

C O M M E N T S

Back to Basics or Slash and Burn? Scott Pruitt's Reign as EPA Administrator

by Bob Sussman

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U.S. Environmental Protection Agency (EPA) Administrator Scott Pruitt describes his philosophy as “back to basics.”¹ This phrase is a sly dig at his predecessors Lisa Jackson and Gina McCarthy for straying from the Agency’s core mission, as well as an implicit promise to return EPA to its roots.

Although Pruitt’s words suggest a renewed focus on the fundamentals of environmental protection, his actions tell a different story. Instead of doubling down on traditional programs safeguarding air, water, and land, Pruitt’s tenure has been defined by an obsessive focus on undoing the legacy of Barack Obama’s EPA, downsizing the Agency’s workforce and budget, repealing rules on the books, weakening EPA’s science capabilities, and scaling back oversight of state programs. As these initiatives unfold, EPA’s ability to maintain core protections and respond to new threats—the bread and butter of EPA’s mission—is rapidly eroding and may suffer irretrievable damage if Pruitt’s policies continue.

EPA has experienced swings of the pendulum before, but none as extreme as this one. Pruitt is well outside the mainstream of previous EPA Administrators of both parties, an outlier who threatens the Agency’s effectiveness more than any challenge it has faced before.

Despite the ebb and flow of environmental policy from one president to the next, the core protections EPA implements have shown remarkable stability and continuity over time. This is because different Administrators, with limited exceptions, have embraced common values and goals and have generally built on and strengthened the work of their predecessors. As a result, as new Agency heads have tackled emerging environmental challenges or improved policies on the books, their efforts have largely endured and

become part of the evolving body of science and law that defines the Agency’s mission.

Pruitt, however, has uprooted the U.S. environmental protection framework by turning this paradigm on its head. Instead of building on the work of his predecessors, he has embarked on an unparalleled effort to undo Obama Administration rules and to suspend their implementation, delaying the environmental benefits they were intended to deliver. Unlike previous EPA Administrators, Pruitt has failed to articulate a vision of future environmental progress, and edicts from the White House have paralyzed EPA’s ability to pursue a forward-looking regulatory agenda. Even routine technical and regulatory tasks have been imperiled by the downsizing of the workforce, loss of critical expertise, and declines in funding. EPA cannot function effectively if its institutional moorings are called into question every four years and the Agency’s main focus is to undo the work of the prior administration rather than to maintain and enhance core protections.

At its root, this deeply destructive approach reflects skepticism and suspicion of the value of environmental regulation, coupled with cynicism about the scientific, legal, and economic tools that have traditionally been the underpinnings of EPA’s programs. Thus, Pruitt is not preserving the “basics” of our environmental protection system, but deconstructing them.

I. The Environmental Policy Consensus

Putting Scott Pruitt in the broader context of U.S. environmental policy since 1970 underscores how radically he has departed from the traditional concept of EPA’s mission.

Today’s environmental protection system is the product of a bipartisan consensus that endured for several decades. This consensus was embodied in a series of comprehensive laws enacted between 1965 and 1996 that passed with large margins in the U.S. Congress, and were signed by presi-

1. Kimberley A. Strassel, *Scott Pruitt's Back-to-Basics Agenda for the EPA*, WALL ST. J., Feb. 17, 2017, <https://www.wsj.com/articles/scott-pruitts-back-to-basics-agenda-for-the-epa-1487375872>.

dents as diverse as Richard Nixon, Jimmy Carter, George H.W. Bush, and Bill Clinton.² These laws have generally stood the test of time and produced a dramatic improvement in U.S. environmental quality. Most Americans value a cleaner environment,³ do not want to turn back the clock, and believe further improvements in environmental quality are necessary.

This record of accomplishment is largely due to the stability and continuity of environmental policy from one presidential administration to the next. With rare exceptions, EPA Administrators have built on the work of their predecessors, retaining regulations on the books and adding new programs in response to changes in scientific understanding and new public concerns. As a result, the floor of basic environmental protections has become progressively stronger and public health improvements have proven durable over time. Tangible measures of progress include the dramatic lowering of blood lead levels in American children,⁴ sharp declines in air pollution and an accompanying reduction in mortality and disease,⁵ the large number of contaminated sites returned to productive use,⁶ recovery of the ozone layer after years of depletion,⁷ and the reappearance of healthy aquatic populations in water bodies previously too polluted for fishing and recreation.⁸

The continuity of environmental policy has served the interests of the key players in the regulatory system. As the frontline implementers of federal environmental laws, states depend on clear and sustained policy direction from EPA for long-term budgeting and priority setting. Industry likewise has a long planning horizon, and relies on a stable regulatory framework to design compliance systems and make investments in pollution control equipment and cleaner processes and products. If EPA regulations were reexamined and eliminated or revised every four years, the result would be chaos and confusion, with states and industry scrambling to keep pace with an ever-changing regulatory landscape. Planning and investment would be paralyzed by the lack of certainty, and the twists and turns of policymaking would inevitably impose unnecessary costs and disruption on the economy.

II. Past Swings of the Pendulum

To be sure, the environmental policy consensus has periodically come under pressure, with internal and external critics of the Agency proposing radical course corrections. The system was severely tested by the brief but stormy tenure of Anne Gorsuch Burford as EPA Administrator in 1981/1982 and the Newt Gingrich “Contract With America” accompanying the Republican takeover of the U.S. House of Representatives in 1994.⁹ But these efforts to pull environmental policy sharply to the right faltered in the face of public opposition and waning support in Congress.

In their aftermath, the pendulum swung decisively back toward the mainstream. William Ruckelshaus, EPA’s first Administrator and a steadfast centrist, was re-appointed by President Ronald Reagan to replace Burford and EPA quickly regained its footing.¹⁰ In the second Clinton term, after the collapse of deregulatory efforts in 1995, Congress enacted stronger laws to regulate pesticides and protect drinking water,¹¹ and a re-empowered EPA under Carol Browner launched several groundbreaking rulemakings to improve air and water quality.

In recent years, as partisan divisions have hardened, calls to dismantle or shrink EPA and limit its authority have become more insistent on the right.¹² Candidate Donald Trump echoed these calls on the campaign trail.¹³ But the movement to gut the Agency has never achieved a critical mass of support, despite the ferocity of the attacks by EPA’s detractors. As a result, no legislation curtailing EPA’s responsibilities or weakening its core statutes has ever reached the president’s desk. Importantly, the only significant environmental law enacted in the past decade—an overhaul of the Toxic Substances Control Act (TSCA) in 2016¹⁴—in fact strengthened EPA’s authority and set stringent new deadlines for evaluating and restricting unsafe chemicals.

Thus, despite growing polarization, the laws defining our environmental policy framework remain securely in

2. Carnegie Mellon University, *Main U.S. Environmental Laws*, http://environ.andrew.cmu.edu/m3/s7/us_laws.shtml (last visited Sept. 20, 2017).

3. Gallup, *Environment*, <http://www.gallup.com/poll/1615/Environment.aspx> (last visited Sept. 20, 2017).

4. *Blood Lead Levels in the U.S. Population 1976-1999*, <https://riversong.files.wordpress.com/2013/05/change-in-blood-levels-us-1976-1999.png> (last visited Sept. 20, 2017).

5. U.S. EPA, *Our Nation’s Air*, <https://gispub.epa.gov/air/trendsreport/2017/> (last visited Sept. 20, 2017).

6. See, e.g., Results Washington, *Clean & Restored Environment—Healthy Lands*, <https://data.results.wa.gov/stat/goals/jwmx-2eqx/mtfw-a334/vh3q-ed6g/view> (last visited Sept. 20, 2017).

