a technical support document with recommendations for monetizing the social cost of carbon, allowing climate change impacts to be weighed alongside other costs and benefits, and recommended a rate of \$36 per ton of CO<sub>2</sub> equivalent for 2015 and \$42 by 2020.

**President Trump’s Order disbanded the working group,** and withdrew the technical support document and its subsequent updates. It instructed that any monetization of the costs of greenhouse gas emissions should be calculated consistent with general cost-benefit guidance dating from the George W. Bush Administration. The Office of Management and Budget (OMB) reportedly is considering how to implement the Executive Order, and in October 2017, [EPA released a regulatory impact analysis](#) of the Clean Power Plan that downgraded the cost of carbon emissions to between \$1 and \$6 per ton in 2020.

However, notwithstanding changes in administration policy, analysis of the social cost of carbon has become established as part of the review under statutes such as the National Environmental Policy Act and the Energy Policy and Conservation Act, and some courts have concluded that such analysis is required. Under those statutes, **the courts may well limit the Administration’s ability to eliminate or downplay—legally—consideration of the social cost of carbon.** And nine states have [announced a cooperative effort](#) to place a formal price on carbon emissions using state law.



# What the “Two-for-One” Executive Order on Regulation Means for Environmental Law

On January 30, 2017, the president issued [Executive Order 13771](#), which directs executive branch agencies and departments to repeal two regulations for every new regulation adopted. The Order also directs that in fiscal year 2017, costs imposed by new regulations must be offset by eliminating existing regulations. In future years, incremental costs of new regulations must be offset using a regulatory “budget” to be prescribed for each agency by the Office of Management and Budget (OMB). This Order:

- creates great uncertainty in selecting regulations to adopt and repeal,
- discourages new regulations even if they offer large benefits in excess of their costs, and
- vests huge discretion in the OMB Director.



## Process.

Executive Order 13771 defines “regulations” to include agency statements designed to implement, interpret, or prescribe law or policy, including procedures. The Order exempts regulations related to military, national security, or foreign affairs functions; regulations related to agency organization, management, or personnel; and any category of regulations exempted by the OMB Director. The requirements of the Order do not apply to independent agencies and commissions.

Executive Order 13771 imposes two distinct, interrelated requirements:

*Two-for-One Requirement.* Whenever a federal agency proposes a regulation for public notice and comment, or otherwise promulgates it, the agency must “identify at least two existing regulations to be repealed.”

*Cost Offset Requirement.* In fiscal year 2017, the “total incremental cost” of all new regulations to be finalized by each agency, “including repealed regulations,” shall be “no greater than zero.” Moreover, all “new incremental costs associated with new regulations” must be completely offset by the “elimination of existing costs associated with at least two prior regulations.”

For each future fiscal year, the OMB Director will identify for each agency “a total amount of incremental costs” that will be allowed for issuing and repealing its regulations. The head of each agency must include in the agency’s annual “regulatory

## Areas to Watch

All environmental, health and safety, and natural resources rules issued by executive agencies will be assessed by OMB under this Order. Scrutinizing the published annual regulatory agendas of EPA, Department of the Interior, U.S. Department of Agriculture, NOAA, and many other agencies will help determine which rules are no longer being developed (or are being withdrawn), as well as planned repeals. Members of the public should also consider disclosure, monitoring, and recordkeeping provisions that are important to their communities, as these are likely targets for deregulatory actions to provide offsets.

plan” submitted to OMB the incremental costs of all new regulations and total costs or savings associated with regulations targeted for repeal. No regulations that exceed the agency’s approved total incremental cost allowance will be allowed “unless required by law or approved in writing by the Director.”

*OMB Guidance.* By two memoranda, dated February 2 and April 5, 2017, the Acting Administrator of OMB’s Office of Information and Regulatory Affairs (OIRA) issued [guidance](#) to agencies on how Executive Order 13771 will be implemented. The regulatory actions subject to the Order will include all “significant regulations,” as defined in [Executive Order 12866](#). (That 1993 executive order, as amended, requires that agencies provide cost-benefit analysis of regulations as well as submit an annual regulatory agenda to OIRA.) Thus, Executive Order 13771 will apply to the 300 to 400 federal regulatory actions each year currently subject to OIRA review:

- ones that have an annual effect on the economy of \$100 million or more,
- that may adversely affect in a material way the economy, any sector thereof, productivity, competition, jobs, the environment, health or safety, or other units of government;
- that create serious inconsistency with other agency actions; or
- that raise novel legal or policy issues.

The OIRA guidance includes as regulatory actions subject to the Trump Order “significant guidance” documents issued by federal agencies. The OIRA guidance exempts rules affecting transfer payments or imposing fees for services, except where such regulatory actions impose more than *de minimis* costs and “may distort markets, causing inefficiencies.”

Deregulatory actions recognized by OIRA for calculating Executive Order 13771 offsets include formal and informal rulemakings, revocation of agency guidance documents, “some actions related to international regulatory cooperation,” and “information collection requests that repeal or streamline recordkeeping, reporting, or disclosure requirements.” Agencies must identify intended deregulatory actions in their annual unified regulatory agendas submitted to OIRA.

Agencies may count savings from regulations revoked by Congress under the Congressional Review Act ([see Chapter 3](#)). On a case-by-case basis, agencies may be allowed by OIRA to use offsets savings from Obama Administration regulations (but not Trump Administration regulations) vacated by a court, provided appeals have been concluded. To calculate dollar offsets from repeals, agencies may not use the Regulatory Impact Analysis that supported the regulation’s adoption, but must conduct a new analysis of ongoing and prospective costs.

Agencies may not consider sunk costs of compliance with existing regulations, but only prospective savings from repeal. Agencies may “bank” deregulatory actions (for the 2-for-1 repeal requirement) as well as bank cost savings from repeals to use in offsetting costs from new regulatory actions.

**Benefits are not to be considered in any determinations, only costs.**

Executive Order 13771 deregulatory actions and cost savings may be transferred within individual federal agencies, allowing offsets in one program to be applied to regulatory actions undertaken by another program; for example, deregulatory actions by EPA’s Air Office can be used to offset actions by the agency’s Office of Water.

*Constraints.* The Order has six similar provisos:

- “unless prohibited by law,”
- “unless otherwise required by law,”
- “to the extent permitted by law,”
- “unless required by law,”
- “implemented consistent with applicable law and . . . the availability of appropriations,” and
- not “construed to impair or otherwise affect the authority granted by law to an executive department or agency or the head thereof.”

However, the guidance takes a narrow view of what is exempt, and says OIRA must in each case determine whether to grant a waiver based on critical issues, and/or the need to comply with an imminent statutory or judicial deadline. Offsetting repeals will still need to be identified. Also, even if a statute prohibits consideration of costs when adopting a regulation, the OIRA guidance says that the agency must still identify two deregulatory actions to use as offsets, and must still offset the costs of the new regulation.



### Discussion.

Discussions between agencies and OIRA about which new rules to forego for lack of offsets, about determining the size of an agency’s annual “total incremental cost allowance,” and about decisions on whether a rule is “required by law” or otherwise exempt, will occur outside of public view.

Repeals of regulations to meet the 2-for-1 goal will, of course, require rulemaking in accordance with statutory and regulatory procedures, including notice and comment, cost-benefit analysis, paperwork reduction, federalism analysis, and justifications for changes in agency position, and in many cases compliance with the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and other requirements.

An agency cannot simply say “we’ve decided training of pesticide applicators is no longer needed,” or “exploration permits are no longer required on federal lands,” without justifying its change in position and the repeal’s consistency with the statutes ([see Chapter 8](#)). Rules whose adoption was expressly required by law, including pursuant to court orders, would need to be replaced by rules that meet the same statutory and judicial standards. OIRA has also stated that even deregulatory actions must meet the Executive Order 12866 requirement that benefits must exceed costs, **so it may be challenging for agencies to repeal environmental and health and safety regulations that are generating benefits to society.**

Finding regulations for repeal may be difficult, given existing statutory mandates and the scarcity of sufficiently “costly” repeals to meet the offset provisions of Executive Order 13771. Existing regulations’ costs have often already been internalized into standard operating processes and new equipment, **so there may be little, if any, cost saving available from repeal of regulations.** Agencies may decide to target recordkeeping, disclosure, monitoring, and transparency rules and document requirements, for which the ongoing costs are determinable, while the benefits are more diffuse or programmatic.

In December 2017, OIRA announced that across the government in FY 2017, agencies had “rolled back” 22 rules for every new one. **It further announced a goal for FY 2018 of eliminating 3 regulations for every new one adopted.**

OIRA issued [Memorandum M-17-31](#) on September 7, 2017, directing federal agencies to prepare a proposed total incremental cost allowance for FY 2018 that would result in a **negative net regulatory cost** for each agency in this year. In its final regulatory agenda for FY 2018, EPA proposed to finalize over 30 deregulatory actions while adopting fewer than 10 regulatory actions, with unspecified total net negative regulatory costs overall. The Department of the Interior identified 28 planned deregulatory actions and no new regulatory actions for FY 2018, with anticipated negative net regulatory cost of “more than a billion net present dollars of deregulatory cost savings.”

Regulations for repeal may be identified by federal agencies through processes under [Executive Order 13777](#). This Order, issued by President Trump on February 24, 2017, directed each federal agency to convene a regulatory reform task force to identify regulations suitable for repeal, replacement, or modification.

Under the OIRA guidance, agencies will not publish in the *Federal Register* notice of which specific deregulatory actions they are using to offset any specific regulatory action. OIRA states that agencies should not cite Executive Order 13771 as the basis for any deregulatory action.



### Opportunities for Public Engagement.

Executive Order 13771 does not *create* any right enforceable against the United States. However, litigation challenging its application to specific delays in new regulations (or repeals of regulations or guidance documents) may be brought under the Administrative Procedure Act (APA) and substantive laws, and the Order would provide no defense against these statutory claims. Groups can be expected to bring targeted litigation aimed at particular rulemaking actions.

Public Citizen, the Natural Resources Defense Council (NRDC), and the Communications Workers of America filed a lawsuit in February 2017 challenging the Order on its face, alleging that it adds requirements for agencies that are not allowed by underlying statutes, and identifying numerous rules that have been delayed, potentially because of the Order. On February 26, 2018, the U.S. District Court for the District of Columbia dismissed the case, finding that the groups lacked both associational and organizational standing to maintain the case. The court held that the groups failed to show that any of their members had suffered injury from delay of regulations that would have been issued “absent the Executive Order.” It further held that the groups did not show that their organizational ability to pursue new rulemakings had been impaired by the Order’s requirements.

Citizen action groups and other beneficiaries of health, safety, and environmental regulations will likely press agencies to identify and justify some of their regulations as “required by law,” as well as to identify repeal targets and cost estimates long in advance of discussions with OMB, so that any trade offs are in public view. They may also highlight rules that get lost in the limbo of agency compliance with the Order, and push for disclosure of, and an opportunity to comment on, periodic agency negotiations with OMB.

# How Congress Can Override Environmental Regulation

The [Congressional Review Act \(CRA\)](#) provides a blunt, powerful tool for Congress to invalidate **regulations** recently issued by any federal agency. It is blunt because:

- it allows Congress to wholly invalidate any regulation subject to the CRA, but not to partially disapprove or modify them; and because
- any regulation invalidated by this process is considered never to have taken effect.

It is also powerful because, once a regulation is disapproved, the agency may not reissue it or another regulation “substantially the same” without authorization from Congress. Fifteen CRA resolutions invalidated Obama Administration regulations.

## Process.

The CRA allows Congress to use a streamlined procedure to invalidate any final agency rule after it is promulgated, subject to a presidential signature or veto. Generally, Congress can introduce a disapproval resolution within 60 *calendar* days of a rule’s issuance (excluding certain days when Congress is adjourned). 5 U.S.C. §802(a). But the CRA adds an additional window for congressional disapproval of regulations that were finalized toward the end of a session of Congress. This window opens approximately 15 days into the next session of Congress, and a CRA resolution can only be introduced within 60 calendar days of that date. *Id.* §801(d)(2). That window, which covered Obama Administration regulations submitted to Congress on or after June 13, 2016, closed on March 31, 2017. **Obama-era regulations can no longer be invalidated via the CRA.**

In addition, to take advantage of expedited Senate procedures discussed below—particularly the inability to filibuster—the Senate must pass a CRA resolution within 60 *session* days from the opening of the review period, which can extend far longer than 60 calendar days because of numerous days the Senate is not in session. *Id.* §802(e). The window for Senate action on Obama Administration regulations opened on January 30, 2017, and ran until May 11, 2017.

This opportunity to invalidate regulations at the beginning of a session of Congress is most relevant when the White House changes parties. When, as now, the current Congress and the current Administration are both opposed to portions of the previous Administration’s agenda, then **regulations passed at the end of the prior Administration are particularly**

## Areas to Watch

*Completed Actions.* With President Trump’s signature, Congress has invalidated 15 Obama Administration regulations, including four environmental or natural resource regulations:

1. the SEC’s reporting rule for extractive industries;
2. the Department of the Interior’s Stream Protection Rule;
3. the Bureau of Land Management’s (BLM’s) “Planning 2.0” rule; and
4. a regulation regarding hunting in Alaskan national wildlife refuges.

Another CRA resolution, which would have invalidated a [BLM rule](#) regulating methane emissions from oil and gas operations on public lands, passed the House but failed in the Senate by a single vote. As the period for addressing 2016 regulations lapsed on May 11, 2017, no more Obama Administration regulations can be invalidated via the CRA.

**vulnerable.** Indeed, before 2017, the only time the CRA had been used successfully was in similar circumstances: in 2001, when the George W. Bush Administration succeeded the Clinton Administration, and the Republican-led Congress invalidated an OSHA regulation setting workplace ergonomic standards, with President Bush's assent.

## Discussion.

*No Filibuster.* The CRA's procedural innovations relate particularly to Senate procedure. Most important, the Act eliminates the filibuster for any resolution that fits within its scope; thus, a simple Senate majority is sufficient to pass a resolution of disapproval. The CRA also sets a maximum of 10 hours of Senate floor debate on each resolution, *id.* §802(d)(2), and allows for a nondebatable motion to further limit debate below 10 hours. Even without motions to further limit debate, fewer than 10 hours were ultimately used for many of the resolutions passed in 2017. But **each individual CRA resolution still requires a significant commitment of time and focus.**

*One Regulation Per Resolution.* The main limitation of the CRA is that each regulation Congress seeks to disapprove requires a *separate* resolution. Given that this Congress has a particularly full agenda, the competition for scarce floor time required trade offs in terms of which regulations were subject to resolutions. This constraint limited the number of disapprovals far below the number of regulations potentially subject to the CRA's reach. (Indeed, this constraint is the motivation for bills like the Midnight Rules Relief Act of 2017 (H.R. 21), which would allow Congress to bundle multiple regulations into a single resolution of disapproval. That bill passed the House in January 2017.)

*Lasting Impact.* Once a rule is invalidated through a disapproval resolution, it “may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a [subsequent] law.” *Id.* §801(b)(2). **This long-term effect has potentially far-reaching implications for entire areas of regulation once a disapproval resolution is enacted.** There is a wide possible range of meanings for what “substantially the same form” means in practice—from allowing promulgation of practically the same regulation under changed circumstances, to barring any attempt to regulate within the broad topical areas. Moreover, because the Act bars judicial review, it is unsettled whether courts will have an opportunity to determine the scope of the bar on future regulations. See 5 U.S.C. §805.

A challenge to the CRA is pending in federal district court in Alaska. *Center for Biological Diversity v. Zinke*, No. 3:17-cv-00091-JWS (D. Alaska filed Apr. 20, 2017). The suit claims, first, that the CRA's prohibition on future regulations “in substantially the same form” as a disapproved rule is an unconstitutional violation of the separation of powers. The suit also claims that by the Act's own terms, the 2017 resolution disapproving a rule regarding hunting in national wildlife refuges in Alaska exceeded the scope of the CRA. However, a motion to dismiss is now pending, and it remains unclear whether a court will ever reach the merits of these claims.

## Areas to Watch

*Other Potential Actions.* Although Obama Administration regulations are immune from the CRA going forward, this Congress may not be finished using the CRA. It remains possible that the CRA may be used to invalidate other regulations issued under Trump appointees—despite the political alignment of Trump's appointees with the Republican majorities in Congress—particularly those produced in response to a statutory command or a court order.

 Opportunities for Public Engagement.

The main opportunity for engagement by members of the public is appealing to members of Congress voting on CRA resolutions. Stakeholder engagement may be most influential in the Senate. If a disapproval resolution passes, there will be future opportunities to:

- engage agencies regarding replacement regulations;
- participate in challenges to new regulations in court, including whether they are substantially similar to an invalidated regulation; and
- reengage Congress if new or clarified authority to regulate is needed.

# “Fast-Tracking” Pipelines, the Border Wall, and Other Infrastructure Projects

The Trump Administration is seeking to fast-track infrastructure or other projects that ordinarily would undergo extensive environmental and permitting review. Federal agencies may approve or reject pipelines and other construction projects:

- that cross international boundaries,
- that occupy federal lands and waters, or
- that require federal permits.

