

To download other chapters or the full book, please visit
<https://www.eli.org/eli-press-books/environmental-protection-in-the-trump-era>

Environmental Protection in the Trump Era

Summer 2017



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., Visiting Attorney Scott Badenoch, and Public Interest Law Fellow Benjamin Solomon-Schwartz. The authors thank Thien Chau and Madison Peticca 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, Esq.

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.

© 2017 American Bar Association and Environmental Law Institute®, Washington, D.C.
All rights reserved.

Weakening Protections Affecting Environmental Justice

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. EPA’s Office of Environmental Justice (OEJ), National Environmental Justice Advisory Council (NEJAC), and the Federal Interagency Working Group on Environmental Justice (IWG) work together to ensure agency progress to further the Executive Order. Unlike other areas of environmental law, [environmental justice \(EJ\)](#) **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. The **Trump Administration’s actions** on numerous fronts dealing with air, water, and soil pollution have implications for vulnerable communities. Changes in approach to climate change, which is projected to be particularly impactful for vulnerable communities, are likewise EJ-sensitive.

Discussion.

Federal Budget (see also Chapter 10). When President Trump’s Office of Management and Budget (OMB) released [A New Foundation for American Greatness: Fiscal Year 2018](#), **EPA was slated for a 31.4% cut** totaling \$2.6 billion, **including the elimination of the OEJ**.

A budget subsequently passed out of the House Subcommittee on Interior and Environment included less-drastic cuts to EPA than OMB’s proposal, but still **included a reduction of 6.6%**, or \$528 million.⁷ In the House budget, OEJ survives, suffering a small budget cut of over \$1 million, but **several EJ-sensitive areas are significantly affected**. The House is calling for reductions in funding for enforcement ([see Chapter 9](#)) and programs around clean air (\$45 million, or a 16.8% reduction from FY17), clean water (\$45 million or 15% reduction), and lead hazard reduction (\$15 million or 10%). The budget also cuts over \$38 million from EPA watersheds programs (8.9% reduction). The Senate Subcommittee held a hearing on the EPA budget, but has yet to pass a bill.

Executive Orders. EO 13755 on “Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects” attempts to expedite 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 the particular needs of communities.

⁷ H.R. 3354, 115th Cong. (2017); H.R. Rep. No. 115-238 (2017).

Areas to Watch

For EJ considerations, the FY18 budget is the single most important federal action to watch. Other indicators of executive branch priorities include whether agencies update and publish their environmental justice reports for public comment, and upcoming appointments at:

- the Department of the Interior,
- EPA,
- the Department of Justice’s Environment and Natural Resources Division, and
- the Council on Environmental Quality.

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, non-profits, and corporations are also likely to continue to step up their efforts for EJ communities in the absence of federal action.

If expedited approvals were to result in poorly planned projects that threaten damages to person or property, citizen suits would be a likely avenue for communities to demand full NEPA compliance. Two other EOs relating to expedited approval for oil and gas pipelines are discussed in Chapter 4 and below.

EO 13795 moved to abolish safety requirements placed on offshore drilling after the BP Gulf 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 took the brunt of the damage from the 2010 spill and faced significant and ongoing economic, environmental, and health challenges. Notably, the Order **highlights costs to oil and gas producers, and does not address impacts to vulnerable coastal communities**.

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. As a result of pressure from protestors, civil rights activists, Native American tribes, underscored by numerous lawsuits, both pipelines are 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, including Nebraska ranchers erecting solar panels in the Keystone pipeline’s path, the **delays have reportedly caused the market opportunity to shrink** and the [developer to reconsider](#) that project.

DAPL, on the other hand, was completed and operational by June 1, despite pushback from the local communities and the judicial intervention in the *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* case. There, the court [ordered expanded environmental review](#) and will hear 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, which could, as with Keystone, diminish the market opportunity for the pipeline. Also noteworthy is the significant divestment movement that has accompanied activist efforts to stop pipelines, with a number of major universities, pension funds, and corporations having [pulled money out](#) of these projects.

While Dakota and Keystone have become international news, **a number of other pipeline projects across the country** are also drawing opposition. See Appendix below.

Supplemental Environmental Projects. Attorney General Jeff Sessions issued a [memorandum](#) in June curtailing the practice of “supplemental environmental projects” (SEPs). **SEPs allow companies to creatively settle cases** by including environmental projects to offset penalty claims, and EJ communities have often been the beneficiaries. For example, BP, as part of its settlement, recently embarked on coastal restoration projects as supplemental relief relative to the 2010 Gulf oil spill.