7. Gail Sullivan, *Earth’s Ozone Layer Is Recovering*, WASH. POST, Sept. 11, 2014, <https://www.washingtonpost.com/news/morning-mix/wp/2014/09/11/try-to-keep-up-earths-ozone-layer-is-recovering-but-that-is-making-global-warming-worse/>.

8. See, e.g., April Fulton, *They’re Back! Chesapeake Oysters Return to Menus After Rebound*, NPR, Dec. 20, 2013, <http://www.npr.org/sections/thesalt/2013/12/18/255225227/theyre-back-chesapeake-oysters-return-to-menus-after-rebound>.

9. Cally Carswell, *Scott Pruitt Isn’t the First Administrator Hostile to the EPA’s Mission*, HIGH COUNTRY NEWS, Mar. 20, 2017, <http://www.hcn.org/issues/49.5/scott-pruitt-isnt-the-first-administrator-hostile-to-the-epa-mission>; Robert L. Glicksman & Stephen B. Chapman, *Contract With America: Improving Environmental Policy or Destroying Environmental Protection?*, 5 KAN. J.L. & PUB. POL’Y 9 (1996), available at https://www.researchgate.net/publication/29441998_Regulatory_Reform_and_Breach_of_The_Contract_With_America_Improving_Environmental_Policy_or_Destroying_Environmental_Protection.

10. Interview by FRONTLINE With William Ruckelshaus, Former Administrator, U.S. EPA (Sept. 3, 2008), <http://www.pbs.org/wgbh/pages/frontline/poisonedwaters/interviews/ruckelshaus.html>.

11. Food Quality Protection Act, Pub. L. No. 104-170, 110 Stat. 1489 (1996); Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, 110 Stat. 1613.

12. Michael Bastasch, *GOP Bill to Eliminate the EPA Is Literally One Sentence Long*, DAILY CALLER, Feb. 15, 2017, <http://dailycaller.com/2017/02/15/gop-bill-to-eliminate-the-epa-is-literally-one-sentence-long/>.

13. Oliver Milman, *Republican Candidates’ Calls to Scrap EPA Met With Skepticism by Experts*, GUARDIAN, Feb. 26, 2016, <https://www.theguardian.com/environment/2016/feb/26/republican-candidates-donald-trump-eliminate-epa-law-experts>.

14. Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448.

place. Even in the Trump era, with Republicans in control of the Congress and the White House, legislative rollbacks could not command majority support. Ironically, although Pruitt has pledged he will be faithful to the will of Congress, his stewardship of the Agency reflects a radical restructuring of its mission at odds with the long-standing statutory framework he ostensibly seeks to carry out.¹⁵

III. Continuity Among Administrations

The stability of the environmental protection system does not mean that different administrations have proceeded in lockstep. Presidents have their own priorities and approaches to environmental protection and bring their own values and philosophy to EPA's agenda. For example, some administrations have been more aggressive than others in tackling emerging environmental problems like mercury emissions, coal ash disposal, and mountaintop mining. On occasion, controversial programs like air emission permitting for new and modified sources have been revisited and adjusted from one administration to the next.¹⁶ Market-based tools, voluntary programs, and cost-benefit analysis have been ascendant in some administrations but disfavored in others.

Most new Administrators conduct a review of the rules promulgated by the outgoing Agency head,¹⁷ focusing mainly on those rules finalized in the final months before the change in administrations. In limited cases, these reviews have resulted in reconsideration of rules: for example, the George W. Bush EPA sought to rescind the drinking water standard for arsenic adopted by the Clinton EPA, and the Obama EPA proposed to tighten the national ambient air quality standard (NAAQS) for ozone adopted by the Bush EPA (although, in both instances, the new administration decided to leave the predecessor rule in place).¹⁸

But these efforts have been narrow and targeted. The great majority of EPA rules have survived from one administration to the next and in some cases become stronger. Time and again, rules that were initially controversial and hotly debated were embraced by later administrations and successfully implemented, delivering public health benefits that are now taken for granted.

For example:

- One of EPA's landmark public health accomplishments, the phaseout of lead in gasoline,¹⁹ was initiated under President Gerald Ford and carried forward by Presidents Carter and Reagan.
- The elimination of ozone-depleting substances originated under President Carter with a ban on chlorofluorocarbons as aerosol propellants,²⁰ and ultimately culminated in the sweeping Montreal Protocol signed by President Reagan in 1988.²¹
- The George W. Bush EPA implemented the new NAAQS for ozone and particulate matter (PM) promulgated in 1997 by the Clinton EPA,²² significantly reducing disease and mortality linked to these pollutants, and later made the PM NAAQS more stringent.²³
- The Bush EPA also stayed the course on Clinton-era regulations lowering sulfur levels in gasoline and diesel fuel and reducing emissions of PM and nitrogen oxide (NO_x) from heavy-duty vehicles,²⁴ a further step in improving air quality that helped to remove "dirty" diesel trucks from U.S. roads. Building on these regulations, the Bush EPA then adopted similar fuel and emission requirements for other vehicle and engine classes.²⁵
- After the George H.W. Bush EPA championed market-based trading of emission allowances,²⁶ the Clinton EPA pioneered the use of regional trading programs to combat the interstate transport of NO_x and sulfur dioxide (SO₂);²⁷ the regional trading model was adopted and improved through a series of rulemakings during the George W. Bush and

15. Brady Dennis & Chris Mooney, *Pruitt to EPA Employees: "We Don't Have to Choose" Between Jobs and the Environment*, WASH. POST, Feb. 21, 2017, available at <http://www.chicagotribune.com/news/nationworld/politics/ct-epa-pruitt-environment-20170221-story.html>.

16. David Shanks, *Time Again for NSR/PDS Reform?*, Address Before the Missouri Air Compliance Seminar (Mar. 2, 2017), <http://regform.org/wp-content/uploads/2017/02/ShanksD-12-45pm-NSR-PSD-Reform.pdf>.

17. Maev P. Carey, *Can a New Administration Undo a Previous Administration's Regulations?*, CRS INSIGHT, Nov. 21, 2016, available at <https://fas.org/sgp/crs/misc/IN10611.pdf>.

18. Katharine Q. Seelye, *EPA to Adopt Clinton Arsenic Standard*, N.Y. TIMES, Nov. 1, 2001, <http://www.nytimes.com/2001/11/01/us/epa-to-adopt-clinton-arsenic-standard.html>; Juliet Eilperin, *Obama Pulls Back Proposed Smog Standards in Victory for Business*, WASH. POST, Sept. 2, 2011, https://www.washingtonpost.com/national/health-science/obama-pulls-back-proposed-smog-standards-in-victory-for-business/2011/09/02/gIQAisTiwJ_story.html.

19. RICHARD G. NEWELL & KRISTIAN ROGERS, RESOURCES FOR THE FUTURE, *THE U.S. EXPERIENCE WITH THE PHASEDOWN OF LEAD IN GASOLINE* (2003), available at <http://web.mit.edu/ckolstad/www/Newell.pdf>.

20. THOMAS P. NELSON & SHARON L. WEVILL, U.S. EPA, PROJECT SUMMARY: ALTERNATIVE FORMULATIONS TO REDUCE CFC USE IN U.S. EXEMPTED AND EXCLUDED AEROSOL PRODUCTS (1990) (EPA/600/S2-89/061), available at <https://nepis.epa.gov/Exec/QueryPDF.cgi/30003TQ2.PDF?Dockey=30003TQ2.PDF>.