Approvals can be fast-tracked either by the executive branch or by Congress, but executive actions must follow procedures set out in current laws. Streamlining permit processes are also under consideration.

## Process.

*Infrastructure Projects.* On January 24, 2017, the president issued [Executive Order 13766](#), entitled “Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects.” The Order **directs the Chair** of the Council on Environmental Quality (CEQ) (position currently operating with an acting career official) **to determine**, within 30 days after a request from any state governor or the head of a federal agency, **whether a proposed infrastructure project is a “high priority” project**, taking into account its:

- importance to the general welfare,
- value to the nation,
- environmental benefits, and
- any other factor the Chair deems relevant.

For any “High Priority” project, **the Chair must coordinate** with the “relevant” federal agency **to establish expedited procedures and deadlines** for completion of environmental reviews and approvals. Federal agencies then must give highest priority to meeting the deadlines, and must explain in writing failures to meet deadlines and steps to complete required reviews. The Order must be implemented “consistent with applicable law and subject to the availability of appropriations.”

On July 19, the president issued [Executive Order 13805](#), **establishing a Presidential Advisory Council on Infrastructure**. This Council, drawn from the private sector, was **to find, recommend, and prioritize the nation’s**

## Areas to Watch

Pipelines, electric transmission corridors, border wall construction, and other infrastructure projects requiring federal approval will likely be subject to substantial pressure for early approval and shortening of environmental review processes. Congressional action may also provide for waivers of environmental laws in some instances, modeled on prior enactments.

It will be critically important to track the huge wish list of regulatory changes affecting NEPA, the Clean Water Act, and other laws, that will emerge from the internal White House infrastructure process. The White House’s lengthy list of [proposed legislative changes](#) includes a two-year permit-issuance deadline, removal of EPA review of NEPA documents, limiting state water quality reviews of proposed federal actions, removing



## Areas to Watch

certain EPA powers under §404 of the Clean Water Act in favor of the Corps of Engineers, and limitations on injunctions affecting infrastructure projects.

**infrastructure needs**, making recommendations on accelerating pre-construction approval processes, developing funding and financing options, and identifying methods to increase public-private partnerships (including statutory or regulatory changes). On August 17, 2017, the White House announced that the Infrastructure Advisory Council would not be formed. However, the listed recommendations are being developed by the White House in a **non-public process**.

On August 15, 2017, the president issued [Executive Order 13807](#), “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure.” This Order endorsed procedures already created by the Government Performance and Results Act (GPRA) Modernization Act of 2010, the Fixing America’s Surface Transportation (FAST) Act of 2015, and the Water Resources Development Act of 2014, and directed federal agencies to **coordinate and expedite review of infrastructure projects**. The Order directed the Office of Management and Budget (OMB) to set a Cross-Agency Priority (CAP) goal for infrastructure permitting modernization within 180 days, in consultation with the current Federal Permitting Improvement Steering Council, and to adopt guidance for federal agencies within 180 days after establishing the CAP goal. It directed CEQ within 30 days to identify a list of actions that it will take to “enhance and modernize” the federal environmental review and authorization process. CEQ did so in a [brief notice](#) identifying targets for changes in guidance documents and announcing an interagency working group to “identify impediments to efficient and effective processing of environmental reviews and authorizations.”

The Order also:

- directed agencies to complete all federal environmental reviews and decisions on “major infrastructure projects” within two years of the beginning of such reviews;
- required agencies to use a system leading to “one Federal decision” where there are multiple federal agencies involved; and
- directed federal agencies not only to rely on a single environmental impact review document for a project, but also to issue a single federal “Record of Decision” unless the project sponsor or lead federal agency determines that this would not best promote completion of the review and authorization process.

The Order also revoked President Obama’s [Executive Order 13690](#), which had required federal agencies to use a federal flood risk management standard that includes climate change-induced sea-level rise when designing and evaluating federally-funded construction projects.

On February 12, 2018, the White House released a new [infrastructure strategy](#) setting out principles and a proposed legislative framework.

*Presidentially-Preferred Projects.* The president can direct executive branch agencies to **carry out review and approval procedures expeditiously**, but cannot waive or supersede federal laws and regulations unless authorized by Congress. On January 24, 2017, the same day as the first infrastructure Executive Order, the president issued two memoranda advancing approvals of the [Keystone XL Pipeline](#) (KXL) and [Dakota Access Pipeline](#) (DAPL).

**The KXL memo directed the Secretary of State to accept a re-submitted application** from the pipeline developer and to reach a final determination within 60 days, including any permit conditions. It directed the Secretary, to the “maximum extent permitted by law,” to consider the environmental impact statement (EIS) and supporting documentation for the prior rejected application as satisfying all requirements under the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and other laws, and to allow any previously issued permits or authorizations to remain in effect.

**The memo directed the Secretary of the Army to take all actions necessary** to “review and approve as warranted, in an expedited manner” KXL’s requests to use Clean Water Act Nationwide Permit 12 to authorize stream crossings, and the **Secretary of the Interior to take all steps necessary to “review and approve** as warranted, in an expedited manner,” right-of-way applications, Migratory Bird Treaty Act requirements, and other approvals, again “to the maximum extent permitted by law.”

**KXL re-filed its application, which was promptly approved by the president** on March 24, 2017. The pipeline faces continuing litigation and opposition from landowners and others over part of its route; and in July 2017 the pipeline owners solicited commitments from potential customers for its capacity, suggesting that demand for transmission may have softened since the project was conceived.

The president’s DAPL memo likewise **directed the Secretary of the Army to “review and approve in an expedited manner” easements and other authorizations for the pipeline:**

- “to the extent permitted by law and as warranted”;
- to consider whether to rescind or modify the prior Secretary’s December 4, 2016, order initiating a new EIS process; and
- to consider prior NEPA documents and environmental reviews as satisfying all applicable requirements of NEPA, the ESA, and consultation requirements.

On February 8, 2017, **the Army granted the easement, incorporating only standard permit conditions.**

In ongoing litigation against the DAPL pipeline, U.S. District Judge James Boasberg denied a motion for preliminary injunction against its completion; and the pipeline was completed and began to carry petroleum under the Missouri River. However, on June 14, 2017, the judge ruled that the **Army Corps of Engineers had not adequately considered the impacts of an oil spill** on tribal hunting and fishing rights, nor evaluated potential disproportionate impacts on minority and low-income populations, in violation of NEPA and environmental justice considerations. ([See discussion in Chapter 13](#)). **The Corps must conduct this evaluation, even as the pipeline continues to operate.**

*Congressional Actions.* Congress can, by law, add or remove environmental review and permitting requirements for individual projects or for entire categories of projects. Congress can also suspend the application of environmental laws, or deem them satisfied, as it did in the many appropriations “riders” affecting forest activities in the Pacific Northwest in the 1990s.

**Congress can also empower federal agencies to waive federal laws under some circumstances,** as it did in 1996 in authorizing construction of border fencing along portions of the U.S.-Mexico border. For example, the 2005 REAL ID Act authorized the Secretary of Homeland Security to waive numerous environmental and regulatory laws to support border activities (including all EPA-

administered pollution control laws, and all of the public land laws administered by the Department of the Interior and the Forest Service). **DHS used this latter authority in 2008 to waive more than 30 laws.** This authority has been used to support border security construction activities by the Trump Administration. DHS adopted waivers of all environmental laws for border security barriers in the Calexico area of California on September 12, 2017, and for a 20-mile stretch of the U.S.-Mexico border in New Mexico on January 22, 2018, to support further development of the proposed border wall.

**Congress has the power to enact legislation requiring rapid environmental reviews**, including the setting of specific timetables, as it did in the Fixing America's Surface Transportation (FAST) Act signed into law by President Obama in December 2015. **Congress can also direct that certain actions be made “categorical exclusions” under NEPA, exempting them from undergoing an environmental impact statement or environmental assessment;** it has used this approach in the past for certain classes of transportation projects, logging operations, and other activities. These congressional actions would be subject to regular congressional procedures dealing with legislation, appropriations, and oversight.



## Discussion.

President Trump's Executive Orders on infrastructure direct the use of authority that already exists in CEQ regulations and recent federal laws speeding up reviews of transportation and water resources projects. CEQ regulations already allow federal agencies to set time limits for environmental review (40 C.F.R 1501.8). The August 2017 Order is somewhat less specific than President Obama's infrastructure permitting order, Executive Order 13604 (March 22, 2012), which created the federal permitting “dashboard” to track projects; and it duplicates to some degree agencies' frequently updated infrastructure approval implementation memos, as well as the procedures created by the FAST Act. It is not yet clear whether the new Order adds anything other than prominence to certain projects, except for the greater involvement of OMB in setting and monitoring agency performance goals.

**The two pipeline memoranda did not change the substantive and procedural legal requirements applicable to those projects.** They remain subject to litigation on the same grounds as before. For DAPL, the Army is required to explain its decision, which may create new issues that can be raised in litigation. On February 17, 2017, the Army published a *Federal Register* notice of its decision to terminate the EIS process. And in June 2017, a federal court found that its NEPA evaluation was inadequate under the law, while not enjoining the continued operation of the pipeline.

For the transboundary KXL, there is a legal issue concerning whether presidential approval is litigable under NEPA. However, in November 2017, the U.S. District Court for the District of Montana denied the State Department's motion to dismiss NEPA claims brought by the Indigenous Environmental Network. And **state court litigation continues over authority to condemn private land along the pipeline's route.**

**Congress can amend laws to exempt activities from procedures and substantive requirements.** However, when it grants authority to an agency to waive application of a federal law, it must provide sufficient guidance for the exercise of that authority to enable a court to determine that the agency has not been improperly delegated congressional powers.

## Opportunities for Public Engagement.

The public will have opportunities to engage agencies, the Council on Environmental Quality, and Congress about possible administrative actions, including:

- direct communication on specific projects,
- participating in administrative notice-and-comment procedures on regulations and guidance documents, and
- litigation over changes to regulations or the issuance of permits.

As to the infrastructure Executive Orders, some questions remain, including whether these could be used to advance renewable energy or other environmentally-friendly infrastructure projects. However, most emphasis appears to be on fossil fuel development and transportation. In January 2018, the Department of the Interior revoked land withdrawals intended to support the prior administration's Desert Renewable Energy Conservation Plan.

# Reviewing, Revising, or Revoking Protection of National Monuments

Presidents have statutory authority to set aside federal lands and waters to create national monuments to protect scientific, historic, cultural, and other resources. On April 26, 2017, the president issued [Executive Order 13792](#), which directed the Secretary of the Interior to review previous monument designations made since January 1, 1996, and greater than 100,000 acres (or smaller designations where the Secretary determines there was inadequate outreach and coordination with “relevant stakeholders”), and to make recommendations for action, including revising and revoking protection, within 120 days.

On December 4, 2017, following receipt of the Secretary’s report, the president issued a [proclamation](#) reducing the Grand Staircase-Escalante National Monument in Utah by 862,000 acres, from its original area of nearly 1.8 million acres; and a separate [proclamation](#) reducing the size of Bears Ears National Monument from 1.35 million acres to 201,876 acres; thus releasing the excluded lands to mineral entry and multiple use management by the federal government.

## Background.

Sixteen presidents, including Presidents Barack Obama and George W. Bush, have used their authority under the [Antiquities Act of 1906](#) to create national monuments by “public proclamation.” 54 U.S.C. §320301. These proclamations set aside federally-owned lands and waters that contain “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest,” and **protect these resources from incompatible activities such as mining, leasing, logging, grazing, collecting, commercial fishing,** and other uses.

Under the Act, these monument reservations are to be the “smallest area compatible with the proper care and management of the objects to be protected,” which courts nonetheless have recognized can include huge acreages. (The Grand Canyon was initially protected by one of the earliest national monument proclamations.) Many of the monument lands have later been added by Congress to legislatively-declared conservation classifications, such as National Parks.

## Process.

*Actions by the president.* The Antiquities Act authorizes designation of monuments by presidential proclamation, **but provides no express authority for**

## Areas to Watch

Additional national monuments may be the subject of action, including:

- Cascade-Siskiyou (Oregon/California);
- Gold Butte (Nevada); and
- the marine national monuments—also undergoing review by NOAA.

Legislation addressing Bears Ears, Grand Staircase-Escalante, and the president’s Antiquities Act power is also under consideration, but may not move unless connected with other major legislation.

**a president to revoke a monument proclamation.**<sup>1</sup> No president has ever attempted to abolish a national monument by executive action, so there is no case law addressing a revocation. A 1938 Opinion of the Attorney General concluded that the president lacks legal authority to abolish a national monument, finding that the establishment of a monument in accordance with the Act is the one-way creation of a trust over the resources (“the president thereafter was without power to revoke . . . the reservation”).

On occasion, **a president has diminished the size of an existing monument or changed the regulations governing uses on a monument**, although this authority is in dispute. Unlike certain other statutes, the Antiquities Act does not expressly include a power to modify. The last diminution of an existing monument by executive action prior to the December 2017 actions occurred in 1963 under President Kennedy.

In general, presidential authority to diminish the area protected by a previous monument proclamation has been grounded on assertions that the area is no longer, per the Act, the “smallest area” compatible with protection of the monument’s objectives. The 1938 Attorney General opinion observed that the president can diminish the area of an existing national monument; however, the rationale for this part of the opinion has been questioned in view of several changes in the laws and precedents it relied on. Recent [scholarship](#) suggests that the **Federal Land Policy and Management Act of 1976 removed any basis for subsequent diminutions by the executive.**<sup>2</sup>

Presidential proclamations frequently set out the specific incompatible activities that are prohibited or restricted within the monument area. There is no record of presidential removal or weakening of use restrictions imposed by a previous president. Presidents have *added* additional use restrictions to monument expansions. (In the Pacific Remote Islands Marine National Monument, created by President G.W. Bush in 2009 and expanded by President Obama in 2014, additional conservation restrictions were applied to the expansion area, but the original monument area remains under the prior restrictions.) Thus, **the authority of a president to remove or weaken use restrictions is untested.**

*Actions by Congress.* Congress, acting by legislation signed by the president, can reverse or modify any of these proclamations or withdrawals under the “property clause,” its plenary constitutional power to make all necessary rules and regulations respecting the territory and property of the United States. Congress can also affect the management of national monuments through the appropriations process, specifying limitations on management activities and/or prohibiting uses of federal funds for certain management activities.

- 
1. Congressional Research Service (CRS), *National Monuments and the Antiquities Act* (Sept. 7, 2016).
  2. See Mark Squillace, Eric Biber, Nicholas S. Bryner, & Sean B. Hecht, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 Va. L. Rev. Online 55 (2017); M. Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, Georgia L. Rev. (2003); Congressional Research Service, *Authority of a President to Modify or Eliminate a National Monument* (Aug. 3, 2000). See also Congressional Research Service, *Antiquities Act: Scope of Authority for Modification of National Monuments* (Nov. 14, 2016) (FLPMA Committee report language creates unresolved issue).

## Discussion.

In addition to recommending the downsizing of Bears Ears and Grand Staircase-Escalante, [Interior Secretary Ryan Zinke's review](#) of 27 national monuments (released to the public on Dec. 9, 2017) included recommendations to the president to reduce the size of two additional terrestrial monuments (Gold Butte and Cascade-Siskiyou); and to change the management measures on Katahdin National Monument to support commercial timber management, on Rio Grande Del Norte to promote grazing access, and on Organ Mountains-Desert Peaks to add access and address national security/border security objectives. The Secretary also recommended changes in boundaries and/or authorized uses for several marine monuments, including Pacific Remote Islands and Northeast Canyons and Seamounts, to support more commercial fishing.

In December 2017, five lawsuits were filed in the U.S. District Court for the District of Columbia by Indian tribes and environmental organizations challenging the proclamations reducing the Bears Ears and Grand Staircase-Escalante National Monuments. The Justice Department has moved that the cases be transferred to Utah.

**Congress can modify or undo any designations** at any time by enacting legislation, and historically has terminated some national monuments by legislation. Congress has occasionally considered legislation that would strip presidents of their unilateral authority to create national monuments (e.g., S. 33, introduced Jan. 6, 2017), but these proposals have not been enacted.

## Opportunities for Public Engagement.

The public and stakeholders may advocate to the White House and Congress about possible presidential or congressional action. Such appeals might involve:

- focusing on the values being protected;
- questioning precedent for an exercise of executive authority to revoke or diminish monuments; and
- the business case for continued protection of these areas, including outdoor recreation and related economic benefits from prior designations, as well as modeling potential harm from oil and gas impacts in the marine monument areas.

Citizen groups may also have litigation options, provided they can demonstrate injury resulting from any revocations or modifications, with special attention to issues of standing and ripeness (immediacy of the injury). The National Environmental Policy Act (NEPA) does not apply to acts of the president or to Congress, and itself provides no basis for challenging these actions. However, **NEPA (and other laws) will apply to agency adoption of management plans and decisions implementing** these proclamations.

