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Environmental Protection in the Trump Era

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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**”¹ **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.² **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.³ 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).