21. The American Presidency Project, *Ronald Reagan—Statement on Signing the Montreal Protocol on Ozone-Depleting Substances*, <http://www.presidency.ucsb.edu/ws/?pid=35639> (last visited Sept. 20, 2017).

22. A.S.L. & Associates, *Original 1997 8-Hour Ozone and PM-2.5 Standards*, <http://www.asl-associates.com/standard.htm> (last visited Sept. 20, 2017).

23. U.S. EPA, *Particulate Matter (PM) Standards—Table of Historical PM NAAQS*, https://www3.epa.gov/ttn/naaqs/standards/pm/s_pm_history.html.

24. Control of Air Pollution From New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements, 66 Fed. Reg. 5002 (Jan. 18, 2001).

25. DieselNet, *Emission Standards—United States—Nonroad Diesel Engines*, <https://www.dieselnets.com/standards/us/nonroad.php> (last visited Sept. 20, 2017).

26. ENVIRONMENTAL STEWARDSHIP: EPA'S FIRST TWO YEARS IN THE BUSH ADMINISTRATION (1991), available at <https://nepis.epa.gov/Exec/QueryPDF.cgi/40000DE6.PDF?Dockey=40000DE6.PDF>.

27. Patricia Ross McCubbin, *Michigan v. EPA: Interstate Ozone Pollution and EPA's "NO_x SIP Call"*, 20 ST. LOUIS U. PUB. L. REV. 47 (2001), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1211180.

Obama Administrations,²⁸ resulting in cumulative emission reductions of millions of tons over nearly two decades.

- The Energy Star program,²⁹ a hugely successful effort to use labeling to create market-based incentives to improve energy efficiency across numerous industrial and consumer products, was a brainchild of the George H.W. Bush EPA that was embraced and strengthened under the next three administrations. The program has reduced energy costs to consumers by billions of dollars, achieved significant emission reductions, and catalyzed widespread innovation in energy-efficiency technologies.³⁰

This continuity between administrations reflects a reluctance to rewind the clock on rules that may not be perfect but represent progress toward shared environmental goals. There are several institutional reasons for this reluctance. Incoming Agency heads want to be forward-looking and focus the Agency's resources on their own agenda rather than a backward-looking reexamination of rules on the books. They also recognize that, despite its limitations, the rulemaking process generally produces credible decisions that may not command universal support but rest on a sound legal and technical foundation and result from a robust exchange of views and information. And they may feel that it is better to rely on judicial review to correct legal and technical errors in previously promulgated rules than to devote time and resources to repealing or revising them—a multi-year process that may easily span all or a substantial part of a president's term in office.

IV. Administrator Pruitt's Assault on Obama-Era Rules

Breaking with his predecessors, Pruitt has embarked on a sweeping effort to block Obama EPA rules unique in the Agency's history. In merely eight months, he has moved to undo, delay, or otherwise undermine more than 30 rules.³¹ Among the rules he has targeted for review are:

- Clean Power Plan (CPP)
- New source performance standards (NSPS) for greenhouse gas (GHG) emissions from steam-electric generating units
- Clean Water Rule or "Waters of the United States" (WOTUS) Rule
- 2016 NSPS for methane and volatile organic compounds (VOCs) emissions from oil and gas operations
- 2012 GHG emissions standards for light-duty vehicles
- Effluent limitation guidelines (ELGs) for steam-electric power generation units
- Disposal and waste management requirements for power plant coal ash residuals
- Farmworker Protection Standard
- Texas Regional Haze Requirements
- National emission standards for hazardous air pollutants (NESHAP) for manufacture of amino/phenolic resins
- Mercury and air toxics standards (MATS)
- Risk Management Plan (RMP) Rule
- Landfill Methane Rule
- Air toxics rules for brick and clay production sector
- Trailer requirements in heavy-duty truck and engine GHG emissions rules
- Certification requirements for pesticide applicators

Collectively, these rules account for most of the regulatory output of the Obama EPA during the president's second term. Thus, rather than presume that rules from an outgoing administration should remain in place absent a compelling reason to change them, Pruitt has established the opposite presumption: rules of his predecessor are inherently suspect and should be replaced or eliminated.

V. The Trump/Pruitt Worldview

Pruitt's attack on the Obama legacy is best understood as the product of several articles of faith that have held sway among vocal EPA detractors for years, but have now been embraced by the president and Pruitt himself. They include:

- A firm belief that the costs of regulation are back-breaking to businesses, responsible for widespread job loss, and a root cause of U.S. economic decline
- Lip service to clean air and water, coupled with deep skepticism that recent environmental standards provide any real benefit to public health or the environment

28. U.S. EPA, CLEAN AIR INTERSTATE RULE: 2009 EMISSION, COMPLIANCE, AND MARKET ANALYSES (2010), available at https://www.epa.gov/sites/production/files/2015-08/documents/cair09_ecm_analyses.pdf; U.S. EPA, *Cross-State Air Pollution Rule—Additional Actions*, <https://www.epa.gov/csapr/cross-state-air-pollution-rule-additional-actions> (last updated July 25, 2017).

29. ENERGY STAR, *ENERGY STAR Overview*, <https://www.energystar.gov/about> (last visited Sept. 20, 2017).

30. U.S. EPA, ENERGY STAR PRODUCTS: 20 YEARS OF HELPING AMERICA SAVE ENERGY, SAVE MONEY, AND PROTECT THE ENVIRONMENT, available at https://www.energystar.gov/ia/products/downloads/ES_Anniv_Book_030712_508compliant_v2.pdf?fd51-9671.

31. Coral Davenport, *Counseled by Industry, Not Staff, E.P.A. Chief Is Off to a Blazing Start*, N.Y. TIMES, July 1, 2017, <https://www.nytimes.com/2017/07/01/us/politics/trump-epa-chief-pruitt-regulations-climate-change.html>.

- Visceral hostility to pro-environment “extremists” and a belief that they have captured EPA career staff and leadership and are using the Agency to advance fringe ideologies
- A perception that EPA is a rogue agency that has persistently exceeded and abused its authority
- An uncritical readiness to accept the claims and demands of lobbyists at face value and cater to their interests
- A cynical view of the conventions of rulemaking and judicial review and a refusal to credit the role of rigorous scientific and economic analysis and peer review in shaping EPA decisionmaking

These beliefs are reflected in the president’s many references to “job-crushing regulations” that are “out of control” and are responsible for “the theft of American prosperity”³²; Steve Bannon’s vow to “deconstruct the administrative state”³³; Pruitt’s assertion that “this past administration didn’t bother with statutes [and] displaced Congress, disregarded the law, and in general said they would act in their own way”³⁴; and his claim that the Obama EPA was not “honest with [the] numbers” it used for scientific assessments and cost-benefit analysis.³⁵

Is there any substance to this dark vision of the U.S. environmental protection system? Sadly, the evidence does not back up the Trump/Pruitt case against EPA.