Stakeholders may also focus attention on funding for the monument areas through the congressional appropriation process; many conservation actions that were once under attack (national parks, marine sanctuaries) eventually were supported by congressional endorsement or budget action.

# Increasing Offshore Drilling for Oil and Gas

[The Outer Continental Shelf Lands Act \(OCSLA\)](#) governs all federal submerged lands from three miles seaward of the U.S. coast (the boundary of state waters) out to 200 miles seaward (the boundary of the U.S. exclusive economic zone). The Act:

- gives the Department of the Interior responsibility for managing mineral exploration and development of these lands, primarily offshore drilling for oil and natural gas; and
- gives the president authority to withdraw offshore lands from development.

The Trump Administration is attempting to revoke a series of Obama Administration actions under OCSLA, including reopening many areas that are currently off-limits to oil and gas exploration.



## Process.

OCSLA requires that federal leases of oil and gas rights be sold according to a series of five-year plans produced through an intensive public notice-and-comment process specific to the Act. The [existing plan](#), covering the years 2017-2022, was finalized in November 2016; it scheduled lease sales in the Gulf of Mexico and in Alaska's Cook Inlet, but no other areas in the Arctic, Pacific, or Atlantic outer continental shelf.

*Leasing Withdrawals.* Section 12(a) of OCSLA grants the president authority “from time to time, to withdraw from disposition any of the unleased lands” of the outer continental shelf. This **authority has been used by six presidents to establish and maintain temporary oil and gas leasing moratoria as well as to create permanent protected areas.** [President Obama withdrew](#) certain areas of the outer continental shelf, including large portions of the U.S. Arctic and the underwater canyon complexes off the Atlantic Coast, from leasing for exploration, development, or production “for a time period without specific expiration.” Section 12(a) does not provide explicit criteria for the exercise of this withdrawal power.

As with presidential designation of national monuments under the Antiquities Act ([see Chapter 5](#)), **OCSLA provides no express language authorizing a president to terminate a leasing withdrawal.** No president has ever revoked an open-ended withdrawal under Section 12(a), and it is legally untested whether a president can terminate a previous withdrawal. However, in 2008, President George W. Bush did rescind time-limited withdrawals issued by President Clinton that were designed to end in 2012; but he left in place permanent marine sanctuary withdrawals that were without expiration dates.

## Areas to Watch

- Ongoing notice-and-comment procedures related to the draft proposed OCSLA 2019-2024 leasing program and its accompanying environmental impact assessment;
- Litigation challenging revocation of OCSLA Section 12(a) leasing withdrawals, including the Chukchi and Beaufort Sea and Atlantic Canyons withdrawals;
- Notice-and-comment procedures and potential litigation over revocation of BSEE Well Control Rule and BSEE Rule on Oil and Gas Production Safety Systems; and
- Department of Commerce review of Marine Sanctuaries and Marine National Monuments.



*Trump Executive Order.* On April 28, 2017, President Trump signed [Executive Order 13795](#) on “Implementing an America-First Offshore Energy Strategy.”

Section 5 of that Order:

- purported to immediately revoke President Obama’s withdrawals of offshore Arctic and Atlantic areas under Section 12(a) of OCSLA.

Section 3 directed the Secretary of the Interior to:

- consider revising the leasing schedule to include sales in these and other areas, and
- on July 3, the Department [commenced the process](#) of developing a new leasing plan covering the years 2019-2024.

Other provisions direct the Secretary to:

- review operating requirements on current lessees (Section 6); and
- to review, reconsider, and revise or rescind existing final rules on well control and on offshore Arctic drilling (Sections 7 and 11) and a proposed rule on offshore air quality (Section 8).

Section 4 of the Order directed the Secretary of Commerce to:

- refrain from designating or expanding any National Marine Sanctuary absent an accounting of the area’s energy or mineral resource potential, and
- to review all Marine Sanctuaries and Marine National Monuments designated or expanded in the past 10 years. That [report was submitted to the president](#) on October 25, 2017, but has not yet been publicly released. A [parallel Department of the Interior review of National Monuments](#) (see Chapter 5), including marine monuments, was released in December 2017 and recommended potential revisions to boundaries and rules on commercial fishing.

*Proposed OCSLA Leasing Program.* On January 8, 2018, pursuant to Section 3 of the Executive Order, the Bureau of Ocean Energy Management (BOEM) issued a [draft proposed leasing program](#) for 2019-2024, intended to supersede the existing plan for 2017-2022. The proposal would open more than 90% of all outer continental shelf resources to oil and gas drilling, including ending long-standing moratoria on drilling off the Atlantic and Pacific coasts and large portions of Alaska. It also represents a direct reversal of the Obama-era plan, under which 94% of offshore acreage is off-limits to development. The proposed leasing program was open for public comment until March 9, 2018.

## Discussion.

Following the April 2017 Trump Executive Order, a coalition of 10 environmental and indigenous groups immediately [brought suit](#) in the District of Alaska **to enjoin Section 5 of the Executive Order and reinstate the Obama-era OCSLA withdrawals**, which included 98% of U.S. Arctic waters and a series of Atlantic canyons stretching from Massachusetts to Virginia. The plaintiffs note that OCSLA makes no provision for revoking a leasing withdrawal, and they cite a [fifty-year string of OCSLA withdrawals](#) that stand today. Their argument parallels the debate over the Antiquities Act (see Chapter 5), which likewise delegates power to the president to designate national monuments but no express power to revoke them. **The American Petroleum Institute and the state of Alaska have intervened in the lawsuit and moved to dismiss it.**

The Executive Order's other directives are moving forward, but **implementing them will entail time, agency resources, public participation, congressional oversight, and the likelihood of additional court challenges.** For example, after the comment period closes on the proposed 2019-2024 leasing program, BOEM must prepare another draft and a draft environmental impact statement for additional comment. Two days after the proposal was released, Secretary of the Interior Ryan Zinke abruptly announced that federal waters off Florida were “off the table,” following a meeting with Florida Governor Rick Scott. That announcement led to multiple requests from governors and lawmakers along both coasts, asking that their states also be removed from the plan. Zinke's statement is not a final agency action and may or may not be reflected in the next version of the plan, but it has muddled the process and [opened it to charges of politicization](#) and potential litigation.

Similarly, Section 7 of the Executive Order directed Secretary Zinke to **review the Bureau of Safety and Environmental Enforcement's (BSEE's) 2016 rule on blowout preventers and well control**, a direct response to the *Deepwater Horizon* explosion and oil spill in the Gulf of Mexico, and to propose a revised rule “if appropriate and as consistent with law.” That review is ongoing, but on December 29, 2017, BSEE [proposed revising another Obama-era rule on offshore oil and gas production safety systems](#). Under the Administrative Procedure Act, applicable requirements for revising these or any final rules will include another full notice-and-comment rulemaking ([see Chapter 8](#)), which must produce a “reasoned analysis”—the Supreme Court's [State Farm standard](#)—to justify the changes. Any revised rule will again be subject to judicial review for compliance with APA procedures and consistency with OCSLA.

Finally, like other Administration actions (including the “two-for-one” Executive Order, [see Chapter 2](#)), **several of the offshore Executive Order's provisions emphasize regulation's costs with little or no consideration of benefits:**

- The Section 4 accounting of the value of Marine Sanctuaries and Marine National Monuments calls for analyzing the “costs of managing” and the “opportunity costs associated with” these protected areas, but not for analysis of their offsetting benefits for fisheries, recreation, or other ocean services;
- Section 6 mandates modifying operator regulations and financial assurance policies to “minimiz[e] unnecessary regulatory burdens,” without any corresponding mention of increased environmental or safety risks; and
- Sections 9 and 10 dismiss [documented concerns](#) about the potential effects of seismic surveying on marine mammal populations.

Each of these policy decisions also may get tested in court against their respective governing statutes.



### Opportunities for Public Engagement.

Environmental or citizen action groups may engage in public notice-and-comment processes for the ongoing development of the 2019-2024 Leasing Program, as well as for any rulemaking procedure to repeal or replace the Bureau of Safety and Environmental Enforcement (BSEE) Well Control Rule. Though the comment period for the review of Marine Sanctuaries and Marine National Monuments has ended, additional stakeholder engagement may help draw attention to the value of specific areas pending a final decision. Finally, litigation over the OCSLA Section 12(a) withdrawals is ongoing, and additional court cases may emerge in the wake of attempts to implement other sections of the Executive Order.

# Withdrawing From the Paris Agreement on Climate Change

On June 1, 2017, following much public and private deliberation, President Trump announced his intent to withdraw the United States from the [Paris Agreement on climate change](#). But the Agreement is currently binding on the United States and other signatory nations (although there are few compulsory actions within it). The process of withdrawing from the Paris Agreement and/or its parent U.N. Framework Convention on Climate Change is governed not only by U.S. law, but by the terms of those international agreements.

Meanwhile, [Trump's announcement](#) has strengthened the resolve of the international community, some U.S. state and local governments, and the private sector to coordinate efforts to meet the Paris goals.



## Process.

On December 12, 2015, 195 countries reached the Paris Agreement, which commits to holding the global average temperature increase to “well below” 2°C and includes intended target emissions reductions for the signatory nations. The United States:

- signed the Agreement on April 22, 2016,
- submitted its formal acceptance on September 3, and
- the Agreement entered into force on November 4 (after it was ratified by at least 55 countries producing 55% of global greenhouse gas emissions).

As of January 2018, **196 countries and the European Union have signed the Agreement**, and **174 of those have ratified or acceded to it, including the United States, E.U., China, and India.**

The Paris Agreement was negotiated under the U.N. Framework Convention on Climate Change (UNFCCC), which was signed by President George H.W. Bush and ratified by the Senate in 1992. The **Obama Administration treated the Paris Agreement as an executive agreement within the president's existing authority to implement** the UNFCCC, rather than as requiring separate Senate ratification. The intention was to implement the U.S. target commitment of a 26%-28% reduction in greenhouse gas emissions through the Clean Power Plan and other domestic measures.

**The U.S. Constitution provides no specific process for withdrawing from treaties**, but [the general rule](#) is that they should be amended or terminated in the same manner they were made. Thus, **under U.S. law, the president may unilaterally withdraw from the Paris Agreement.** But he also must follow the withdrawal procedure in the Agreement itself, which requires a “cooling-off” period of at least three years from its November 2016 entry into force, and another year before a notice of withdrawal takes effect. Alternatively, he might attempt to withdraw entirely from the

## Areas to Watch

- The Paris Agreement,
- UNFCCC,
- Clean Power Plan, and other domestic measures to implement Paris greenhouse gas commitments, and
- U.S. state, local and private-sector commitments to reduce their emissions to meet or surpass the United States' original Paris goals.

UNFCCC, but would need Senate approval (presumably by a two-thirds majority) to do so. Regardless of how a party withdraws from the Agreement, it remains binding on the other signatory countries.

## Discussion.

Unlike the Trans-Pacific Partnership Agreement, from which President Trump [immediately withdrew](#), **the Paris Agreement has been signed by the United States** and has entered into force. Trump could take executive action memorializing his intention to withdraw from the Agreement, which would signal to executive branch agencies that they should no longer implement it. He has also proposed to defund U.S. financial commitments under the Agreement, and on August 4, 2017, the State Department sent the United Nations a [communication signaling its “intent to withdraw.”](#) But **a formal notice of withdrawal could not be sent until November 4, 2019, and would not go into effect until November 5, 2020**—two days after the next U.S. presidential election.

The **Administration also could attempt to withdraw from the parent UNFCCC**, which would effectively withdraw from the Paris Agreement as well. But that withdrawal would likely face a difficult Senate vote, or a constitutional challenge if the president were to attempt it without the Senate’s advice and consent. On the other hand, it has been suggested that the president might simply submit the Paris Agreement to the Senate for formal ratification, which would almost certainly fail to attract two-thirds support, and then declare it a dead letter. It is **questionable whether such a maneuver could negate President Obama’s accession to the Agreement**, considering it has already entered into force.

In the interim, the **Trump Administration has repeatedly signaled that it might be willing to “renegotiate” the Paris Agreement**, and that it will continue to participate in related meetings and activities **while doing little on implementation**. The Agreement’s target emissions reductions are non-binding, and failure to meet them would carry no official sanction. But the loss of U.S. leadership on the world stage is a significant blow to the Agreement’s ambition of even greater global reductions.

On the other hand, Trump’s announcement also galvanized the international community into further action. On June 12, 2017, six of the G7 environment ministers [reaffirmed their countries’ commitments](#), calling the Paris Agreement “irreversible” and “non-negotiable,” with only the United States abstaining. A group of **U.S. governors and mayors, businesses and investors, and colleges and universities have mobilized to form the “We Are Still In” coalition**, an alliance dedicated to filling the gap left by federal withdrawal. Nine states have [announced a cooperative effort](#) to place a price on carbon emissions using state law.

# Delaying, Reversing, or Weakening Existing Environmental Regulations

Most environmental regulations are detailed rules issued by agencies under their statutory authority, using a public notice-and-comment procedure. **Final agency rules cannot simply be undone by the president**, but they may be:

- delayed by the implementing agency,
- challenged in court,
- amended or reversed through a subsequent agency rulemaking process, or
- revoked by congressional act.

Many Obama Administration final rules, including the high-profile [Clean Power Plan \(CPP\)](#) and [“Waters of the United States” \(WOTUS\) Rule](#), have proven vulnerable to one or more of these actions.



## Process.

*Legislative Authority.* When enacting environmental statutes, Congress typically outlines a general regulatory structure for protecting public health and natural resources, then delegates the details to EPA or other federal agencies. These agencies fulfill Congress’ intent and fill statutory gaps by issuing administrative rules that:

- spell out detailed standards,
- create permitting and approval procedures, and
- govern agency monitoring, inspection, and enforcement.

Some rules are mandated by statute, which may set out specific deadlines. Others are developed over time or in response to new information or events, allowing the agency to interpret its congressional mandate.

*Agency Rulemaking.* Most agency regulations go through a rulemaking procedure governed by the [Administrative Procedure Act \(APA\)](#), 5 U.S.C. ch. 5, which requires:

- public notice of a proposed rule,
- a period for receiving comments on the proposed rule, and
- issuance of a final rule, including responses to the comments received and explaining whether and how they were taken into account.

## Areas to Watch

- EPA proposed rule rescinding the Clean Power Plan for existing power plants;
- EPA advance notice of proposed rulemaking seeking comments on a replacement rule for the Clean Power Plan;
- EPA greenhouse gas standards for new power plants;
- EPA/Army Corps of Engineers final rule delaying the “applicability date” of the Waters of the United States (WOTUS) Rule;
- EPA/Army Corps of Engineers proposed rule repealing the WOTUS Rule;
- EPA methane standards for the oil and gas industry;
- EPA rule on methane emissions from landfills;

The record of this process includes the agency’s justification for the rule and provides the basis for any subsequent judicial review.

**These “administrative records” can be voluminous, spanning several years and comprising thousands of pages,** from:

- initial scientific studies,
- to advisory committee deliberations and public hearings,
- to publication of the final rule.

*Judicial Review.* A final agency rule may be challenged in federal court on the grounds it is “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.”

5 U.S.C. §706(2)(A). This standard sets a high bar, but does allow judges to intervene where an agency has, for example:

- failed to follow the notice-and-comment procedure,
- offered incomplete or inconsistent justifications for its action, or
- exceeded its statutory mandate.

If the challenge is to an agency’s interpretation of its governing statute, the court looks to the statutory language to determine Congress’ intent; if the statute is silent or ambiguous, the court will accept any agency interpretation that is “reasonable.” This so-called “***Chevron* deference**”<sup>1</sup> **has tended to favor EPA in environmental cases, where Congress often has not spoken with precision** and courts defer to the agency’s scientific expertise.

### Discussion.

Although they are produced by the executive branch, **agency rules cannot be undone by executive order or other presidential action.** Agencies remain governed by their respective statutory mandates, and must still follow the procedures established by the APA. Thus, while President Trump has directed EPA and other agencies to begin the process of reversing numerous existing regulations, they generally must go through another full rulemaking to do so; in the interim, some agencies have attempted to delay the rules’ implementation.

Likewise, where an existing agency rule has been challenged in court, the Department of Justice may seek to stay or delay its effect, decline to appeal an adverse ruling, or attempt to reach a settlement more favorable to industry.

Congress also may attempt to revoke specific rules or remove certain subject matter from an agency’s jurisdiction. Each of these options is outlined below.

### Areas to Watch

- EPA Clean Water Act standards for toxic water discharges from power plants;
- EPA mercury and air toxics standards;
- EPA 2015 ozone standard;
- EPA chemical safety rule;
- BLM rule regulating methane from oil and gas operations on public lands;
- BLM rule rescinding Obama-era rule governing hydraulic fracturing on public and tribal lands;
- Federal Highway Administration proposed rule to rescind greenhouse gas reporting requirements from national highways; and
- many other Obama Administration regulations in all sectors.

1. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

*Delaying Implementation of Final Rules.* The Trump Administration has [repeatedly employed](#) the tactic of postponing implementation of Obama-era final rules, citing the need to “review” or “reconsider” them. Such delays are common at the beginning of a new administration, including blanket “freezes” of pending regulations governmentwide; on Inauguration Day, President Trump [ordered a 60-day freeze](#) of most agency rules “for the purpose of reviewing questions of fact, law, and policy they raise.” But **repeated or indefinite delays raise legal questions about whether they constitute *de facto* suspension or repeal of a final rule in violation of the Administrative Procedure Act.**

For example, on April 20, 2017, EPA Administrator Scott Pruitt announced a 90-day delay in implementing a final rule governing methane emissions in the oil and gas industry, claiming that certain industry concerns were not taken into account during the original rulemaking process. Four days later, Department of Justice lawyers requested a stay in pending litigation challenging the rule, arguing that a new rule would be forthcoming. On July 3, a panel of the D.C. Circuit found that EPA had exceeded its authority in delaying the existing rule, and on August 1, [the full court ordered](#) the agency to begin implementing it. In parallel, the Agency issued a [proposed new rule](#) that would stay implementation of the Obama-era standards for an additional two years, and is [moving ahead](#) with finalizing that rule.

A similar battle is being fought over the Bureau of Land Management’s rule regulating methane from oil and gas operations on public lands, for which the Bureau, citing litigation, [announced an indefinite delay](#) on June 15, 2017. This delay was challenged in court, and in October, a California district judge ruled that it was unlawful. The Bureau responded by formally proposing a rule to delay implementation until January 2019, and [finalized that rule](#) in December 2017. States and a coalition of environmental groups challenged that decision, and the judge granted a preliminary injunction on February 22, 2018, finding BLM’s suspension “untethered to evidence.” The Bureau has since proposed a new rule that would rescind or revise most of the methane rule’s requirements.

*Reversing Rules Through Subsequent Rulemaking.* In general, **final agency rules can only be amended or reversed through another rulemaking, including a notice-and-comment period** and development of a full administrative record. For the new rule to survive judicial review under the “arbitrary and capricious” standard, the record must provide a “reasoned explanation,” beyond a mere change of presidential administration, of the basis for the revision.<sup>2</sup> **Key Obama Administration rules that relied on reams of scientific evidence and months of public procedure**, like the Clean Power Plan or Waters of the United States (WOTUS) Rule (both discussed below), **might require an equally laborious effort to undo.** It may prove even harder to vacate EPA’s “endangerment finding,” the scientific underpinning for the CPP and other climate measures, where the agency’s analysis has been upheld in court.

*Declining to Defend Agency Rules.* **For rules facing litigation**, there is also a question of whether or **how vigorously the Department of Justice (DOJ) will defend the rules** in court. Representing federal agencies is a core part of DOJ’s mission, but a change in administration presents the opportunity to reevaluate litigation priorities, change tactics, and revise legal interpretations to bring them more in line with new policy goals.

---

2. *Encino Motorcars v. Navarro*, 136 S. Ct. 2117 (2016).

For many pending challenges to Obama-era regulations—including to the Clean Power Plan and WOTUS Rule—DOJ has petitioned courts to delay their briefing or decision schedules, pending ongoing agency efforts to reconsider, revise, or revoke the rules.

If a court reaches a decision invalidating (and vacating) all or part of an existing rule, **DOJ might decline to pursue an appeal, in which case the agency could rewrite the rule or drop it altogether.** DOJ also might opt to settle cases on terms at odds with some stakeholders' interests. To guard against these possibilities, environmental groups or state attorneys general have been seeking intervenor status in some cases, so they can participate in settlement discussions or maintain an appeal if DOJ fails to do so.

*Congressional Revocation.* Finally, **Congress retains the option to weigh in against an agency rule at any time.** This may take the form of legislation disapproving or revoking a specific rule (similar to the Congressional Review Act, [see Chapter 3](#), but via regular congressional procedures); or a broader repeal of the agency's statutory authority to issue a rule. The success of such legislation may ultimately depend on the status of the Senate filibuster.

## Examples.

*Clean Power Plan.* On March 28, 2017, the president signed [Executive Order 13783](#) on “Promoting Energy Independence and Economic Growth.” Among many other measures, Section 4 of **that Order directed EPA Administrator Pruitt to begin proposing rules to “suspend, revise, or rescind” the Clean Power Plan and related rules and guidance.** On April 4, [EPA announced](#) its review of the CPP, with the objective of initiating a new rulemaking proceeding “as soon as practicable and consistent with law.” On October 16, EPA [proposed to completely repeal](#) the Clean Power Plan, arguing that it exceeded the Agency's statutory authority under the Clean Air Act. A comment period on the proposed repeal was open until April 26, 2018.

**EPA's proposal does not offer a replacement rule,** but on December 28, 2017, the Agency issued an [advance notice of proposed rulemaking](#) that solicits comments on a possible future rule, presumably one that would confine federal regulation of greenhouse gases to improvements “inside the fence line” of existing electricity generating facilities. That comment period was open until February 26, 2018. In the meantime, the Administration has continued to request suspension of the pending litigation challenging the Clean Power Plan in the D.C. Circuit.

On the legislative front, the [“Stopping EPA Overreach Act of 2017”](#) (H.R. 637) introduced in the House of Representatives would completely **remove carbon dioxide and other greenhouse gases from EPA's Clean Air Act jurisdiction,** while expressly **disapproving the Clean Power Plan and EPA methane standards for the oil and gas industry.** The bill also would prohibit any “regulation of climate change or global warming” under the CAA, Clean Water Act, NEPA, Endangered Species Act, or Solid Waste Disposal Act.

*Waters of the United States (WOTUS) Rule.* In 2015, EPA and the Army Corps of Engineers adopted a final rule defining the term “waters of the United States” for the Clean Water Act's regulatory programs governing discharge of pollutants, protection of water quality, and disposal of dredged material.

**The rule was stayed by a federal district (trial) court in North Dakota and by the U.S. Court of Appeals for the Sixth Circuit,** and the U.S. Supreme Court agreed to determine which level of



federal court has jurisdiction to review challenges brought by opponents of the rule. On January 22, 2018, [the Court unanimously held](#) that jurisdiction belongs in the district courts, leading to the possibility that the Obama-era rule could go into effect in parts of the country. On January 31, the Trump EPA responded by [finalizing a new rule](#) that would delay the WOTUS Rule’s “applicability date” for an additional two years. That rule went into effect February 6, and is being [challenged in court by states](#) and [environmental groups](#), who argue that it offers insufficient rationale for the delay.

On the substantive front, on February 28, 2017, the president issued [Executive Order 13778](#), directing EPA and the Corps to review the Obama-era rule and to **publish for notice and comment a proposed rule rescinding or revising it**. The Order directed the agencies in proposing a new rule to “consider interpreting the term ‘navigable waters’ ... in a manner consistent with” a restrictive plurality opinion of the late Justice Antonin Scalia.<sup>3</sup> The agencies decided that taking on the massive re-evaluation of the record of the prior rulemaking and development of a detailed, scientifically justified replacement rule would be a lengthy process. Accordingly, they undertook a two-step approach.

On July 27, 2017, the agencies [proposed](#) a rule to repeal the Obama Administration rule and replace it with the rule and guidance that had been on the books prior to 2015. Because some rationale is needed for this action, they cited the uncertainty associated with the stays issued by the two courts, and also confusion that might result from action by the Supreme Court. They also argued that the 2015 rule did not give sufficient weight to the interests of states and tribes under Section 101(b) of the Clean Water Act “in guiding the choices the agencies make in setting the outer bounds of jurisdiction of the Act.” The comment period for the proposed rule closed on September 27, 2017.

If this repeal rule is enacted, the agencies expect to re-adopt the old rule, which provided minimal guidance and itself had led to extensive litigation. They then would need to **commence a lengthy rulemaking** in which they will consider the Scalia definition **which, if adopted, would limit the Clean Water Act’s protection to continuously flowing navigable waters and immediately adjacent wetlands**. The agencies also would need to develop a detailed administrative record that includes scientific justifications for the new definitions. It is expected that litigation would ensue at each phase of this process.

Meanwhile in Congress, the [“Stop WOTUS Act”](#) (H.R. 1105) **would simply negate the 2015 WOTUS Rule and its protections for seasonal or isolated waters and wetlands**. Similarly, several appropriations bills contained riders ([see Chapter 10](#)) that would authorize the agencies to repeal the 2015 Rule without following the public comment or other requirements of the Administrative Procedure Act, the Clean Water Act, or other applicable laws and regulations.



## Opportunities for Public Engagement.

Citizens or advocacy groups can:

- participate in public notice-and-comment procedures for replacement rules,
- bring litigation challenges to replacement rules or delays of existing rules, and
- seek to intervene in challenges to administrative rules brought by other parties.

---

3. *Rapanos v. United States*, 547 U.S. 715 (2006).

# Cutting Enforcement of Environmental Law

Federal agencies and Department of Justice attorneys have considerable discretion in deciding whether, when, and how to enforce regulatory requirements, and enforcement priorities often change with a new administration. The **Trump Administration's stated support for deregulation** and its plans to dramatically cut EPA's enforcement budget **suggest cutbacks in federal environmental enforcement**, and federal oversight of state enforcement, in the coming years.

## Process.

Federal environmental laws establish a broad array of enforcement tools to help ensure compliance, including:

- agency notices of violation;
- agency orders requiring cleanup, compliance, or assessing civil penalties; and
- judicial proceedings for civil penalties, cost recovery, injunctions, or criminal sanctions.

The agency charged with administering a specific statute determines whether to initiate an enforcement action. If the case involves judicial proceedings (civil or criminal), the Department of Justice (DOJ) represents the agency in court and settlement negotiations. **Most civil environmental enforcement cases are resolved by settlement** between the parties.

*Federal-State Relationship in Enforcement.* In some areas, notably requirements governing activities on federal lands and prosecution of federal crimes, federal agencies have exclusive or near-exclusive enforcement authority. Under many federal pollution control laws, states with delegated and approved programs have the primary role in implementation and enforcement, but the federal government oversees state programs and has concurrent enforcement authority. **EPA and states enter into and periodically review Memoranda of Agreement governing implementation** of these delegated or approved programs, including enforcement practices. EPA's "Revised Policy Framework for State/EPA Enforcement Agreements" describes the **circumstances that would give rise to federal enforcement**: when state enforcement is untimely or inappropriate; a state requests federal enforcement; a national legal precedent is involved; or there is a violation of a federal order or consent decree.

## Areas to Watch

*Federal Agencies.* The Administration has established new enforcement priorities that refocus resources among regulated activities and industries. For example, EPA priority areas that might be deemphasized include natural gas extraction/production and water pollution from animal waste. In addition to revising enforcement priorities, there are myriad ways DOJ, EPA, and other agencies might curtail federal enforcement. Deregulatory pressures in enforcement can take different forms, including:

- the initiation of fewer investigations and enforcement actions;
- slower schedules for bringing enforcement actions;
- decreased penalty demands or more relaxed compliance schedules in consent agreements; and
- decreased federal oversight of state permitting and enforcement efforts.

*Agency Discretion.* Agencies and DOJ exercise prosecutorial discretion in **deciding which enforcement cases to pursue with their limited resources** and how to conduct those cases. Relatively few provisions in the major environmental laws have been found to impose a mandatory and enforceable duty to undertake an enforcement action. Agencies also establish written policies that guide their enforcement decisions in specific types of cases. In lawsuits challenging agency enforcement decisions or policies, courts generally apply a presumption in favor of agency discretion, and look to the particular statute to determine whether Congress has constrained that discretion.

Federal agencies also may establish broad priority areas for focusing enforcement resources. EPA, for example, selects “National Enforcement Initiatives” every three years.

### Discussion.

In short, **federal agencies have considerable discretion as to whether and how to pursue enforcement of federal laws.** The Trump Administration is likely to exercise this discretion by **revising the enforcement priorities** within each agency, pursuing a **more limited environmental enforcement role** across federal programs, and **reducing its oversight of states’ efforts to enforce** those programs where states have primacy.

The impacts of weaker federal enforcement would generally be greatest in states with less active enforcement programs and on issues where federal agencies have exclusive or near-exclusive authority to enforce federal requirements (e.g., Department of the Interior regulation of offshore oil and gas development or illegal wildlife trade). Criminal prosecutions could be affected significantly by a smaller federal presence, given the prominent federal role in that area.

### Opportunities for Public Engagement.

Some **federal laws allow the public to review and comment on the proposed resolution of an enforcement matter**—e.g., the Clean Water Act requires public notice and an opportunity to comment on civil penalty orders, while RCRA (the federal solid waste law) requires notice and comment and an opportunity for a public meeting on proposed settlements.

More generally, DOJ has issued by rule its formal policy of providing the public an opportunity to comment on a proposed consent decree before judgment is entered by the court. The **public may also have an opportunity for input on an agency’s proposed enforcement priorities.** For example, EPA took public comment and solicited feedback from stakeholders prior to finalizing its 2017-2019 National Enforcement Initiatives.

*Congress.* Congress might also seek to weaken enforcement generally by continuing to cut federal agency budgets and staff ([see Chapter 10](#)), or by enacting substantive legislation—e.g., to curtail existing enforcement authorities or limit the role of citizens in enforcement. For example, H.R. 732 (the “Stop Settlement Slush Funds Act”), passed by the House in October, would limit the use in settlement agreements of SEPs and other payments by defendants that do not “directly remed[y] actual harm” caused by the defendant. Another House bill, H.R. 985 (“Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act”), would add new barriers to class action suits in federal court and to federal multi-district litigation.

**Most major federal environmental laws authorize citizens to bring suit to enforce the laws themselves where the government has failed to take action.** In addition, under the Administrative Procedure Act, citizens are generally authorized to bring suit against the federal government to challenge agency actions that are procedurally or substantively unlawful. Citizen enforcement can be expected to increase in the event of a decrease in government enforcement. Where federal or state government action has been initiated, citizens or environmental groups also may be able to intervene as a party and play a direct role in pursuing the violations, including involvement in settlement negotiations.

**Action Areas to Watch.** *Federal Agencies.* Agencies can change their approach to enforcement directly through written or informal policies.

In December 2017, with the Senate’s confirmation of Susan Bodine, EPA filled its top enforcement position. The agency’s draft Strategic Plan for FY 2018-2022, issued in October, states: “EPA’s enforcement priorities remain focused on cleaning up hazardous waste sites and addressing the most significant violations consistent with EPA’s statutory authorities.” EPA will likely revisit the National Enforcement Initiatives to refocus resources among regulated activities and industries.

**Current priority areas that might be deemphasized include natural gas extraction/production and water pollution from animal waste.**

The Department of Justice issued a policy in June that **raised concerns about the continuing use of supplemental environmental projects (SEPs), a mechanism where polluters pay** some settlement funds to a third party to carry out environmental remediation or conservation work. The June 5, 2017, [Memorandum](#) from the Attorney General prohibits, in civil and criminal cases litigated under the direction of the Attorney General, settlement payments to nongovernmental third parties unless expressly authorized by statute or unless the payment “directly remedies the harm that is sought to be redressed.” On January 9, 2018, DOJ provided guidance on implementing the new policy. The Acting Assistant Attorney General issued a [Memorandum](#) establishing that the policy does not prohibit the use of SEPs if the project is consistent with EPA’s SEP policy, and offering examples of allowable third-party payments in environmental cases.

Shortly after issuing the June 5 Memorandum, DOJ changed the terms of a court-entered consent decree in a Clean Air Act case that the Obama Administration brought against Harley-Davidson Motor Co. The [substitute decree](#) filed by DOJ is identical to the [original settlement](#) terms except that it *removes* a requirement for the company to carry out a \$3 million penalty mitigation project to reduce air emissions from woodstoves. On January 31, 2018, several states filed an amicus brief asking the court to reject the proposed consent decree and reinstate the mitigation project.

DOJ also recently addressed the use of agency guidance documents in future affirmative civil enforcement (ACE) cases. In a January 25, 2018, [Memorandum](#), DOJ’s Associate Attorney General stated that DOJ litigators “may not use noncompliance with guidance documents as a basis of proving violations of applicable law in ACE cases,” and noted that a party’s failure “to comply with agency guidance . . . does not mean that the party violated [the] underlying legal requirements....” It remains to be seen whether the brief Memorandum signals a shift in enforcement practice for EPA and other agencies.

Another way that agencies might change their approach to enforcement is to change the legal interpretation of what constitutes a prosecutable violation. In December 2017, the Department of the Interior in [Solicitor's Opinion M-37050](#) changed a long-standing interpretation of the Migratory Bird Treaty Act to determine that a person cannot be prosecuted for violating this law unless the person (including an oil company, mining company, or timber company) engaged in the “intentional” killing of migratory birds. This redefinition of an element of the criminal offense is a significant change from prior practice.

In addition to developing new policies and priorities, **there are myriad ways DOJ, EPA, and other agencies might curtail federal enforcement.** Deregulatory pressures in enforcement can take different forms, including:

- the initiation of fewer investigations and actions;
- slower schedules for bringing enforcement actions;
- decreased penalty demands or more relaxed compliance schedules in consent agreements; and
- decreased federal oversight of state permitting and enforcement efforts.