The Sessions memorandum precludes payments to any nongovernmental organization (NGO) that is not a party to the dispute for purposes of conducting SEPs. Precluding penalty mitigation projects of this kind means corporations will likely fund fewer public health and environmental protection efforts in response to enforcement actions, moving financial resources from on-the-ground EJ projects to government coffers.

Environmental Protection Agency. As discussed throughout, the **EPA under Administrator Scott Pruitt has been rolling back Obama-era rules on the environment**. Of the 131 rulemaking initiatives abandoned by the Trump Administration, 49 fell under EPA jurisdiction. Many of these

rules are EJ-sensitive, including updated standards for lead in drinking water and new pollution controls on existing oil and gas operations on Indian reservations.

Two of Administrator Pruitt's **most controversial moves, rolling back the Clean Water Rule and Clean Power Plan** (see [Chapter 8](#)) would have potential 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](#) the Clean Power Plan would have reduced carbon dioxide emissions by 32% from 2005 levels by 2030, 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 2 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) far more potent than carbon dioxide and have been regarded a significant driver of climate change. Methane also is an asphyxiant that can contribute to respiratory and other health issues for communities downwind from operations.

The Superfund, the federal program tasked with managing and remediating the nation's most toxic waste sites, is slated for an increase in funding, as Administrator Pruitt has prioritized brownfield programs. Administrator Pruitt also [increased his office's oversight](#) of any Superfund project costing over \$50 million, to "streamline and improve efficiency." The **concern being expressed by EJ communities is whether the "efficiency" objective will result in lower cleanup standards and increased human health risks, and whether some sites will be removed from the National Priorities List (NPL) without appropriate and necessary remediation.**

Administrator Pruitt is seeking to create a "top-ten list" of Superfund sites to address, which has raised a question about the fate of the remaining 1,326 sites on the NPL, many of which are located in overburdened communities, and, in particular, whether **focusing on 10 sites signals that other sites may be "mothballed,"** the industry term for properties that remain fallow and contaminated.

On the chemicals front, Administrator **Pruitt recently rejected the findings of EPA scientists and declined to ban the chemical chlorpyrifos**, a chemical with respect to which children's health concerns have been raised. The 9th Circuit Court of Appeals rejected an initial motion by states and environmental organizations challenging the decision.⁸ Further litigation is anticipated.

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, a regulation that [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

8 Order, Pesticide Action Network North America v. EPA, No. 14-72794 (9th Cir. 2017).

the CRA **to repeal the BLM Waste Prevention Rule**, which restricts methane emissions from drilling operations on public lands.

Public Lands. In July, the Department of the Interior submitted a proposed rule governing hydraulic fracturing on public lands.⁹ 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 been increasing 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.

Climate Justice. The Administration’s decision to **withdraw the United States from the Paris Agreement** ([see Chapter 7](#)) has several significant EJ implications. As noted, the world’s impoverished suffer most from a changing planet, in reduced access to clean water, arable land, and nutrition. Studies have pointed to upwards of **two billion people who may eventually be displaced by climate change, which would represent an unprecedented refugee crisis**. Rising global 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**.

In March, [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 vulnerable communities in the face of a changing climate.

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. In 2014, Flint, Michigan, experienced a [human-made drinking water crisis](#) that exposed thousands of residents, including 9,000 children, to dangerous levels of lead and other contaminants.

Three years later, Flint officials [still do not recommend](#) drinking tap water without a filter until line replacements are complete in 2019, and until water consistently tests below legal levels for lead. Flint [received \\$100 million](#) from EPA during the final months of the Obama Administration [and \\$85 million](#) through a settlement with the state to replace lines and conduct other programs. Over 2,000 lines have been replaced since 2016, with the ultimate goal of replacing all 20,000 by 2020.

The Attorney General of Michigan [has vigorously pursued](#) those responsible, yielding [51 total charges](#) for 15 officials, including 4 for manslaughter, due to citizen deaths caused by legionnaire’s disease associated with the switch to the corrosive Flint River. Administrator Pruitt has commented that “the people of Flint and all Americans deserve a more responsive federal government,” but no new initiatives or legislation have yet been introduced relating to this challenge in Michigan and elsewhere.

9 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).