Numerous studies conclude that the benefits of environmental programs are real and quantifiable, often amounting to billions of dollars in reduced disease and mortality, improved worker productivity, and avoided medical costs.³⁶ The costs of regulation, while not insignificant, represent a small fraction of gross domestic product and a minor contributor to unemployment³⁷; other factors, like high U.S. labor costs, are generally viewed as a much bigger threat to U.S. competitiveness. Overall, many EPA regulations have been shown to deliver benefits that exceed their costs and to stimulate private-sector innovation that helps the United States retain a technological edge.³⁸

Environmental groups are an important constituency for EPA, but do not dictate decisions. Other stakeholders like states and industry have numerous opportunities to present their views, which are often adopted by the Agency. Indeed, EPA has at times been criticized as overly beholden to industry influence.³⁹ While different administrations may have closer ties to some interest groups than others, EPA has a history of seeking to harmonize conflicting views, consistent with legal requirements and the weight of evidence in the record. By contrast, Pruitt has made no pretense of openness to all points of view: he has provided unfettered access to business while shutting out virtually all public health and environmental advocates.⁴⁰

Major EPA regulations have always faced legal challenges, but the Agency’s lawyers and U.S. Department of Justice have been vigilant in grounding decisions in precedent and governing statutes. EPA has lost some cases but courts have upheld the great majority of its rules,⁴¹ evidence that the Agency has operated well within the legal mainstream, not outside the law as claimed by Administrator Pruitt. Indeed, the Agency prevailed in many of the legal challenges filed by Pruitt when he was Oklahoma Attorney General.⁴²

And finally, the combination of peer review and the give-and-take of the rulemaking process provides a critical test of the objectivity and rigor of EPA’s technical and economic analyses,⁴³ with the courts providing additional protection against slipshod or biased work.⁴⁴ To assume that EPA can manipulate law and science to serve political goals, and a new administration with a different political agenda can summarily uproot the rules of its predecessor, is to ignore the many hurdles that must be cleared in the rulemaking process and the time and resources required to create a rulemaking record that will stand up to peer review and judicial scrutiny. As Pruitt will discover, the courts require a legally and factually defensible rationale for withdrawing or modifying rules⁴⁵; standing alone, a

32. Donald Trump, Remarks at Signing of Executive Order to Create Energy Independence (Mar. 28, 2017), <https://www.whitehouse.gov/the-press-office/2017/03/28/remarks-president-trump-signing-executive-order-create-energy>.

33. Z. Byron Wolf, *Steve Bannon Outlines His Plan to “Deconstruct” Washington*, CNN, Feb. 24, 2017, <http://www.cnn.com/2017/02/23/politics/steve-bannon-world-view/index.html>.

34. Strassel, *supra* note 1.

35. *Id.*

36. See, e.g., Hannah Li, *Why Environmental Regulation Is Good for the Economy*, PENN WHARTON PUB. POL’Y INITIATIVE, Nov. 8, 2016, <https://publicpolicy.wharton.upenn.edu/live/news/1545-why-environmental-regulation-is-good-for-the>.

37. Noelle Swan, *How Do Environmental Regulations Affect the Economy? Experts Describe a Nuanced Picture*, AM. ASS’N FOR ADVANCEMENT OF SCI., May 13, 2013, <https://www.aaas.org/news/how-do-environmental-regulations-affect-economy-experts-describe-nuanced-picture>.

38. See, e.g., U.S. EPA OFFICE OF AIR AND RADIATION, *THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020* (2011), available at https://www.epa.gov/sites/production/files/2015-07/documents/fullreport_rev_a.pdf.

39. David Heath & Ronnie Greene, *EPA Contaminated by Conflict of Interest*, PBS, Feb. 13, 2013, <http://www.pbs.org/newshour/multimedia/epa-corporate/>.

40. Eric Lipton & Lisa Friedman, *E.P.A. Chief’s Calendar: A Stream of Industry Meetings and Trips Home*, N.Y. TIMES, Oct. 3, 2017, at A1, available at <https://www.nytimes.com/2017/10/03/us/politics/epa-scott-pruitt-calendar-industries-coal-oil-environmentalists.html>.

41. See, e.g., Memorandum From Avi Garbow, General Counsel, U.S. EPA, to Gina McCarthy, Administrator, U.S. EPA (Jan. 18, 2017) (EPA Clean Air Act Rules Track Record in the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit and the U.S. Supreme Court), <https://blog.epa.gov/blog/wp-content/uploads/2017/01/ObamaAdministrationCourtRecordinSignificantCAACases.pdf>.

42. Jeremy Jacobs, *Pruitt’s Record Mixed in EPA Showdowns*, Dec. 8, 2016, <https://www.eenews.net/stories/1060046900>.

43. U.S. EPA SCIENCE POLICY COUNCIL, U.S. ENVIRONMENTAL PROTECTION AGENCY PEER REVIEW HANDBOOK (3d ed.) (EPA/100/B-06/002), available at https://www.epa.gov/sites/production/files/2015-09/documents/peer_review_handbook_2006_3rd_edition.pdf; Center for Effective Government, *The Players in Rulemaking*, <https://www.foreffectivegov.org/node/3462> (last visited Sept. 20, 2017).

44. Comments, *Developments in the Law: Judicial Review of Agency Rulemaking and Adjudication*, 1982 DUKE L.J. 393 (1982), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2807&context=dlj>.

45. See *Motor Vehicle Mfrs. Ass’n v. State Farm Ins.*, 463 U.S. 29, 13 ELR 20672 (1983).

new administration's desire to impose its political preferences will be insufficient, just as political considerations are irrelevant in judicial review of Obama-era rules now in place. Previous Administrators have understood these constraints and moved cautiously to undo the rules of their predecessors, but the Pruitt EPA has attacked Obama rules with abandon.

VI. Stopping Implementation of Obama Administration Rules

Pruitt's choice of rules to reconsider appears to be a knee-jerk response to long-standing right-wing grievances against EPA and the special pleading of industry lobbyists, rather than the result of careful analysis.⁴⁶ He and his staff have provided little or no public explanation of the deficiencies in these rules that warrant reconsideration, the nature of possible revisions, or the timetable and process for new rulemaking. Maybe Pruitt believes that the hurdles of rulemaking are easily finessed and that his team can improvise legal and policy justifications when the time comes. However, this is unrealistic. Withdrawing or revising the rules Pruitt has targeted will take years, as resources and expertise are consumed by revisiting legal and technical issues that have already been vetted fully through previous rulemakings. The reconsideration process will morph into the main priority of Pruitt's tenure and may remain unfinished by the end of Trump's first term, even without considering legal challenges that drag on for several more years.

It is possible that Pruitt fully understands these realities but does not care because his goal is to stop implementation of Obama Administration rules, not to replace them with better versions. It is telling that Pruitt has proposed lengthy delays of the effective or compliance dates of most of the regulations he plans to reconsider. (Exceptions are the CPP and WOTUS, which were previously stayed by courts.⁴⁷) This would let industry off the hook on compliance—and put environmental benefits on hold—long before there is any assurance that EPA is moving toward new rules that can pass environmental or legal muster. For instance, Pruitt seeks to suspend compliance with portions of the oil and gas NSPS for two years, the RMP Rule by 20 months, and the ELGs for coal-fired power plants indefinitely.⁴⁸ Since the avowed goal of these delays is to protect industry from compliance costs while the rules are

reconsidered and modified, further extensions are likely if reconsideration requires more time.