The Administration might also advance a less aggressive approach to enforcement through reduction in agency staff or through reorganization of enforcement responsibilities within the agency. Federal agencies might reduce their funding and technical assistance to the states, making it more difficult for states to fill enforcement gaps. The Administration might also change course on federal agencies’ efforts to integrate environmental justice considerations into enforcement and other regulatory actions ([see Chapter 13](#)).

*Congress.* **Congress might seek to weaken enforcement generally by continuing to cut federal agency budgets and staff** ([see Chapter 10](#)), or **by enacting substantive legislation—e.g., to curtail existing enforcement authorities or limit the role of citizens in enforcement.** For example, H.R. 732 (the “Stop Settlement Slush Funds Act”), which was passed in the House in October and is pending in the Senate, would limit the use in settlement agreements of SEPs and other payments by defendants that do not “directly remed[y] actual harm” caused by the defendant.

Following are other bills introduced in 2017 that would affect the ability of citizens and public interest groups to directly enforce environmental laws or to ensure that federal agencies are fulfilling their legal obligations:

- H.R. 3131 (Endangered Species Litigation Reasonableness Act), introduced in the House of Representatives on June 29, 2017, would amend the Endangered Species Act to impose new limitations on attorney fees in cases brought under the Endangered Species Act (ESA). It does so by subjecting fees under the ESA to the Equal Access to Justice Act, which imposes several limits on fees paid by the United States government.
- H.R. 985 (“Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act”) would add new barriers to class action suits in federal court and to federal multi-district litigation—two different procedural pathways for grouping the claims of individual plaintiffs. The changes to the class action process include raising the bar for class certification and delaying or capping fees for class counsel. The bill was passed by the House on March 9, 2017, and is pending before the Senate.

- H.R. 720 and S. 237 (The “Lawsuit Abuse Reduction Act”) would modify the Federal Rules of Civil Procedure by making sanctions for “frivolous” lawsuits mandatory rather than a tool that can be used at the discretion of the district court judge. Under this bill, sanctions must include reimbursement of all reasonable expenses due to the violation necessitating the sanctions; the sanctions may also address case-specific consequences and the levying of additional penalties for deterrence purposes. The bill would also make it impossible for a party to avoid sanctions by withdrawing the objectionable claim or other action within 21 days, as can be done under the present rules. The bill was passed by the House on March 10, 2017, and is pending before the Senate.
- H.R. 2936 (The “Resilient Federal Forests Act of 2017”) would prohibit the award of legal fees to plaintiffs challenging forest management activities, defined as any “project or activity carried out . . . on National Forest System lands or public lands consistent with the forest plan covering the lands.” The measure also would set time limitations for preliminary injunctive relief and provide the U.S. Departments of Agriculture (National Forest System) and Interior (public lands) discretion to subject challenged forest management activities to binding arbitration. The bill was passed by the House on November 11 and is pending before the Senate.

# Cutting Funding for Environmental Protection

Congress has broad authority to set funding levels for agencies and to determine how those funds are spent. The executive branch also plays a role in putting forth budget proposals and implementing appropriations and other budget legislation. The complexity of the federal budget process makes specific outcomes difficult to predict, but it is **likely that the coming years will see reductions in overall environmental agency budgets**, as well as cuts to specific environmental programs and activities.

## Process.

Congress' authority over the federal budget—the “power of the purse”—is provided in Article I of the U.S. Constitution. A number of federal laws govern how Congress implements this authority, including the 1974 Congressional Budget Act, which established the framework for the federal budget process in effect today. The [Congressional Research Service](#) characterizes federal budgeting as an “enormously complex” process that involves “dozens of subprocesses, countless rules and procedures, [and] . . . millions of work hours each year.”

Key elements include **authorizing legislation**, which **creates or modifies federal programs and activities**; and **appropriations legislation**, which **provides the funds for those programs**.

Below is a brief summary of the main procedural components expected to be followed in appropriating agency funds each fiscal year.

*President's Budget.* The president submits a budget to Congress that is non-binding but that puts forth the Executive's proposals and requests for funding levels and policy changes. Although the budget is supposed to be submitted by the first Monday in February, in transition years it is not unusual for the president to submit a budget outline in that month and a fuller proposal later in the spring. In May 2017, the White House submitted to Congress its [Budget for Fiscal Year 2018](#) (October 1, 2017 – September 30, 2018). On February 12, 2018, the White House submitted its [Budget for Fiscal Year 2019](#) (with Addendum).

*Congressional Budget Resolution.* Under the Congressional Budget Act, the House and Senate develop a **joint budget resolution** by April 15, which **sets both aggregate amounts** (total revenues, total new budget authority/outlays, surplus/deficit, and debt limit) and **spending levels** for each functional category in the budget (Natural Resources and Environment, Energy, Health, Transportation, etc. ). The **budget resolution does not include amounts for specific programs**,

## Areas to Watch

*Agency Budgets.* FY 2018 appropriations bills are currently being drafted to implement the increased federal spending levels established by the Bipartisan Budget Act, signed into law on February 9, 2018. Prior to the budget deal, both houses of Congress had been considering appropriations bills that reduced environmental spending, but by far less than proposed by the president. Those bills included an array of anti-environmental riders.

Once FY 2018 appropriations legislation is enacted, Congress will begin the FY 2019 appropriations process.

but accompanying reports may include non-binding assumptions about major programs. **Budget resolutions are not legislation, and thus do not require presidential action**, can pass with a simple majority, and are not subject to the filibuster.

*Appropriations Legislation.* Funding for discretionary programs, including most environmental programs, is provided through annual appropriations bills. The House and Senate Appropriations Committees divide the total allocation established in the budget resolution among 12 subcommittees, which in turn develop **12 appropriations bills** (including a bill for “Interior, Environment, and Related Agencies”) that **determine funding levels for specific agencies and programs**. In addition to regular appropriations acts, Congress often adopts supplemental appropriations acts to meet needs that arise during the fiscal year. It has become increasingly common for **appropriations bills to target specific programs and activities for elimination** by attaching “riders” that prohibit an agency from using funds to take certain actions.

Like other legislation, both houses must pass the same version of an appropriations bill before it is sent to the president for approval. If Congress fails to act to provide funding by the start of the fiscal year (October 1), most federal operations are subject to shutdown. To avoid shutting down the government, Congress has resorted to continuing resolutions (CRs) to temporarily fund government operations, typically at existing levels. It is possible (but less likely) for a CR to be stopped by a filibuster or to include riders addressing contentious policy issues.

*Budget Reconciliation.* **Budget reconciliation** is an optional process that has become a **powerful and commonly used element of federal budgeting**. Congress may enact reconciliation legislation that changes current law to bring revenue and spending in line with the budget resolution (which itself includes reconciliation instructions). **Reconciliation is used mainly to change “mandatory spending”** (other than Social Security), whereas the **appropriations process affects discretionary spending**. Omnibus budget reconciliation bills are not subject to filibuster in the Senate and are considered under an expedited process that places limits on amendments and debate.



### Discussion.

The outcome of the federal budget process is determined by an array of political interactions and calculations among and within the White House, House of Representatives, and Senate. Generally, the budget process might:

- reduce an agency’s overall appropriation,
- reduce or eliminate funding for certain programs, and
- prohibit specific agency activities.

All of these elements can be seen in the **president’s proposed budgets for FY 2018 and FY 2019, which include deep cuts to environmental programs**. For example, the budgets would reduce EPA’s overall funding by 31% (FY 2018) and 23% (FY 2019), and cut the agency’s staffing by around 25% and 20% from FY 2017 enacted budget levels. The budgets include elimination of dozens of individual EPA programs, along with steep cuts to categorical grants to states and tribes, science and technology activities, enforcement, and other areas.



Were such **cuts made to EPA funding**, there would likely be **significant impacts on environmental protection programs** around the country, including the timeliness and integrity of the various permit, license, and approval decisions needed to support commercial and development activities.

Thus far in FY 2018, however, the federal government has operated under a series of continuing resolutions that have maintained existing agency funding levels while Congress develops appropriations bills. **The spending bills put forward to date have varied significantly from the president's FY 2018 request**, both in terms of overall agency funding levels and in continuing funding for specific environmental and other programs targeted for elimination by the Administration.

On February 9, **Congress passed the [Bipartisan Budget Act of 2018](#), setting new total federal spending levels for FY 2018 and 2019**. In addition to lifting the debt limit for one year, the Act increases two-year spending caps for military and non-military programs by about \$300 billion, including an increase for FY 2018 non-defense spending of more than \$60 billion. The Act **temporarily continues overall funding for federal agencies at existing levels through March 23**, to enable Congress to write appropriations bills to allocate the total funding among agencies and programs through September 30.

Within the constraints ultimately established by Congress, individual agencies exercise discretion in implementing their assigned budgets and use internal budgeting decisions to achieve the Administration's policy goals. Agency managers could:

- cut or eliminate programs,
- shift staff from one program to another, or
- reduce staff by failing to fill vacancies or (less commonly) by implementing layoffs through reductions in force (RIFs).

The Administration took action along these lines with the March 2017 issuance of [Executive Order 13781](#) ("Comprehensive Plan for Reorganizing the Executive Branch) and subsequent [OMB guidance](#) implementing the Order ("Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce.")

The OMB guidance ends a federal hiring freeze, but directs agencies to start bringing their workforce size and activities in line with the president's FY 2018 budget proposal. It also **required agencies to develop long-term strategies for reducing the size of their workforce**, to feed into proposals for the FY 2019 budget. An [OMB Memo](#) issued on July 7, 2017, directed agencies to submit with their FY 2019 budget requests workforce plans that "include proposals in four categories: eliminate activities; restructure or merge; improve organizational efficiency and effectiveness; and workforce management." The memo encourages "bold reform or reorganization proposals that have the potential to dramatically improve effectiveness and efficiency of government operations."

EPA has taken steps to implement the OMB guidance. In April, the Acting Deputy Administrator issued a Memorandum ("Reforming the Federal Government and Reducing the Workforce") that **kept the hiring freeze in place for EPA and outlined a plan to initiate an early retirement and buyout program**. For these steps and for any possible future reductions in force, there are rules and procedures that must be followed.

 Opportunities for Public Engagement.

The primary action by members of the public and citizen groups would be to seek to influence voting by members of Congress on budget bills.

**Action Areas to Watch.** FY 2018 appropriations bills are currently being drafted to implement the increased federal spending levels established by the Bipartisan Budget Act, signed into law on February 9, 2018.

Appropriations bills that had been under consideration prior to February's budget deal would have reduced EPA and other agency budgets, though not nearly to the extent requested by the president. For example, the [Interior and Environment](#) spending bill approved by the House Appropriations Committee on July 11, 2017, included a cut to EPA's budget of around 6.5% from FY 2017 levels, with some programs subject to sharper cuts. The Senate Appropriations Committee released an [Interior and Environment](#) bill in November that included a decrease in EPA's FY 2018 budget of less than 2% from 2017 levels.

These appropriations bills also included a wide array of [anti-environmental riders](#), some of which aligned with regulatory rollbacks already initiated by the Administration. The targets of the riders ranged from repeal of the 2015 Clean Water ("WOTUS") Rule ([see Chapter 8](#)) to prohibiting specific actions under the Endangered Species Act and requiring federal agencies to treat forest biomass as carbon-neutral. Over the past eight years, the vast majority of proposed riders were defeated by the threat of presidential veto. The Trump Administration seems far less likely to serve as a check on riders of this kind.

Once Congress has completed the appropriations process for FY 2018, it will turn to developing appropriations bills for FY 2019.

## CHAPTER 11: Preventing States From Enacting and Enforcing Their Own Laws

The Republican Party Platform for the 2016 election “encourage[d] states to reinvigorate their traditional role as the laboratories of democracy, propelling the nation forward through local and state innovation.” Even so, **the emphasis** of the Trump Administration and Congress **on deregulation raises questions about federal action that could preempt state environmental policies.** (Not discussed in this chapter is the issue of state preemption of *local* environmental regulations, which is governed by state constitutions and laws.)

### Background.

Federal preemption of state law, displacing or barring state authority, has its foundation in constitutional provisions that establish our system of shared powers.

*The Spheres of Federal and State Authority.* The Tenth Amendment to the Constitution, which reserves to the states all powers not delegated to the federal government or specifically prohibited to the states, confirms states’ general “police power” to protect health, safety, and welfare. In contrast, the federal government may only act within the powers enumerated in the Constitution. The **primary source of the federal government’s broad authority over environmental matters is the Commerce Clause** (Article I, Section 8, clause 3), which gives Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” Thus, **both the federal government and the states have authority to protect the environment.**

*The Supremacy of Federal Law.* The Constitution’s Supremacy Clause (Article VI, clause 2) addresses the relationship between federal and state laws in areas of shared authority such as environmental protection: “The Constitution, and the Laws of the United States . . . and all Treaties made . . . shall be the supreme law of the land . . .” Thus, **federal law may displace state (and local) law where Congress is acting within the sphere of its enumerated powers.** Preemption occurs in three ways:

- First, “express” preemption exists when a federal statute includes provisions that explicitly preempt state law.
- Second, where a federal law does not explicitly address preemption, “conflict preemption” may be implied if the state law conflicts with (or impedes implementation of) the federal law.

### Areas to Watch

*Agency Denial of State Preemption Waivers.* The most highly publicized preemption issue involves Clean Air Act (CAA) emissions standards for new motor vehicles. The CAA generally preempts states from establishing their own standards, but the Act specifically allows California to request a waiver to enforce its own more stringent standards. When the waiver is granted, as it typically has been, other states also may adopt California’s standards. California has been granted a waiver for the vehicle emissions standards it adopted through model year 2025; those standards are consistent with national standards that were adopted by the Obama Administration following negotiations with California and automakers. EPA is currently reconsidering the national standards.

*Federal Agency Regulations and Weak Preemption.* Actions by the Administration to delay or weaken new regulations could result in “weak preemption” if the relevant authorizing statute

- Third, “field preemption” is another form of implied preemption that may arise where federal law seeks to occupy a given field to the exclusion of state law.

## Process.

The enactment of a federal law is the starting point for preemption analysis. Federal agencies may also address preemption through their regulations applying federal laws. Ultimately, it is the **courts that determine whether a specific state law is preempted**.

*Legislation.* Congress can act to preempt state law by addressing preemption in a new federal law or by amending an existing law to include a preemption provision. Express preemption provisions are of three general types:

- First are provisions that preempt states from establishing requirements that are weaker than federal standards, but do allow states to establish more-stringent laws and regulations. The Clean Water Act and RCRA (the federal solid waste law) are prominent examples of this “cooperative federalism” approach.
- A second type of express provision—sometimes called “ceiling preemption”—simply prohibits states from adopting their own laws and regulations on the subject (unless identical to federal law), with or without an exemption for state laws already in place. For example, the federal GMO labeling law enacted in July 2016 establishes a national labeling requirement, but in the process it preempts state laws, including Vermont’s landmark law that went into effect earlier that month.
- Finally, where Congress enacts a broad preemption provision, it may allow states to apply to a federal agency for a waiver of preemption and approval to regulate. The Toxic Substances Control Act (TSCA) legislation enacted in 2016 establishes a detailed framework for preempting state law where EPA has acted to regulate chemicals, but also provides for certain mandatory and discretionary EPA waivers to allow states to regulate in certain situations.

*Regulations and Executive Actions.* The executive branch might seek to advance preemption in a number of ways. Where there is an express statutory preemption provision that authorizes states to seek waivers and approvals to regulate, agencies might deny such requests; those decisions typically are governed by statutory criteria and subject to notice-and-comment requirements. In addition, the president **might guide**

## Areas to Watch

also preempts additional state regulation. Examples include required rulemaking still pending on appliance energy efficiency standards (DOE) and GMO labeling (USDA), as well as EPA rulemaking to implement new TSCA requirements for the prioritization, evaluation, and management of chemicals. A similar result might follow agency repeal or weakening of existing regulations ([see Chapter 8](#)) or congressional rejection of recently-adopted agency rules through the Congressional Review Act ([see Chapter 3](#)).

*New Federal Legislation.* As the 2016 debates over TSCA and federal GMO labeling showed, industry often turns to Congress for relief from potentially stronger state standards. Preemption provisions could emerge in new federal legislation in any number of areas. A House bill introduced in January 2017, the Energy Efficiency Free Market Act of 2017, would repeal existing federal appliance efficiency standards and add a blanket state preemption provision.

*Revoking or Revising Executive Orders and Memoranda.* The president might seek to establish a new approach to preemption by repealing or revising existing executive orders addressing preemption ([see Chapter 1](#)).

**the executive branch’s approach to preemption by revoking, modifying, or issuing executive orders and presidential memoranda**, both of which have the force of law if they exercise presidential powers granted by the Constitution or delegated by Congress. ([see Chapter 1.](#))

Federal **agencies have in the past sought to advance preemption even in the absence of express statutory provisions**, for example as part of a regulation’s preamble, a descriptive statement that is not subject to notice and comment. Concerns over such practices led Congress in 2008 to prohibit the Consumer Product Safety Commission from attempting to limit, expand, or modify the preemption provisions of the laws it administers.

President Obama’s 2009 Presidential Memorandum titled “Preemption” was also a response to prior agency actions taken “without explicit preemption by the Congress or an otherwise sufficient basis under applicable legal principles.” The Memorandum stated the Obama Administration’s policy that “preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption,” and specifically eliminated the process of preemption by regulatory preamble.

*Court Challenges to State Laws and Regulation.* It is ultimately up to the **courts to decide whether a state statute or regulation (or common-law tort scheme) is partially or wholly preempted**. Litigation raising preemption claims may arise in a number of ways: where the federal government sues a state to challenge a particular state law; where a private party affected by a state law sues the state, claiming that the law is preempted; or where preemption is offered as a defense by a regulated entity in a private suit. In cases brought by private plaintiffs, federal agencies (via the Department of Justice) might choose to weigh in on the preemption issue by filing an amicus brief.

In deciding preemption claims, courts generally apply a presumption *against* preemption where the federal law addresses an area that historically has been subject to states’ police power. There is no single test or formula for this inquiry, and courts’ decisions have been neither uniform nor entirely predictable. In general, **courts focus on the statutory language and scheme in deciding whether and to what extent Congress intended to preempt the state law** in question.

## Discussion.

The extent to which actions of the Trump Administration and Congress will impede state efforts to fill in gaps in federal protections remains to be seen. Though broad displacement of state environmental authority may be unlikely given the history of state primacy in environmental protection, Congress, the president, and federal agencies might nonetheless attempt **preemption of state action as part of a strategy for advancing certain environmental priorities**.

New or amended federal laws that are enacted under Congress’ broad commerce authority and that include express preemption provisions would pose a considerable obstacle to state regulation. Such laws would be especially problematic were they to create weak federal standards and requirements (“weak preemption”). Congressional action might also result in “field preemption” if laws are enacted without express preemption provisions, but are nonetheless seen as “displacing” state regulations. The extent to which **a state policy is preempted or displaced by a new or amended federal law would likely be tested in court** and subject to judicial interpretation.

## Opportunities for Public Engagement.

On the legislative front, the primary opportunity for action by citizens, environmental organizations, or others is through advocacy related to preemption provisions in new or amended federal laws that would impinge on states' traditional authority to protect health, safety, and welfare. **Notice-and-comment periods for federal rulemaking provide an opportunity for stakeholders to respond** to agency efforts to include preemption language in new rules (especially in the absence of express statutory preemption provisions) or to deny state waiver requests. Litigation over preemption could involve cases brought by states challenging a federal statute, regulation, policy or action, or state defense of lawsuits challenging state regulation as preempted by federal law.

**Action Areas to Watch.** State product regulation policies have been common targets of preemption challenges, based on claims that they create a “patchwork of regulations” that impedes interstate commerce; but legislative, executive, and private-sector preemption challenges to state regulation have arisen on a broad array of other environmental issues as well. Following are prominent examples of potential federal actions that could raise preemption questions in the near term.

*Agency Denial of State Preemption Waivers.* The most highly publicized **preemption issue involves Clean Air Act (CAA) emissions standards for new motor vehicles.** The CAA generally preempts states from establishing their own standards, but the Act specifically allows California to request a waiver to enforce its own more stringent standards. When the waiver is granted, as it typically has been, other states also may adopt California's standards. California has been granted a waiver for the vehicle emissions standards it adopted through model year 2025; those standards are consistent with national standards adopted by the Obama Administration following negotiations with California and automakers.

On March 15, 2017, EPA [announced](#) that it “will **revisit the previous administration's rule that finalized standards to increase fuel economy** to the equivalent of 54.5 mpg for cars and light-duty trucks by Model Year 2025.” On August 10, EPA and the Department of Transportation published a joint [notice](#) requesting comments on reconsideration of those rules, as well as comments on whether the standards for model year 2021 “remain appropriate.” According to the notice, “EPA intends to make a Final Determination regarding the appropriateness of the model year 2022–2025 greenhouse gas standards, and potentially the model year 2021 greenhouse gas standard, no later than April 1, 2018.”

If the federal vehicle emissions standards are weakened, California could enforce its own standards, as could the dozen or so other states—covering around one-third of the U.S. population—that have adopted the California standards.

It is unclear whether EPA will pursue any action to revoke California's current waiver. At his Senate confirmation hearing, EPA Administrator Pruitt suggested that the waiver would be reviewed by the new Administration. During his June 15, 2017, testimony before a House Appropriations subcommittee, the Administrator stated: “The waiver is not currently being reviewed by the EPA.”

The CAA does not explicitly address revocation of an existing waiver. The Act requires that the waiver be granted unless EPA finds that California does not need the standards to meet “compelling and extraordinary conditions,” that its standards and enforcement scheme are inconsistent with the Act, or that California was arbitrary and capricious in determining that its standards are at least as protective as federal standards. Before making a waiver decision, EPA must publish a notice for

a public hearing and written comments. **If EPA does act to withdraw the waiver or deny future waiver requests, California (and other states) can be expected to challenge the decision in court.**

Examples of other laws under which federal agencies may exercise discretion to approve or deny state requests for preemption waivers in coming years include:

- TSCA (regulation of individual chemicals);
- the Consumer Product Safety Act (limits on chemicals in products and other safety standards);
- the Energy Policy and Conservation Act (requirements for energy use, energy efficiency, or water use of residential appliances).

Each statute establishes criteria that agencies must use in deciding state waiver requests.

*New Federal Legislation.* As the 2016 debates over TSCA and federal GMO labeling showed, **industry often turns to Congress for relief from potentially stronger state standards.** Preemption provisions could emerge in new federal legislation in any number of areas. For example, a House bill introduced in January 2017, the Energy Efficiency Free Market Act of 2017 (H.R. 117), would repeal existing federal appliance efficiency standards and add a blanket state preemption provision: “No State or Federal agency may adopt or continue in effect any requirement to comply with a standard for energy conservation or water efficiency with respect to a product.”

*Federal Agency Regulations and Weak Preemption.* Actions by the Administration to **delay or weaken new regulations could result in “weak preemption”** if the relevant authorizing statute also preempts additional state regulation. Examples include required rulemaking that is still pending on appliance energy efficiency standards (DOE) and GMO labeling (USDA), as well as EPA rulemaking governing the agency’s prioritization, evaluation, and management of chemicals pursuant to new TSCA requirements. A similar “weak preemption” result might follow agency repeal or weakening of existing regulations ([see Chapter 8](#)) or congressional rejection of recently-adopted agency rules through the Congressional Review Act ([see Chapter 3](#)).

Anticipating such actions and their potential effects, the California Senate **passed legislation (SB 49) in May that would “ensure no backsliding”** in the event that federal environmental standards are weakened; the bill, which is being considered in the state Assembly, would require state agencies to adopt standards that are at least as stringent as federal standards under an array of federal statutes as of January 1, 2016, or January 1, 2017. Similarly, in May 2017, Vermont enacted H. 411 (Act 42) adopting the federal lighting and appliance energy efficiency standards as of January 19, 2017, if those federal standards are repealed or voided.

*Revoking or Revising Executive Orders and Memoranda.* The president might seek to establish a **new approach to preemption by repealing or revising existing executive orders addressing preemption** ([see Chapter 1](#)). For example, President Clinton’s Executive Order on Federalism (Executive Order 13132, from 1999) establishes policies and criteria agencies must apply when taking action that may involve state preemption. The president might advance preemption by revising that Order to remove existing safeguards or procedural checks on preemption. In addition, the president could revoke and/or replace President Obama’s 2009 Preemption Memorandum.

# Creating New Roadblocks for Future Regulation

Several bills pending in Congress would **add major procedural hurdles for federal agencies issuing new regulations**, as well as constrain agencies' use of scientific data. **Pending legislation also would facilitate Congress' authority to invalidate existing regulations.** If enacted, any of these bills would add structural constraints to federal agencies' ability to regulate in the effort to protect the environment, human health and safety, and the public welfare more broadly.



## Process.

Like most federal legislation, the bills discussed in this chapter would require an affirmative vote from each house of Congress. Passage by the Senate may require overcoming a possible minority filibuster, which would require 60 votes to end debate on the legislation. Once passed by both houses, the bill is then presented to the president for signature; if the president vetoes a bill, it would only become a law if both houses of Congress override the veto with a two-thirds supermajority vote.

Several pieces of the legislation described here were introduced in previous sessions of Congress in the same or similar forms. Most passed the House of Representatives but died in the Senate, under the threat of a filibuster or of a veto from President Obama. Once the White House changed hands, these bills' prospects improved. However, there has been little recent action on most of the bills discussed below.



## Opportunities for Public Engagement.

The primary action for members of the public and advocacy groups would be to seek to influence member voting on these bills. The Senate will be key, because to overcome a filibuster there, 60 votes would be necessary.

**Action Areas to Watch.** *Midnight Rules Relief Act of 2017 (H.R. 21, S. 34).* This bill would **facilitate the future invalidation of agency regulations** under the Congressional Review Act ("CRA," [see Chapter 3.](#)) One key CRA limitation is that a separate disapproval resolution is required for each regulation, which requires a substantial amount of Senate floor time. For regulations promulgated toward the end of the last year of a president's term, the **Midnight Rules Relief Act would allow actions on multiple regulations to be bundled into a single disapproval resolution.**

## Areas to Watch

*Regulatory reform legislation*, including: the Midnight Rules Relief Act, and the REINS Act, which would strengthen congressional review of rulemaking; the Regulatory Accountability Act, adding numerous steps to the regulatory process and abolishing *Chevron* deference; the SCRUB Act, identifying rules for repeal and establishing a regulatory cut-go process (REINS contains a similar concept); and the Regulatory Integrity Act and the GOOD Act, adding more transparency into the regulatory process. There has been little recent action on these measures, which were developed in the context of the prior Administration. The exception is the GOOD Act, which was not introduced until early 2018.

*Legislation on the use of science*, including: the EPA Science Advisory Board Reform Act of 2017, changing board membership and processes; and the Honest and Open New EPA Science Treatment Act of 2017, requiring publication of scientific information on which EPA action is based. The BEST Act imposes similar requirements on administrative agencies more generally.



## Areas to Watch

*New membership on EPA advisory committees, due to a new policy barring any direct recipient of an active agency grant from serving.*

Specifically, any regulations promulgated during the last 60 session days of the Senate or the last 60 legislative days of the House of Representatives during the last year of a presidential term **could be bundled and disapproved** during a window of time at the beginning of the next session of Congress. This change would relax the current constraint imposed by the current CRA, which allows for each resolution requiring up to 10 hours of Senate floor, and **would greatly speed the CRA disapproval process**.

This bill was passed by the House of Representatives on January 4, 2017. It is now pending before the Senate.

*Regulations from the Executive in Need of Scrutiny Act of 2017 (H.R. 26, S. 21) (“REINS Act”).* The **REINS Act encompasses radical changes to the regulatory process** that would make it much more difficult to regulate generally. The following are the primary provisions of the REINS Act.

**First**, for all new regulations, **the bill would implement a “regulatory cut-go requirement.”** Every agency issuing a new rule would be required to “identify a rule or rules that may be amended or repealed to completely offset any annual costs of the new rule to the United States economy.” REINS Act, Sec. 3. The agency would also be required to “make each such repeal or amendment” before the new rule could take effect. *Id.* This requirement resembles—but is not identical to—President Trump’s January 30 Executive Order ([see Chapter 2](#)) that creates a regulatory “budget” and requires two regulations to be repealed for every new regulation. Notably, the provisions of the REINS Act would apply to future administrations, while the new Executive Order could be rescinded by a subsequent president.

**Second**, the REINS Act would create a new process for issuing new “major rules,” defined as those likely to cause:

- an annual cost to the economy of \$100 million or more,
- a major increase in costs or prices, or
- significant “adverse effects on competition, employment, investment, productivity, innovation” or on the ability of American companies to compete with foreign companies.

Under the bill, no major rule could take effect without a congressional resolution explicitly *approving* that rule. This is the inverse of the current CRA process, which permits finalized rules to go into effect unless specifically disapproved by Congress. Moreover, such a resolution could only be passed within the timelines set by the Act; if no resolution were passed within the allowable time frame, the rule could not take effect.

For non-major rules, **the REINS Act retains a slightly modified version of the disapproval process under the CRA**, which currently applies to all rules. Under the Act, there would be a window for Congress to pass disapproval resolutions with respect to individual non-major regulations. Absent congressional disapproval, a non-major regulation would take effect.

**Third**, the **REINS Act establishes a process for congressional review of all rules in effect at the time the legislation is enacted.** This process would occur over 10 years following the Act’s enactment, with one-tenth of existing rules reviewed each year. There is some ambiguity as to

how the legislation's provisions would apply to existing rules. It appears that, **for each set of rules identified each year, Congress can:**

- approve all rules through a single resolution,
- attach conditions to the approval of certain rules, or
- separate certain rules for individual approval or disapproval resolutions.

Notably, any regulation not approved within the 10-year review is deemed not to continue in effect.

The REINS Act was passed by the House of Representatives on January 5, 2017. It is now pending before the Senate.

*Regulatory Accountability Act of 2017 (H.R. 5).* This legislation is an **omnibus bill that would add numerous steps to the regulatory process** across federal agencies. This bill was passed by the House of Representatives on January 11, 2017, and a modified version, S. 951, was introduced in the Senate. Parallel versions of certain titles of this bill also have been introduced in the Senate as stand-alone bills.

- *Title I – Regulatory Accountability Act.* **This title would add numerous obstacles**—by some counts, more than 80—**to the regulatory process.** These include additional analyses and procedures for any “major rule” or “high-impact rule.” In addition, the Act establishes a default requirement to adopt regulations that are “least costly” to the regulated parties, setting aside the rule’s expected benefits. Adopting a rule that is not the “least costly” would require an explicit justification. A stand-alone version of the Regulatory Accountability Act (S. 951) was introduced in the Senate on April 26, 2017. There are significant differences between the Senate bill and Title I of the House omnibus bill: among others, the Senate bill requires agencies to adopt the “most cost-effective” alternative considered rather than the “least costly alternative.”
- *Title II – Separation of Powers Restoration Act.* **This title abolishes Chevron deference,** under which courts are required to defer to agencies’ legal interpretations in certain circumstances. Instead, courts would interpret legal provisions independently, without any deference to agency perspectives. A parallel version of this title was introduced in the Senate (S. 1577) on July 18, 2017, and is now pending.
- *Title III – Small Business Regulatory Flexibility Improvements Act.* **This title strengthens the provisions of the Regulatory Flexibility Act,** which provides protections for small businesses and establishes additional required procedures for rulemaking. Parallel stand-alone versions of this title have been introduced in the Senate (S. 584) and in the House (H.R. 33); both are now pending.
- *Title IV – Require Evaluation Before Implementing Executive Wish Lists Act (or “REVIEW Act”).* **This title postpones the effective date of any “high-impact rule,”** defined as rules that would impose an annual cost of \$1 billion or more, “until the final disposition of all actions seeking judicial review of the rule.” Sec. 402. Given the complexity and pace of litigation for most major regulations, **this could stay a rule’s effectiveness for years.** The legislation could also encourage litigation as a vehicle for postponing the implementation of rules.
- *Title V – All Economic Regulations Are Transparent Act (or “ALERT Act”).* **This title would add multiple additional reporting requirements for each agency** regarding ongoing

rulemakings, including a requirement that the White House's Office of Information and Regulatory Affairs post on the Internet information regarding individual rules. The bill also would impose a six-month delay after the posting of that information before any rule could become effective. A stand-alone version of this title has been introduced in the House (H.R. 75) and is now pending.

- *Title VI – Providing Accountability Through Transparency Act.* **This title requires each agency to include the internet address for a 100-word summary of a proposed rule,** to be posted on regulations.gov, in any notice of proposed rulemaking and in the docket for the proposed rule. (Currently, notices regarding rulemakings are already required to include a brief summary of the rule, see 1 C.F.R. §18.12 (2015)). Parallel standalone versions of this title have been introduced in the Senate (S. 577) and in the House (H.R. 77); both are now pending.

*Searching for and Cutting Regulations That Are Unnecessarily Burdensome Act (H.R. 998) (“SCRUB Act”).* This bill would **create a commission to identify rules for repeal and implement a regulatory cut-go requirement based on the commission’s report.**

- *Title I – Retrospective Regulatory Review Commission.* **This title establishes a commission with a five-year mission to evaluate rules set out in the Code of Federal Regulations against a set of criteria to determine if they should be repealed** to reduce the cost of regulation to the economy, with a 15 percent cost-reduction goal. One criterion is whether and the extent to which repealing a rule would impact public health. The Commission would classify identified rules for either immediate action to repeal, or as eligible for repeal under Title II’s regulatory cut-go procedures. Agencies must repeal those rules identified, upon enactment of a congressional joint resolution. Similar to the CRA, the SCRUB Act prohibits agencies from reissuing a rule that is substantially the same as one repealed unless specifically authorized by law. An agency must also ensure a new rule does not result in the adverse effects that either initiated the recommendation for repeal, or which are of the kind identified in the criteria used to evaluate rules for repeal.
- *Title II – Regulatory Cut-Go.* **This title requires agencies to offset the costs of any new rule by repealing rule(s) classified by the commission in Title I.**
- *Title III – Retrospective Review of New Rules.* **This title requires agencies, when promulgating a new rule, to include a plan for its review within the subsequent 10 years.**
- *Title IV – Judicial Review.* This title subjects to judicial review agency compliance with the bill’s provisions pertaining to repealing rules under the terms of a joint resolution and the reissuance of rules, the cut-go procedures under Title II, and plans for future review of newly promulgated rules under Title III.