Pruitt has offered little justification for delaying compliance, beyond relieving industry from regulatory burdens under rules that may be changed. He has made no effort to consider the public health impacts of delay or to evaluate whether these lost benefits outweigh the costs industry will avoid. Nor has he demonstrated that the delayed rules have serious legal or scientific shortcomings that make it likely they would be struck down—a central consideration that courts apply when deciding whether to stay regulations.⁴⁹

VII. Missteps on the Methane NSPS and Ozone

This skewed approach is illustrated by Pruitt's proposal to delay for two years compliance with the 2016 NSPS for oil and gas operations, which would reduce emissions of VOCs and methane. Emissions of VOCs⁵⁰ contribute to ground-level ozone, which can adversely affect the respiratory and cardiac systems. Methane is the second most prevalent GHG emitted in the United States from human activities,⁵¹ and approximately one-third of those emissions comes from oil extraction and the production, transmission, and distribution of natural gas.⁵² Overall, the Obama EPA estimated that the benefits of the NSPS outweighed its costs by at least \$170 million.⁵³

Yet, the EPA proposal to delay compliance with the NSPS ignores the public health and environmental benefits of the rule and the impacts of postponing these benefits. While the delay is estimated to save companies between \$172 million and \$173 million,⁵⁴ these are minuscule costs for an industry with hundreds of billions of dollars in annual revenue. The proposal does not explain why such a modest impact on a huge industry is material or outweighs the lost benefits of delaying compliance. Indeed, at the time the rule was promulgated, the industry itself did not seek a judicial stay.

Rule (May 25, 2017), <https://www.epa.gov/newsreleases/epa-takes-action-postpone-costly-steam-electric-power-plant-effluent-guidelines-rule>.

46. Davenport, *supra* note 31.

47. Jonathan H. Adler, *Supreme Court Puts the Brakes on the EPA's Clean Power Plan*, WASH. POST, Feb. 9, 2016, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/>; Jonathan H. Adler, *Sixth Circuit Puts Controversial "Waters of the United States" (WOTUS) Rule on Hold*, WASH. POST, Oct. 9, 2015, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/09/sixth-circuit-puts-controversial-waters-of-the-united-states-wotus-rule-on-hold/>.

48. Juan Carlos Rodriguez, *EPA Proposes 2-Year Methane Emissions Rule Delay*, LAW360, June 13, 2017; News Release, U.S. EPA, EPA Extends RMP Effective Date to 2019 (June 12, 2017), <https://www.epa.gov/newsreleases/epa-extends-rmp-effective-date-2019>; News Release, U.S. EPA, EPA Takes Action to Postpone Costly Steam Electric Power Plant Effluent Guidelines

49. See LELAND E. BECK, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, AGENCY PRACTICES AND JUDICIAL REVIEW OF ADMINISTRATIVE RECORDS IN INFORMAL RULEMAKING (2013), available at <https://www.acus.gov/sites/default/files/documents/Agency%20Practices%20and%20Judicial%20Review%20of%20Administrative%20Records%20in%20Informal%20Rulemaking.pdf>.

50. National Research Council, *Rethinking the Ozone Problem in Urban and Regional Air Pollution* 163 (1991), available at <https://www.nap.edu/read/1889/chapter/8>.

51. U.S. EPA, *Overview of Greenhouse Gases*, <https://www.epa.gov/ghgemissions/overview-greenhouse-gases> (last updated Apr. 14, 2017).

52. Presentation, U.S. EPA, Actions to Reduce Methane and VOC Emissions From the Oil and Natural Gas Industry: Final Rules and Draft Information Collection Request (2016), https://www.epa.gov/sites/production/files/2016-09/documents/epa-oilandgasactions-may2016_presentation.pdf.

53. Fact Sheet, U.S. EPA, EPA's Actions to Reduce Methane Emissions From the Oil and Natural Gas Industry: Final Rules and Draft Information Collection Request, <https://www.epa.gov/sites/production/files/2016-09/documents/nsps-overview-fs.pdf>.

54. Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements, 82 Fed. Reg. 27645 (proposed June 16, 2017).

Is Pruitt overreaching? The courts are now considering challenges to the legality of several EPA compliance date extensions. The early returns do not bode well for Pruitt.

On July 3, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit voided a 90-day stay of methane NSPS compliance that EPA had sought to justify on the basis of the reconsideration provisions in §307(d)(7)(B) of the Clean Air Act (CAA).⁵⁵ (EPA sought to leverage this 90-day stay to justify a longer proposed two-year delay of the rule's compliance dates.) The law allows EPA to grant reconsideration only if a petitioner can show that it could not have raised an issue of "central relevance" during the comment period.⁵⁶ Yet, the court found that the issues on which EPA had granted reconsideration not only could have been raised in the rulemaking process, but in fact were, removing the predicate for the stay. After a brief delay, the court reinstated the original compliance dates in the rules, placing in jeopardy companies that delayed compliance in reliance on the stay only to now find that it is no longer valid.⁵⁷

This setback on the methane NSPS may be tempering Pruitt's overconfidence. On August 2, Pruitt abruptly reversed his June 28 decision to delay by one year the designation of nonattainment areas under the 2015 ozone NAAQS revisions.⁵⁸ Facing numerous legal challenges to the delay, Pruitt apparently realized that it could not be defended under the CAA and cut his losses to avoid another defeat in the courts. Whether Pruitt will nonetheless seek to revisit the levels set by Administrator McCarthy in the 2015 NAAQS revisions remains to be seen. In the meantime, the October 1, 2017, deadline for designating nonattainment areas under the standard has passed without any action by EPA, giving rise to a new legal challenge.⁵⁹

VIII. Doublespeak on the Rule of Law and Climate Change

As a self-proclaimed advocate of the "rule of law"⁶⁰ and harsh critic of the Obama Administration for overstepping legal limits, Pruitt's legal stumbles are embarrassing and call into question whether he is more motivated by expedi-

ency and the Trump political agenda than his professed adherence to EPA's core statutes.

Nowhere is Pruitt's doublespeak more troubling than in his maneuvers to dismantle the Obama EPA rules addressing climate change. Pruitt has been outspoken about his reservations about climate science, and was a strong proponent of the president's decision to abandon the Paris climate agreement.⁶¹ It is hardly surprising that he has sought to reconsider the CPP, NSPS for new fossil fuel-fired power plants, oil and gas NSPS, landfill methane rules, and light- and heavy-duty vehicle GHG standards.

But to justify eliminating these rules, Pruitt would need to unwind the legal and scientific framework for regulating GHG emissions established by the U.S. Supreme Court's 2007 *Massachusetts v. Environmental Protection Agency*⁶² decision and implemented by EPA in its 2009 "endangerment determination" concluding that human activities are the principal cause of climate change.⁶³ Pruitt has declined to do this⁶⁴—maybe because he believes the EPA staff could not or would not construct a credible case to reverse the endangerment finding that would stand up to judicial review. (He has called for a public debate between supporters and opponents of the prevailing consensus on climate change,⁶⁵ but this is far different than a rigorous peer-reviewed determination that the endangerment finding was incorrect.)

Instead, Pruitt has insinuated that he is withdrawing the Obama EPA rules because they are on shaky legal ground, at various times asserting that "the courts have seriously called into question the legality of those rules,"⁶⁶ that EPA lacks "the tools in the toolbox"⁶⁷ to address climate change, that Congress never expressly affirmed *Massachusetts*,⁶⁸ and that use of the CAA to reduce GHG emissions has been "a failure."⁶⁹

55. *Clean Air Council et al. v. Pruitt*, No. 17-1145, 47 ELR 20084 (D.C. Cir. July 3, 2017), [https://www.cadc.uscourts.gov/internet/opinions.nsf/a86b20d79beb893e85258152005ca1b2/\\$file/17-1145-1682465.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/a86b20d79beb893e85258152005ca1b2/$file/17-1145-1682465.pdf).

56. 42 U.S.C. §7607(d).

57. *D.C. Circuit Gives EPA 2 Weeks to Plan Next Step on O&G Methane Regs.* ENVIRO.BLR, July 19, 2017, <https://enviro.blr.com/environmental-news/air/NSPS-new-source-performance-standards/D.C.-Circuit-gives-EPA-2-weeks-to-plan-next-step-0/>.

58. Lisa Friedman, *E.P.A. Reverses Course on Ozone Rules*, N.Y. TIMES, Aug. 3, 2017, <https://www.nytimes.com/2017/08/03/climate/epa-reverses-course-on-ozone-rule.html>; News Release, U.S. EPA, EPA to Extend Deadline for 2015 Ozone NAAQS Area Designations (June 6, 2017), <https://www.epa.gov/newsreleases/epa-extend-deadline-2015-ozone-naaqs-area-designations>.

59. Sean Reilly, *Groups Threaten EPA With Another Lawsuit in Ozone Standoff*, Oct. 4, 2017, <https://www.eenews.net/greenwire/2017/10/04/stories/1060062607>.

60. *Pruitt: EPA Is Focused on Rule of Law and Cooperative Federalism*, NTK NETWORK, June 15, 2017, <http://ntknetwork.com/pruitt-epa-is-focused-on-rule-of-law-and-cooperative-federalism/>.

61. Alex Guillén, *Critics Pound EPA Chief After He Disputes Human Role in Climate Change*, POLITICO, Mar. 9, 2017, <http://www.politico.com/story/2017/03/scott-pruitt-carbon-dioxide-climate-change-235871>; Alex Guillén, *EPA's Pruitt Basks in Trump Glow After Paris Pullout*, POLITICO, June 2, 2017, <http://www.politico.com/story/2017/06/02/scott-pruitt-donald-trump-paris-climate-change-agreement-239086>.

62. 549 U.S. 497, 37 ELR 20075 (2007).

63. U.S. EPA, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, <https://www.epa.gov/ghgemissions/endangerment-and-cause-or-contribute-findings-greenhouse-gases-under-section-202a-clean> (last updated July 11, 2017).

64. Josiah Neeley, *Scott Pruitt Hasn't Gone After the Endangerment Finding Yet. Why?*, GREENTECH MEDIA, Aug. 24, 2017, <https://www.greentechmedia.com/articles/read/scott-pruitt-hasnt-gone-after-the-endangerment-finding-yet-why>.

65. Emily Holden, *Pruitt Will Launch Program to "Critique" Climate Science*, E&E NEWS, June 30, 2017, <https://www.eenews.net/stories/1060056858>.

66. David Shepardson, *Trump to Order Reversal of Obama Water Regulation Rule: Official*, REUTERS, Feb. 24, 2017, <http://www.reuters.com/article/us-usa-waters/trump-to-order-reversal-of-obama-water-regulation-rule-official-idUSKBN1632GX>.

67. Andrew Childers, *EPA Climate Science Next Target After Pruitt's Carbon Comments?*, Daily Env't Rep. (BNA) (Mar. 9, 2017), <https://www.bna.com/epa-climate-science-n57982085022/>.

68. Gregory Dotson, *Is Scott Pruitt Calling for an Amendment to the Clean Air Act?*, LEGAL PLANET, July 24, 2017, <http://legal-planet.org/2017/07/24/guest-blogger-gregory-dotson-is-scott-pruitt-calling-for-an-amendment-to-the-clean-air-act/>.

69. Emily Atkin, *Scott Pruitt Is the Hypocritical Liar That Trump Deserves*, NEW REPUBLIC, May 19, 2017, <https://newrepublic.com/article/142671/>

These statements are reckless and misleading. The D.C. Circuit in fact upheld the 2009 endangerment finding and 2010 light-duty vehicle GHG emissions standards based on that finding,⁷⁰ and the Supreme Court in 2014 largely sustained EPA's application of CAA permitting requirements to GHG emissions at major pollution sources.⁷¹ In February 2016, by a 5-4 margin, the Court did stay the CPP, but this was not a decision on the merits,⁷² and many observers of the D.C. Circuit's later en banc consideration of the CPP felt that it would likely uphold the rule's validity.⁷³ To say that the CAA lacks the "tools" to address climate change and that the Obama Administration "failed" in its efforts not only ignores its successes in the courts, but disregards the substantial emission reductions that its rules would achieve if left in place and affirmed on judicial review.

While touting the unlawfulness of the Obama EPA rules, Pruitt has maneuvered to avoid a judicial determination of their validity. For example, at the time Pruitt took office, the D.C. Circuit had been pondering the merits of the CPP for months and a decision seemed imminent. Yet, instead of allowing the court to issue its opinion, Pruitt requested that the case be held in abeyance,⁷⁴ circumventing a definitive ruling that could have refuted his attacks on the CPP's legality.

Pruitt's latest gambit, formally announced on October 10, is a proposal⁷⁵ to withdraw the CPP. The proposal is based solely on Pruitt's re-reading of the CAA to greatly circumscribe EPA's authority to reduce GHG emissions under §111(d). Not surprisingly, Pruitt presented the complex legal issues around the CPP as black-and-white, proclaiming that "We are committed to righting the wrongs of the Obama administration"⁷⁶ and slamming EPA's earlier interpretation of the CAA as just "made up."⁷⁷ The proposal provides no other rationale for repealing the CPP beyond its claimed legal deficiencies: it is silent on the science of climate change, ignores *Massachusetts v. EPA*, and sidesteps the endangerment finding. While the accompanying regulatory impact analysis uses misleading and

questionable assumptions to try to construct an economic case against the CPP,⁷⁸ it succeeds only in confirming that under most scenarios the CPP's benefits exceed its costs, albeit less dramatically than the Obama EPA concluded.⁷⁹

Many members of industry had lobbied to replace the CPP with a narrower rule that would fill a void in the CAA and potentially forestall more ambitious measures by a future administration.⁸⁰ But apparently unwilling to embrace even scaled-back GHG limits, Pruitt only committed to issue an advance notice of proposed rulemaking (ANPRM) seeking comment on whether and how to replace the CPP.

As the rulemaking process and related legal challenges play out, the CPP will remain in limbo for several more years, with Pruitt staking out an untested and disputed legal position, dancing around the scientific findings underpinning the endangerment determination, and delaying a CPP successor rule. The same pattern is evident for other climate-related rules, like the oil and gas NSPS and landfill methane requirements, where the Pruitt strategy is to suspend judicial challenges that could determine their validity while raising doubts about their legal basis, to put compliance on hold without a court decision setting these rules aside, and to delay a meaningful effort to develop replacement rules.

Pruitt seems to want the political benefit of denouncing the Obama EPA as lawless without the accountability of putting his rhetoric to the test of judicial scrutiny. This may give Pruitt room to pursue his agenda without clear legal guideposts in the near term, but it means that the legality of the CPP and other major rules will remain unsettled well into the future, creating protracted uncertainty about the scope of EPA's authority and the requirements that the regulated community will need to meet. Again, Pruitt—who has presented himself as a guardian of legal and regulatory certainty⁸¹—is violating his own principles.

IX. Claiming the Environmental High Ground

Pruitt has claimed that the Obama Administration was "so focused on climate change" that other "priorities were neglected," that the Administration was "all about words," and that it did little to improve the environment while fostering the myth of President Obama as an "environmental savior."⁸² According to Pruitt, the meager accomplishments of the Obama EPA were due to its "lack of focus"

scott-pruitt-hypocritical-liar-trump-deserves.