This bill was passed by the House of Representatives on March 1, 2017. It is now pending before the Senate.

*Guidance Out of Darkness Act (H.R. 4809, S. 2296) (“GOOD Act”).* This bill would **require agencies to publish in a single online location nearly all agency statements issued outside the notice-and-comment process.**

Guidance documents are policy statements clarifying existing laws or regulations, and are usually excluded from notice-and-comment rulemaking requirements. The GOOD Act defines the term expansively to include nearly all agency statements issued outside of the notice-and-comment process that are not agency orders. Agencies must also publish online, within 60 days, all guidance issued in the 10-year period prior to the bill being enacted. All rescinded guidance documents must be retained online and marked with the date of rescission.

This bill was introduced in the House of Representatives on January 16, 2018, and in the Senate on January 11, 2018.

*Regulatory Integrity Act (H.R. 1004).* This bill would **require agencies to publish online information regarding pending regulatory activity and associated public communications.**

The bill's goal is to increase transparency of regulatory action, which spans rulemaking, adjudications, policy statements, and guidance. Its provisions mandate that executive agencies publish online a list of pending regulatory actions and associated information, including their status and any other, duplicative actions. Agencies must also publish, within 24 hours of issuance, all public communications pertaining to each regulatory action, and maintain their availability at least five years after such regulatory action is finalized. Public communications are limited to impartial requests for comment or dissemination of information; agencies are prohibited from using public communication to advocate in support or opposition of pending action.

This bill was passed by the House of Representatives on March 2, 2017. It is now pending before the Senate.

*Legislation on the Use of Science.* Several bills are now pending regarding the use of science by EPA and by other agencies.

For example, the EPA Science Advisory Board Reform Act of 2017 (H.R. 1431) would change the membership of EPA's Science Advisory Board and the procedures by which it operates. Among other changes, it would require that "the scientific and technical points of view represented on and the functions to be performed by the Board are *fairly balanced* among the members of the Board." H.R. 1431, Sec. 2 (emphasis added). Similarly, the Act would make it easier for experts tied to regulated entities to serve on the Board. It also constrains the Board's ability to set limits on the time for receiving public comments, potentially creating substantial delays for the Board's work. The House passed this bill on March, 30, 2017, and it is now pending before the Senate.

The Honest and Open New EPA Science Treatment Act of 2017 (H.R. 1430) ("**HONEST Act**") would **require that all scientific and technical information on which an EPA action is based be publicly available before that action is taken.** However, the **bill does not adequately account for the privacy concerns** that make it impossible to release certain data publicly; thus, the Act would appear to prevent EPA from issuing regulations in those circumstances. The bill would also require that the information made public allow "substantial reproduction of research results." H.R. 1430, Sec. 2. This requirement seems likely to create another significant obstacle to environmental regulation because many critical environmental and public health studies may not be reproducible—even though they are considered reliable. The House passed this bill on March 29, 2017, and it is now pending before the Senate.

Looking beyond EPA, the Better Evaluation of Science and Technology Act of 2017 (S. 578) (“BEST Act”) would apply similar principles as those embodied in the HONEST Act to administrative agencies across the federal government.

In addition to these legislative efforts regarding science, it is possible that **similar goals may be pursued through administrative action**. For example, on October 31, EPA Administrator Pruitt issued a directive establishing new policy for EPA’s 22 federal advisory committees. This includes barring any direct recipient of an active agency grant from serving and regularly rotating members. Key committees include the Science Advisory Board (SAB), Clean Air Scientific Advisory Committee (CASAC), and the Board of Scientific Counselors (BOSC). Changes in the membership of these and other advisory boards may be used to achieve changes to agency scientific practices—in addition to any changes that may be mandated by legislation.

# Environmental Justice in the Trump Era

The Trump Administration's actions on numerous fronts dealing with air, water, and soil pollution have significant implications for environmental justice (EJ) communities, defined as low-income, communities of color, and/or indigenous groups. A record year for natural disasters compounded these impacts. Declining EPA resources and a major shift in priorities from regulation and enforcement to deregulation and increased deference to states also present challenges in the environmental justice sphere. New limitations in the federal approach to climate change and resilience planning also have important EJ implications, as climate change is projected to be particularly impactful for already vulnerable communities.

## Background.

- Rooted in the civil rights movement, and important social activism like the 1968 Memphis Sanitation Strike led by Dr. Martin Luther King Jr., many believe environmental justice was born in the 1970s in [Warren County, N.C.](#), where citizens fought back against a PCB dump, culminating in the governor of the state heeding the citizenry's call to prevent expansion of the dump.
- President George H.W. Bush formed the precursor to the current EPA Office of Environmental Justice (OEJ)—the Office of Environmental Equity—in 1992.
- President Bill Clinton's 1994 [Executive Order 12898](#) directed each executive branch agency to promote nondiscrimination in federal programs that affect human health and environment, emphasizing impacts on minority and low-income populations.
- George W. Bush's EPA reaffirmed the commitment to EJ in a 2001 memo.
- President Obama, in a [memo](#) in 2011, expanded federal focus on EJ and Executive Order 12898.
- EPA's OEJ, the National Environmental Justice Advisory Council ([NEJAC](#)), and the Federal Interagency Working Group on Environmental Justice ([IWG](#))—composed of the heads of each federal agency—work together to ensure progress for EJ communities.

## Areas to Watch

- For EJ considerations, the continuing battle over the federal budget bears watching. Other indicators of executive branch priorities include whether agencies update and publish their environmental justice reports for public comment, as well as upcoming appointments.
- The D.C. Circuit, which has final say over most federal regulations, will continue to play a huge role in determining the effectiveness of the Administration's efforts to roll back regulations. States, cities, nonprofits, and corporations are also likely to continue to step up their efforts for EJ communities in the absence of federal action.
- Bipartisan Legislation
  - [S.692 – Water Infrastructure Flexibility Act \(H.R. 1971; H.R. 2355\)](#)
  - [H.R. 4177 – PREPARE Act](#)

- Unlike other areas of environmental law, [environmental justice](#) does not have a centralized location within one major piece of legislation, but is found in many laws, regulations, and agency guidelines throughout the federal government.

## Discussion.

*Disproportionate Impacts.* Recent reports show that communities of color are still disproportionately exposed to pollution and polluting industries, and the [effects of climate change](#). While non-EJ communities have received infrastructure upgrades and mitigation measures, resulting in cleaner air, water, and land, progress in EJ communities continues to lag behind. A recent [report](#) indicates that depression linked to anxiety over environmental quality and the effects of climate change hits low-income communities and women the hardest.

*Natural Disasters.* Coastal communities across the country are experiencing vanishing coastlines, most notably in [Louisiana](#) where Gov. John Bel Edwards has declared “a state of crisis” and litigation continues to compel industry to pay for restoration efforts. Natural disasters across the country made [2017 the most expensive year](#) on record for recovery, amounting to over \$300 billion, according to NOAA; the Congressional Budget Office [determined](#) that by 2075, five times the number of U.S. residents currently at risk from destructive hurricanes will be substantially at risk. The West Coast experienced record wildfires exacerbated by a climate-induced drought, costing billions of dollars for first responders, rebuilding, and lost productivity, followed by unprecedented mudslides that [cost many more lives](#). EJ communities face the worst impacts because they do not have the resources to move or flee, and their protective infrastructure is often inadequate.

Given the fact that hazardous sites are most likely to be located in EJ communities, these communities bear the brunt of the harm when disasters strike. With over [2,500 sites](#) managing toxic chemicals in flood-prone areas nationwide, and [327 Superfund sites](#) in floodplains, the risks for adjacent neighborhoods are increasing. Florida, Houston, and Puerto Rico saw storm damage to Superfund sites, landfills, coal ash and mine tailing deposits, storage tanks, and retention ponds, leading to further contamination of areas.<sup>1</sup> The federal government has yet to

1. SkyTruth [Spill Tracker](#) has been keeping track of these sites online.

## Areas to Watch

- [H.R. 1675—National Landslide Preparedness Act](#)

### EJ Legal Documents

- [Plan EJ 2014 Legal Tools \(EPA 2014\)](#)
- [Opportunities for Advancing Environmental Justice \(ELI 2001\)](#)
- [Charles Lee, \*Toxic Waste and Race in the United States\* \(1987\)](#)
- [Charles Lee, Vernice Miller-Travis, Isaiah Madison, \*The Principles of Environmental Justice\* \(1992\)](#)

### EJ Resources

- [EJSCREEN](#)
- [NPL List](#)
- [CA Envirostor](#)

### Developments That Advance Environmental Justice

- Environmental Justice Act of 2017 introduced in both houses ([S. 1996](#); [H.R. 4114](#)).
- Abrams Environmental Law Clinic at University of Chicago Law School obtained a major [settlement](#) against U.S. Steel for polluting waterways in Indiana.
- EJ Legislation passed in:
  - [Connecticut](#)
  - [Florida](#)
  - [Hawaii](#)

establish a plan for addressing the risks these disasters pose to surrounding communities.

*Federal Budget* ([see also Chapter 10](#)). In President Trump’s recent Office of Management and Budget (OMB) release of [An American Budget: Fiscal Year 2019](#), EPA would receive **a proposed 23.2% cut, totaling a potential \$2.6 billion reduction.**

A year ago, President Trump’s proposed FY 2018 budget called for a similar cut in EPA funding, including eliminating OEJ. The budget passed out of the House Subcommittee on Interior and Environment included less-drastic cuts to EPA than the White House proposal, but still included a reduction of 6.6%, or \$528 million.<sup>2</sup> In the House budget, OEJ was to survive, but would suffer a budget cut of over \$1 million. The House called for reductions in funding for enforcement ([see Chapter 9](#)) and programs around clean air, clean water, and lead hazard reduction. That budget also would have cut millions from EPA watersheds programs.

The Senate Subcommittee held a hearing on the EPA budget, and proposed a total reduction of \$149.5 million, an even [less-drastic cut](#) to the FY 2017 total. **Subsequently, on March 28, 2018, the Consolidated Appropriations Act was signed into law**, after Congress eliminated nearly all previously proposed budget cuts and extended or increased previous funding levels across the federal government.

*Executive Orders* ([see also Chapter 1](#)). [EO 13766](#) on “Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects” attempts to shorten the environmental impact assessment process ([see Chapter 4](#)). The **EJ implications of a truncated review process could be significant** if projects do not adequately manage risk or address the particular needs of communities. If expedited approvals result in poorly planned projects that threaten damages to person or property, citizen suits by communities demanding full NEPA compliance will increase.

[EO 13795](#) moved to abolish safety requirements placed on offshore drilling after the 2010 BP Gulf of Mexico oil spill, in order to start “the process of opening offshore areas” to energy exploration ([see Chapter 6](#)). A specific **EJ concern is potential revocation of the [Well Control Rule](#)**, which was promulgated to reduce the likelihood of the kind of catastrophic equipment failure seen in the Gulf, where vulnerable communities absorbed much of the spill damage and faced catastrophic and ongoing economic, environmental, and health challenges. Notably, the Order **highlights costs to oil and gas producers, and does not speak to impacts to vulnerable coastal communities.**

[EO 13817](#), like many of the Administration’s actions around public lands, seeks to emphasize the exploration and extraction of domestic minerals in order to reduce the financial and national security vulnerabilities of a possible disruption in supply. The EJ consequences of increased mining and resource extraction lie primarily in the possibility of land, water, and air contamination caused by typical mining processes. While the Order does address the vulnerabilities caused by importation of these minerals, it does not mention the impact that increased mineral extractions could have on already-vulnerable communities. ([See Chapter 5](#) for more on the reduction of National Monuments.)

## Areas to Watch

- [Illinois](#)
- [Maryland](#)
- [New York](#)
- [Oregon](#)

---

2. H.R. 3354, 115th Cong. (2017); H.R. Rep. No. 115-238 (2017).



*Pipelines.* The transport of oil and gas across the nation has come into focus in recent years due to the controversial Keystone XL (Keystone) and Dakota Access (DAPL) Pipelines. Due to pressure from protesters, civil rights activists, and Native American tribes, underscored by numerous lawsuits, the Keystone pipeline is [still in limbo](#). Several presidential and secretarial **orders directed federal agencies to fast-track permits related to pipelines, overturning an Obama Administration denial of Keystone** based on risks found during the original environmental review ([see Chapter 4](#)). Due to activism in and out of the courtroom, the **delays have reportedly caused the market opportunity to shrink** and the [developer to reconsider](#).

**DAPL, on the other hand, was completed and operational** by June 1, 2017, despite pushback from the local communities and judicial intervention in the *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* case. There, the court [ordered expanded environmental review](#) and heard arguments to determine whether the pipeline should be shut down during the period of the review. [Most expect](#) the expanded review period to take many months and up to several years. Also noteworthy is the significant divestment movement, with a number of major universities, pension funds, and corporations having [pulled money out](#) of these projects.

**A number of other pipeline projects across the country** are also drawing opposition. In Pennsylvania, the Atlantic Sunrise pipeline currently faces a legal challenge [centered on religious grounds](#); a district court has dismissed the suit for reasons unrelated to the religious claims, and it awaits hearing in appellate court. The Bayou Bridge pipeline in southern Louisiana also faces legal challenges, stemming from [purely environmental](#) as well as [environmental justice](#) issues; a federal judge [has ordered](#) a halt in the pipeline's construction. [See Appendix](#) below for additional information about pipeline construction across the country.

*Climate Justice.* The Administration's **decision to withdraw the United States from the Paris Agreement** ([see Chapter 7](#)) has several long-term EJ implications. The impoverished suffer most from a changing climate, in the form of reduced access to clean water, arable land, and nutrition. Rising temperatures increase the frequency of extreme heat events and flooding, both of which hit lower socioeconomic classes hardest. Those with more wealth can afford air conditioning, flood insurance, or to relocate altogether; the **poor are often forced to stay in dangerous conditions for lack of resources**. EPA recently [lowered its estimate of the social cost of carbon](#) ([see Chapter 1](#)) from \$42 per ton to \$1 per ton, which can be expected to diminish climate mitigation measures and reduce government focus on climate adaptation and resilience efforts to protect EJ and other communities.

Signed in March of 2017, [Executive Order 13783](#) **rescinded six Obama Administration executive orders focused on limiting the worst impacts of climate change and reducing carbon emissions**, as well as a Council on Environmental Quality guidance to federal agencies on how to include climate change in environmental impact statements under NEPA. The absence of federal planning around climate change due to these rescissions raises questions about the resilience and preparedness of EJ communities in the face of a changing climate.

In Oregon, a collection of environmental activists and individual youth filed a lawsuit in 2015 against the United States, alleging that the federal government had violated a public trust by not taking more decisive action against fossil fuel development and consumption. The suit has overcome numerous standing challenges filed by both the federal government and intervening energy companies at the district court level, and the U.S. Court of Appeals for the Ninth Circuit [has ruled](#) that it may proceed to trial. Similar lawsuits have been filed in [Alaska](#), [California](#), New

England, [New York](#), along with many more suits by environmentalists, citizen advocacy groups, and state attorneys general demanding action to address climate risks and to fund mitigation and adaptation projects.

*Safe Drinking Water.* The ability of state and local governments and public utilities to provide **safe drinking water has become a major national question** as numerous crises have come to light. ([See Appendix.](#)) In 2014, Flint, Michigan, experienced a [drinking water crisis](#) that exposed thousands of residents, including 9,000 children, to dangerous levels of lead and other contaminants. Four years later, Flint officials [still do not recommend](#) drinking unfiltered tap water until water line replacements are complete, and until water consistently tests within legal levels for lead. Administrator Pruitt has commented that “the people of Flint and all Americans deserve a more responsive federal government,” but few initiatives or bills have been introduced relating to this challenge. Although EPA under the Obama Administration [proposed a series of changes](#) to the Lead and Copper Rule, which regulates the type of lines at issue in Flint, the Trump EPA has thus far [delayed the implementation](#) of these changes. Recently, EPA [requested public comment](#) on potential revisions to the rule, signaling that changes may be in motion.

*Environmental Protection Agency.* As discussed throughout, **EPA under Administrator Scott Pruitt has prioritized rolling back, suspending, or delaying Obama-era rules** on the environment. Of the 131 deregulatory initiatives undertaken by the Trump Administration, [43 fell under EPA jurisdiction](#). Many of these rules directly or indirectly affect EJ communities.