70. Andrew Childers, *D.C. Circuit Decision Upholds EPA Greenhouse Gas Regulations in Entirety*, Daily Env't Rep. (BNA) (June 27, 2012), <https://www.bna.com/dc-circuit-decision-n12884910286/>.

71. See Utility Air Regulatory Group v. Environmental Prot. Agency, 134 S. Ct. 2427, 44 ELR 20132 (2014).

72. Adler, *Supreme Court Puts the Brakes on the EPA's Clean Power Plan*, *supra* note 47.

73. Ann E. Marimow & Brady Dennis, *Appeals Court Considers Obama's Climate Change Plan*, WASH. POST, Sept. 29, 2016, https://www.washingtonpost.com/local/public-safety/appeals-court-considers-obamas-climate-change-plan/2016/09/27/55226324-8417-11e6-92c2-14b64f3d453f_story.html; Megan Herzog, *The Clean Power Plan Oral Arguments*, LEGAL PLANET, Sept. 29, 2016, <http://legal-planet.org/2016/09/29/the-clean-power-plan-oral-arguments/>.

74. John H. Cushman Jr., *Trump's Justice Dept. Asks Court to Halt Clean Power Plan Case*, INSIDE CLIMATE NEWS, Mar. 29, 2017, <https://insideclimatenews.org/news/29032017/clean-power-plan-climate-change-epa-scott-pruitt>.

75. U.S. EPA, *EPA Takes Another Step to Advance President Trump's America First Strategy, Proposes Repeal of "Clean Power Plan"*, <https://www.epa.gov/newsreleases/epa-takes-another-step-advance-president-trumps-america-first-strategy-proposes-repeal>.

76. *Id.*

77. Robin Bravender, *Pruitt: Plan to Kill Rule Coming Tomorrow*, <https://www.enews.net/stories/1060063067>.

78. U.S. EPA, *Regulatory Impact Analysis for the Review of the Clean Power Plan: Proposal*, https://www.epa.gov/sites/production/files/2017-10/documents/ria_proposed-cpp-repeal_2017-10.pdf.

79. *Id.*

80. Emily Holden, *Trump May Replace Obama's Big Climate Rule—Not Just Repeal It*, Sept. 14, 2017, available at <http://www.politico.com/story/2017/09/14/trump-administration-may-replace-key-obama-climate-rule-242747>.

81. *EPA Chief Scott Pruitt Says Regulators "Exist to Give Certainty" in First Speech to Agency*, CNBC, Feb. 21, 2017, <https://www.cnbc.com/2017/02/21/watch-scott-pruitt-deliver-a-speech-to-epa-staff-live.html>.

82. Atkin, *supra* note 69.

and “poor leadership.”⁸³ The Trump Administration, he claims, is “all about action.”⁸⁴

Pruitt’s efforts to belittle the Obama EPA and seize the environmental high ground are either disingenuous or reflect appalling ignorance about the Obama environmental record.

The Obama EPA was not perfect; as one example, its response to the Flint, Michigan, drinking water crisis was weak and untimely.⁸⁵ But the Agency moved the needle significantly on several environmental challenges on Obama’s watch. Its accomplishments included long-overdue regulations on coal ash management and disposal at coal-fired power plants⁸⁶; curbs on adverse water quality impacts of mountaintop mining⁸⁷; revitalization⁸⁸ of the TSCA chemical risk reduction program; strengthening of NAAQS for ozone, PM, SO₂, and nitrogen dioxide (NO_x)⁸⁹; landmark reductions of mercury, SO₂, and other pollutants from power plants under MATS⁹⁰; more stringent market-based controls of regional transport of SO₂ and NO_x⁹¹; tighter emission limits for boilers, incinerators, and refineries under CAA Title III⁹²; controls on woodstove emissions⁹³;

additional safeguards against lead exposure by children during the renovation and repair of homes and schools with lead-based paint⁹⁴; and groundbreaking enforcement investigations and settlements such as the massive emission control “defeat device” case against Volkswagen.⁹⁵

Ironically, Pruitt and his Republican state attorney general colleagues sought to block many of these Obama EPA initiatives in the courts—efforts that were largely unsuccessful despite Pruitt’s misleading defense of his litigation record.⁹⁶

Pruitt’s “back to basics” mantra promises that he will raise the nation’s environmental performance in areas where he believes the Obama EPA failed to deliver. But all the signs point in the opposite direction. Previous EPA Administrators made early announcements of environmental priorities they hoped to pursue. But Pruitt lacks an affirmative environmental agenda beyond a vague (and as yet unfulfilled) desire to help the states implement air quality standards and an interest in accelerating Superfund cleanups⁹⁷ (which critics argue may simply mean less-stringent and less-protective remediation, lower-cost remedies, and severe reduction⁹⁸ in enforcement resources to compel private-party cleanups).⁹⁹

X. Crippling the Rulemaking Process

Rulemaking has historically been the major EPA tool for tackling unmet environmental challenges, but Trump deregulatory policies all but guarantee that this tool will be used sparingly except to roll back Obama Administration rules. Trump’s Executive Order No. 13771,¹⁰⁰ which requires agencies to offset the costs of any new regulation by repealing at least two existing regulations imposing equivalent or greater costs, is intended and will operate to bring the machinery of rulemaking to a halt.

For starters, finding existing rules that can be eliminated or narrowed without weakening core protections or violating statutory requirements will be a challenging task. Most existing rules serve an ongoing regulatory purpose, were based on a robust record, and were upheld legally if challenged. Pruitt and his team have already begun a

83. Timothy Cama, *EPA Chief: Obama Was No “Environmental Savior,”* HILL, May 11, 2017, <http://thehill.com/policy/energy-environment/332958-epa-chief-obama-wasnt-an-environmental-savior>.

84. Interview by Reuters With Scott Pruitt, Administrator, U.S. EPA (July 10, 2017), <https://www.usnews.com/news/us/articles/2017-07-11/transcript-of-reuters-interview-with-epa-administrator-scott-pruitt>.

85. Julie Bosman, *E.P.A. Waited Too Long to Warn of Flint Water Danger, Report Says*, N.Y. TIMES, Oct. 20, 2016, <https://www.nytimes.com/2016/10/21/us/epa-waited-too-long-to-warn-of-flint-water-danger-report-says.html>.

86. Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21302 (Apr. 17, 2015).

87. David A. Fahrenthold, *Environmental Regulations to Curtail Mountaintop Mining*, WASH. POST, Apr. 2, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/01/AR2010040102312.html>.

88. U.S. EPA, *Assessing and Managing Chemicals Under TSCA*, <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/tsca-work-plan-chemicals> (last updated Sept. 26, 2016).

89. U.S. EPA, *2015 Revision to 2008 Ozone National Ambient Air Quality Standards (NAAQS) Supporting Documents*, <https://www.epa.gov/ozone-pollution/2015-revision-2008-ozone-national-ambient-air-quality-standards-naaqs-supporting> (last updated Apr. 4, 2017); Fact Sheet, U.S. EPA, *The National Ambient Air Quality Standards—Overview of EPA’s Revisions to the Air Quality Standards for Particulate Pollution (Particulate Matter)*, https://www.epa.gov/sites/production/files/2016-04/documents/overview_factsheet.pdf; U.S. EPA, *2010 Primary National Ambient Air Quality Standards (NAAQS) for Sulfur Dioxide*, <https://www.epa.gov/so2-pollution/2010-primary-national-ambient-air-quality-standards-naaqs-sulfur-dioxide> (last updated Aug. 15, 2017); Primary National Ambient Air Quality Standards for Nitrogen Dioxide; Final Rule, 75 Fed. Reg. 6474 (Feb. 9, 2010).