Two of Administrator Pruitt’s **most significant moves, rolling back the Clean Water Rule and Clean Power Plan** ([see Chapter 8](#)) have implications for communities already suffering from disproportionate rates of respiratory illness and lack of access to clean water. The Clean Water Rule was intended to provide protection for source waters for over 100 million Americans, [according to an Obama-era EPA study](#). The [Obama Administration claimed](#) that the co-benefits of the Clean Power Plan would have avoided up to 3,600 premature deaths, and led to 90,000 fewer asthma attacks in children.

Administrator Pruitt **also attempted to delay a final Clean Air Act rule on methane** via a 90-day moratorium, later extended to two years, and argued his actions were not subject to court review ([see Chapter 8](#)). In a 2-to-1 decision, the **United States Court of Appeals** for the District of Columbia Circuit [ruled that the agency’s decision was “arbitrary and capricious”](#) and that EPA lacked the authority to block the rule. Methane emissions are greenhouse gases (GHGs) regarded as far more potent than carbon dioxide as a driver of climate change. Methane also is an asphyxiant that can contribute to respiratory and other health issues for communities downwind of operations. EPA has likewise moved to slow rules concerning ozone, indoor radon, auto emissions, and other air pollutants, and issued a [guidance memo](#) withdrawing the “once in always in” policy for classifying major sources of air pollution.

Superfund, the federal program tasked with managing and remediating the nation’s most toxic sites, is slated for an increase in funding, as Administrator Pruitt has made accelerating remedies and moving sites off the **National Priorities List** (NPL) the cornerstone of his “back to basics” strategy at EPA. He has prioritized brownfield programs, while [increasing his office’s oversight](#) of any Superfund project costing over \$50 million, to “streamline and improve efficiency.” While the reforms and focus on Superfund may advance progress on legacy sites in EJ communities, a number of worries are being expressed, for example, **whether the “efficiency” objective will result in**

**lower cleanup standards** and residual human health risks, and whether the speed imperative will result in some sites being **removed from the NPL** without appropriate and necessary remediation.

Administrator Pruitt created a list of 21 priority Superfund sites for “immediate, intense action” as part of his [Superfund Task Force](#). This has been met with questions within the EJ community about the fate of the remaining sites on the NPL, many of which are located in EJ communities, and whether those sites will also be addressed, or rather will be “**mothballed**,” the industry term for properties that remain fallow and contaminated.

*Chemical Safety.* EPA’s chemical safety program is the preventative counterpart to Superfund, intended to provide assurance to EJ and other communities that chemicals in commerce are safe and not contributing to significant risk scenarios. During the first year of the Trump Administration, EPA faced significant challenges in its implementation of the Toxic Substances Control Act (TSCA), as revised by the Frank R. Lautenberg Chemical Safety for the 21st Century Act.<sup>3</sup> EPA’s initial suite of framework implementation rules (i.e., its prioritization, risk evaluation, and inventory rules) were promulgated in June 2017 and promptly challenged by a number of environmental groups. The litigation over them is currently pending.

EPA also had to address significant changes in the provisions of TSCA governing the Agency’s review and evaluation of new chemicals that manufacturers are introducing into commerce. In contrast to the prior law, the Lautenberg Act’s amendments to TSCA require EPA to make affirmative findings regarding the safety of chemicals within specified time frames from the submission of notifications from manufacturers. EPA has struggled to meet those deadlines, and has recently been working on streamlining measures to eliminate the new chemicals backlog that has emerged. This has produced worries about the potential for shortcuts to be taken in the effort to expedite the process.

With respect to pesticides, one of the Administrator’s most significant decisions was to reverse course on EPA’s proposed action regarding chlorpyrifos, which would have led to a ban of the pesticide. The Administrator’s change in direction is now the subject of a challenge from environmental groups. Also of significance were EPA’s actions on rules promulgated under the previous Administration regarding the certification and training of applicators of restricted use pesticides (the most dangerous chemicals) and worker protection standards. Administrator Pruitt delayed the effective date of the certification and training rule, which was successfully challenged in court by farmworker and health groups. EPA is now in the process of seeking to make modifications to those rules.

*Supplemental Environmental Projects.* Attorney General Jeff Sessions issued a [memorandum](#) in June curtailing the use of certain types of “supplemental environmental projects” (SEPs) ([see Chapter 9](#)). **SEPs allow companies to creatively settle cases** by including environmental projects to offset penalty claims, and EJ communities have often been the beneficiaries. The Sessions memorandum precludes payments to any nongovernmental organization that is not a party to the dispute for purposes of administering SEPs.

Precluding penalty mitigation projects of this kind may mean that defendants will be less likely to fund public health and environmental protection efforts in response to enforcement actions, potentially moving financial resources from on-the-ground EJ projects to government coffers.

---

3. Frank R. Lautenberg Chemical Safety for the 21st Century Act.

Administrator Pruitt also has [voiced concerns about](#) the practice of utilizing SEPs to remedy environmental violations; however, EPA has yet to issue an official stance on their viability.<sup>4</sup>

*Congressional Action.* As discussed in detail in Chapter 3, congressional Republicans and the Administration **rolled back several Obama-era environmental regulations** via the Congressional Review Act (CRA). Two of the rules with EJ implications were the Stream Protection Rule, which [was intended to protect](#) an additional 6,000 miles of streams and 52,000 acres of forest near mining communities over the next two decades, and the Bureau of Land Management’s “Planning 2.0” Rule, designed to empower BLM to more readily address changing conditions on public lands caused by climate change. By contrast, the Senate, by a vote of 51-to-49, [blocked an attempt](#) to use the CRA to **repeal the BLM Waste Prevention Rule**, which restricts methane emissions from drilling operations on public lands.

*Public Lands.* In July of 2017, the Department of the Interior submitted a proposed rule governing hydraulic fracturing on public lands.<sup>5</sup> This **new rule would effectively rescind the safety standards** established by a 2015 Obama Administration rule that intended to protect nearby communities from pollution of drinking water. Overall, Secretary of the Interior Ryan Zinke has prioritized opportunities for the oil and gas industry to drill, frack, and mine on the nation’s public and tribal lands, [moving to speed up permitting](#) and [announcing expansions](#) of areas for development. This has drawn resistance from environmental groups, conservationists, and Native American tribes.

- 
4. The [2015 memorandum](#) updating the Agency’s general SEP policy remains the most recent policy document on the EPA website.
  5. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule, 82 Fed. Reg. 34464 (proposed July 25, 2017) (to be codified at 43 C.F.R. pt. 3160).

## Other Pipelines

Pipeline	Location	Status
Southeast Markets	Alabama, Florida, Georgia	<i>Sierra Club v. Ferc</i> : D.C. Circuit Court of Appeals granted Sierra Club’s appeal in part and remanded for further review by FERC. Court found that FERC failed to adequately address climate change concerns in developing its EIS. However, Court found that FERC adequately addressed EJ concerns in EIS.  <a href="#">Opinion</a>
TransMountain “Northwest”	Alberta and British Columbia, Canada; Washington, USA	<i>Tsleil-Waututh Nation v. Canada (NEB)</i> : Federal Court of Appeal of Canada denied appeal by Tsleil-Waututh Nation to block pipeline.  <a href="#">Opinion</a>
Atlantic Coast	North Carolina, Virginia, West Virginia	Has received FERC approval to start tree-felling in certain regions; has received approval by Army Corps of Engineers.
Atlantic Sunrise	Pennsylvania	<i>Adorers of the Blood of Christ v. FERC</i> : Religious challenge in District Court denied; pending appeal in Third Circuit Court of Appeals.
Rover	Michigan, Ohio, Pennsylvania, West Virginia	ETP granted permission from the Federal Energy Regulatory Commission to resume hydraulic directional drilling on its Rover pipeline project under the Tuscarawas River in Ohio after the company strengthened its plans to monitor for inadvertent returns at the site.
Bayou Bridge	Louisiana	In Louisiana State Court; <i>Pastor Harry Joseph, Sr. v. Louisiana Dep’t of Natural Resources</i>  Faces additional legal challenge by Earthjustice.
Mariner East 2	Ohio, Pennsylvania, West Virginia	Philadelphia Department of Environmental Protection halts Mariner East 2 work amid “egregious” violations.
Mountain Valley	Virginia, West Virginia	Environmentalists suing VA regulators over approval of water permit for natural gas pipeline.
Constitution	New York, Pennsylvania	FERC denied water quality permit for the project, Constitution seeks rehearing or appeal of FERC’s decision.

## Other Water Crises

Location	Status
<a href="#">East Chicago, Indiana</a>	Governor Holcomb declared disaster site: provides East Chicago financial assistance to clean up Superfund site that has forced resident relocations and a school closure; EPA estimates 90% of homes have lead in water lines; U.S. Army Corps of Engineers planning to dispose of contaminated sediment in the city. EPA <a href="#">has put six companies</a> “on the hook” for Superfund cleanup.
<a href="#">North Carolina</a>	North Carolina Department of Environmental Quality states that the Chemours Company leak of GenX into NC drinking water has halted, and the water quality has returned to standards “within state goals.” No federal action.
<a href="#">Pittsburgh, Pennsylvania</a>	After private management company likely caused dangerous levels of lead in the city water system, Pittsburgh took remedial actions. Water <a href="#">now testing just below</a> federal threshold. No federal action.
<a href="#">St. Joseph, Louisiana</a>	After years of having discolored water, St. Joseph received money from the state and replaced its aging pipes after lead was found in the water and the town was declared a public health emergency. Many citizens are struggling to pay increased water rates. No federal action.
<a href="#">Belmont, Michigan</a>	In the 1960s, a footwear company put chemical-laden tannery sludge into unlined trenches at its 76-acre landfill, contaminating local drinking water. Michigan DEQ said that they had never seen such high levels of toxins in a private drinking water well. The company is providing alternate drinking solutions until a cleanup solution is reached. No federal action.

**Administrative Procedure Act (APA)** Governs the procedures that federal agencies must follow to create legally-binding regulations (also known as rules). The APA provides the default framework for judicial review of agency regulations and other actions.

**Antiquities Act of 1906** Grants the president the power to publicly designate federally-owned lands that contain “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest” as protected national monuments.

**Army Corps of Engineers (“the Corps”)** Federal agency within the Department of Defense that oversees and develops a range of public works projects, including dams, canals, and flood prevention infrastructure. The Corps also engages in ecosystem restoration projects and determines whether to issue permits under the Clean Water Act for the dredging and filling of “waters of the United States.”

**Bureau of Safety and Environmental Enforcement (BSEE)** An agency within the Department of the Interior, created in 2012 in response to the *Deepwater Horizon* spill of 2010, that seeks to reduce the human and environmental risks associated with offshore oil and gas production through regulation, engagement with the industry, enforcement, and coordination among related federal programs.

**Clean Air Act (CAA)** The nation’s central law for addressing air pollution. The CAA requires EPA to create emissions standards and pollution-abatement technology standards for mobile and stationary sources of air pollution. EPA enforces the CAA largely through permits issued to stationary sources, such as coal-fired power plants.

**Clean Water Act (CWA)** The nation’s central law for addressing water pollution, which prohibits the discharge of any pollutant from a point source into “navigable waters” without a permit. “Navigable waters” are defined by the CWA as “waters of the United States,” which in turn are defined in regulations of EPA and the U.S. Army Corps of Engineers (and interpreted in a series of Supreme Court cases). The CWA also grants EPA the authority to approve water quality standards for individual bodies of water, and to set effluent guidelines for use in federal and state discharge permits. It also requires private parties to obtain federal permits from the Corps of Engineers before discharging fill material into waters of the United States.

**Congressional Review Act (CRA)** Legislation that allows Congress to use a streamlined procedure to invalidate recently promulgated agency rules, subject to a presidential signature or veto.

**Consumer Product Safety Act (CPSA)** Federal law that established the Consumer Product Safety Commission (CPSC) and authorizes the agency to take action—including issuing safety standards and product bans – to address injury risks from a wide range of consumer products. The law was amended in 2008 by the Consumer Product Safety Improvement Act, which gave the CPSC additional regulatory authorities and established new requirements to ensure the safety of children’s products.

**Council on Environmental Quality (CEQ)** An executive branch office that advises, and helps to coordinate environmental activities among, the federal agencies that administer environmental law. The CEQ focuses on administration of the National Environmental Policy Act.

**Department of Energy (DOE)** Executive branch agency that implements policies addressing nuclear power, fossil fuels, and alternative energy sources. Among other functions, the agency establishes

and implements the National Energy Policy, funds and oversees extensive scientific research programs, and oversees cleanup and legacy management of the nation's nuclear weapons complex.

**Endangered Species Act (ESA)** The nation's central law for the conservation of threatened and endangered species and their habitat. The law prohibits "take" of listed species, and requires that federal agencies engage in consultation with the U.S. Fish & Wildlife Service and the National Oceanic and Atmospheric Administration with respect to federal actions that may result in jeopardy to listed species or adversely modify a critical habitat.

**Energy Policy and Conservation Act (EPCA)** Federal law that established a number of energy-related policies and programs. EPCA directs the Department of Energy to set energy conservation standards for consumer products, authorizes the Strategic Petroleum Reserve, and establishes the Corporate Average Fuel Economy program for vehicles.

**Environmental impact statement (EIS)** Public report prepared by a federal agency that details the effect(s) that an action of the agency will have on the environment. The National Environmental Policy Act, along with regulations of the Council of Environmental Quality, mandates the preparation of an EIS for certain federal actions, and describes what kinds of analysis the statements must include.

**Environmental justice (EJ)** Umbrella term for studying, crafting, and advocating for policies that address the disparate impacts of environmental pollution, along with inequitable access to environmental amenities, suffered by low-income and minority populations. No congressional legislation explicitly addresses EJ, but a patchwork of executive orders, regulations, and agency policy and guidance documents requires the consideration of EJ for certain federal government activities.

**Environmental Protection Agency (EPA)** The principal executive branch agency tasked with implementing federal environmental laws, such as the Clean Air Act and the Clean Water Act. The agency promulgates regulations under its guiding statutes, conducts scientific and policy research, conducts oversight of state programs delegated authority to carry out federal laws, and issues guidance on how the agency may interpret and enforce its statutory mandates.

**Federal Land Policy and Management Act of 1976** Established a mandate for the U.S. Bureau of Land Management (an office within the Department of the Interior) to manage federally-owned lands (for multiple uses), and to identify potential federally-protected wilderness areas, subject to the formal legislative approval of Congress.

**National Environmental Policy Act (NEPA)** Compels federal agencies to consider and analyze the environmental impacts of their proposed projects, identify alternatives, and document those analyses.

**National Oceanic and Atmospheric Administration (NOAA)** Executive branch agency located within the Department of Commerce that focuses on collecting and studying scientific data on Earth's ocean and weather systems, preparation of fisheries management plans, and administration of the Coastal Zone Management Act.

**Office of Environmental Justice (OEJ)** Office within EPA that coordinates the agency's activities relating to environmental justice. The OEJ oversees and manages both the National Environmental Justice Advisory Council and the Federal Interagency Working Group on Environmental Justice.

**Office of Information and Regulatory Affairs (OIRA)** Located within the Office of Management and



Budget, OIRA conducts centralized review of regulations prepared by executive agencies and issues guidance to agencies on compliance with a wide range of statutes and executive orders.

**Outer Continental Shelf Lands Act (OCSLA)** Establishes as federally owned the submerged lands from 3 to 200 miles seaward of the coasts of the United States (the “Outer Continental Shelf” as expanded by the nation’s exclusive economic zone), and establishes planning and standards for leasing and energy development of such lands. OCSLA also grants the president the authority to create moratoria on oil and gas leasing on unleased areas of the Outer Continental Shelf.

**Reductions in force (RIFs)** The process by which federal agencies reduce their number of employees in response to funding shortages, reorganization, lack of work, and other circumstances. Regulations of the Office of Personnel Management (OPM), the agency that manages the civil service, govern how RIFs must be implemented by agencies.

**Resource Conservation and Recovery Act (RCRA)** The primary law governing the generation, transportation, treatment, storage, disposal, and overall handling of hazardous and non-hazardous solid wastes. EPA sets standards for all of these activities, including permits for facilities that treat, store, or dispose of hazardous wastes and for the cleanup and closure of such facilities.

**Supplemental environmental project (SEP)** An environmentally beneficial project that a defendant agrees to undertake as part of a settlement of an enforcement action. SEPs seek to obtain environmental and public health benefits that may not otherwise have occurred in the settlement of the enforcement action.

**Toxic Substances Control Act (TSCA)** The principal federal law governing chemicals management in the United States. TSCA authorizes EPA to screen new chemicals, test existing chemicals, and restrict the use of chemicals that present unreasonable risks. In 2016, TSCA was amended significantly to strengthen EPA authorities and requirements, including new directives for agency review of existing chemicals.

**U.N. Framework Convention on Climate Change (UNFCCC)** The central international treaty for addressing climate change through reductions in greenhouse gas emissions. The treaty itself does not set targets for greenhouse gas emissions, but provides the organizational and procedural mechanisms through which member nations may create and enforce further treaties that set individual, binding emission reductions targets (commonly called “protocols,” such as the Kyoto Protocol).