90. U.S. EPA, *Mercury and Air Toxics Standards (MATS)*, <https://www.epa.gov/mats> (last updated Sept. 12, 2017).

91. U.S. EPA, *Overview of the Cross-State Air Pollution Rule (CSAPR)*, <https://www.epa.gov/csapr/overview-cross-state-air-pollution-rule-csapr> (last updated Sept. 19, 2017).

92. Webinar, U.S. EPA, *Understanding EPA’s Major Source Boiler MACT Rule* (Nov. 21, 2013), <https://www.epa.gov/sites/production/files/2016-09/documents/20131121webinar.pdf>; U.S. EPA, *Hazardous Waste Combustors: National Emission Standards for Hazardous Air Pollutants (NESHAP)*, <https://www.epa.gov/stationary-sources-air-pollution/hazardous-waste-combustors-national-emission-standards-hazardous> (last updated Sept. 26, 2016); Fact Sheet, U.S. EPA, *Petroleum Refinery Startup, Shutdown, and Maintenance Standards*, <https://www.epa.gov/sites/production/files/2016-07/documents/refinery-final-factsheet.pdf>.

93. Fact Sheet, U.S. EPA, *Summary of Requirements for Woodstoves and Pellet Stoves*, <https://www.epa.gov/residential-wood-heaters/factsheet-summary-requirements-woodstoves-and-pellet-stoves>.

94. U.S. EPA, *Renovation, Repair, and Painting Program*, <https://www.epa.gov/lead/renovation-repair-and-painting-program> (last updated Aug. 30, 2017).

95. U.S. EPA, *Volkswagen Clean Air Act Civil Settlement*, <https://www.epa.gov/enforcement/volkswagen-clean-air-act-civil-settlement> (last updated Sept. 6, 2017).

96. Cama, *supra* note 83.

97. *Id.*; Brady Dennis, *Scott Pruitt Vows to Speed the Nation’s Superfund Cleanups. Communities Wonder How.*, WASH. POST, June 18, 2017, https://www.washingtonpost.com/national/health-science/scott-pruitt-vows-to-speed-the-nations-superfund-cleanups-communities-wonder-how/2017/06/18/353c6566-4b07-11e7-9669-250d0b15f83b_story.html.

98. Charlie Savage, *E.P.A. Threatens to Stop Funding Justice Dept. Environmental Work*, N.Y. TIMES, Sept. 27, 2017, at A19, available at <https://www.nytimes.com/2017/09/27/us/politics/scott-pruitt-epa-justice-department-funding.html>.

99. *See, e.g.*, Dianna Wray, *In Houston’s Fifth Ward, Concern Over Superfund Site Grows With EPA Budget Cuts*, HOUSTON PRESS, July 26, 2017, <http://www.houstonpress.com/news/houston-activists-join-task-force-to-fight-epa-head-scott-pruitt-plan-to-cut-superfund-budget-9637595>.

100. Exec. Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

push¹⁰¹ to find deregulatory opportunities (beyond Obama rules targeted for reconsideration) but with limited success to date. Staff will be reluctant to devote time and resources to developing new rules without identifying rules on the books that can be withdrawn or scaled back.

Even where there is a legitimate rationale to repeal or narrow an existing rule, further time and effort will be necessary to estimate the resulting cost savings and then to show that these savings equal or exceed the costs of the new rule under consideration. These obstacles may simply result in a suspension of all new rulemaking activity, an outcome anticipated under the Trump regulatory agenda for EPA,¹⁰² which reclassifies several planned rulemakings as “inactive.” If “back to basics” means using rulemaking to maintain and build on the core elements of EPA’s air, water, waste, and toxics programs, the path Pruitt is now on will defeat that goal.

XI. Weakening Core Functions

The “basics” of environmental protection also include day-to-day permitting, enforcement, and monitoring activities that are necessary to assure that regulations and standards are in fact delivering the improvements in environmental performance they were designed to achieve. This is not glamorous work, but it is essential for accountability and results at all levels of the regulatory system.

Pruitt, however, is presiding over an unprecedented weakening of environmental protection capability. EPA’s workforce, already at historically low levels, is being downsized further and its budget is on track to be cut significantly.¹⁰³ The elimination of research funding and turmoil on the Agency’s scientific advisory committees are eroding its technical and scientific competency.¹⁰⁴ Enforce-

ment activity has dropped well below the levels of previous administrations,¹⁰⁵ lowering the threat of civil and criminal penalties that deter violations. And budget uncertainties, attrition of key staff, and conflicting signals from leadership have reduced EPA’s ability to provide financial support, policy guidance, and expertise to state programs. These trends will take a large toll on EPA’s effectiveness that will be difficult to reverse.

XII. Where We Stand

EPA has been tested before but has proven resilient in maintaining and enhancing core protections of human health and the natural environment. The result has been a steady and measurable improvement of most aspects of environmental quality and a solid base of public support. However, under Pruitt and President Trump, the Agency now faces a threat to its legitimacy and traditional tools more dire and fundamental than any it has confronted before. EPA’s historic strength—the stability and continuity of basic protections over multiple administrations—has been put at serious risk by Pruitt’s unprecedented push to repeal or scale back the rules of his predecessor and suspend compliance with their requirements. These rollbacks of existing rules have been compounded by the lack of an affirmative environmental agenda, an effective freeze on new rulemaking activity and program cutbacks that are eroding EPA’s ability to perform basic day-to-day technical and regulatory functions.

These trends should be of deep concern to supporters of EPA’s mission, who must come together in its defense before it is too late.

101. Evaluation of Existing Regulations, 82 Fed. Reg. 17793 (proposed Apr. 13, 2017).

102. See generally <https://www.epa.gov/laws-regulations/regulatory-agendas-and-regulatory-plans>.

103. Brady Dennis, *EPA Plans to Buy Out More Than 1,200 Employees by the End of Summer*, WASH. POST, June 20, 2017, <https://www.washingtonpost.com/news/energy-environment/wp/2017/06/20/epa-plans-to-buy-out-more-than-1200-employees-by-the-end-of-summer/>; Devin Henry, *House Bill Would Cut EPA Funding by \$528M*, HILL, July 11, 2017, <http://thehill.com/policy/energy-environment/341507-house-bill-would-cut-epa-funding-by-528m>.

104. Warren Cornwall, *Trump Plan for 40% Cut Could Cause EPA Science Office “to Implode,” Official Warns*, SCIENCE, Mar. 3, 2017, <http://www.sciencemag.org/news/2017/03/trump-plan-40-cut-could-cause-epa-science-office-implode-official-warns>; Chris Mooney & Juliet Eilperin, *EPA Just Gave Notice to Dozens of Scientific Advisory Board Members That Their Time Is Up*, WASH. POST, June 20, 2017, <https://www.washingtonpost.com/news/energy-environment/wp/2017/06/20/trump-administration-to-decline-to-renew-dozens-of-scientists-for-key-epa-advisory-board/>.

105. Valerie Volcovici, *Trump EPA Lags Behind in Environmental Enforcement: Report*, REUTERS, Aug. 10, 2017, <https://www.reuters.com/article/us-usa-epa-enforcement/trump-epa-lags-behind-in-environmental-enforcement-report-idUSKBN1AQ24I>.