

Regulatory Reform in the Trump Era

Environmental Law Institute



ENVIRONMENTAL
LAW • INSTITUTE®

March 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., and Public Interest Law Fellow Benjamin Solomon-Schwartz. Funding for research and drafting was provided by the Walton Family Foundation.

Design by Davonne Flanagan. Cover photo by Jiuguang Wang, (from flickr), licensed under CC BY-SA 2.0.

Regulatory Reform in the Trump Era.

© 2017 Environmental Law Institute®, Washington, D.C. All rights reserved.

Regulatory Reform in the Trump Era

This white paper was prepared by the Environmental Law Institute (ELI) to aid understanding of the *legal mechanisms and processes* that the White House, federal agencies, and Congress are considering as a means of changing the regulatory approach to environmental, natural resources, and health and safety standards and safeguards. It attempts to answer the questions that are increasingly being asked of ELI: What are the pathways and potential impacts of regulatory reform efforts likely to be undertaken? What are the opportunities for the public and other stakeholders to engage relative to these initiatives?

The paper is organized as a series of short “fact sheets,” each addressing a specific legal tool or pathway that could be used to change existing environmental protection. They assume the reader has some familiarity with the federal regulatory landscape, but no particular legal or technical background. Each fact sheet identifies the relevant actors, describes the applicable procedures, discusses key features of each procedure, and identifies categories or specific examples of current and potential areas where action may be taken. The examples are not all-inclusive, but illustrative of how each process might be used, both now and in the future; the information about them is current as of March 21, 2017. Where relevant, the fact sheets highlight opportunities for stakeholder engagement that are specific to individual processes.

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

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

Table of Contents

Revising or Eliminating Existing Environmental Protection Requirements

1. Reversing or Revising Executive Orders and Actions.....	1
2. Undoing Presidential Actions Protecting Public Lands and Resources.....	3
3. Fast-Tracking Projects That Require Federal Approval	7
4. “Canceling” the Paris Agreement on Climate Change	9
5. Reversing or Revising Agency Regulations, Generally.....	11
6. Invalidating Recent Agency Regulations Under the Congressional Review Act.....	13
7. Implementing the New “Two-for-One” Executive Order on Federal Regulations.....	15
8. Rolling Back Public Lands Plans	17

Changing the Implementation of Environmental Protection

9. Cutting Back on Federal Enforcement of Environmental Law.....	19
10. Defunding Federal Environmental Protection Programs.....	21
11. Preempting State Environmental Protection Requirements.....	25
12. Subjecting Agency Regulations to Additional Cost-Benefit Analysis	29
13. Enacting New Procedures for Federal Regulation.....	31
14. Enacting New Constraints on Citizen Enforcement of Environmental Law	35

FACT SHEET 1: Reversing or Revising Executive Orders and Actions

ACTOR: President

All presidential administrations employ a wide variety of executive orders and other executive actions, which serve important organizational, symbolic, and policy purposes. However, this presidential power is limited: it largely consists of directives to the executive branch, it must be in accordance with the law, and its exercise is readily subject to modification or reversal by a successor president. The Obama White House's presidential actions on environment and climate change likely will be subject to modification.

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

Except in the unusual case where Congress has authorized the President to make decisions having legal effect, executive orders are not lawmaking in the ordinary sense. Rather, they are directives to be followed within the executive branch, by virtue of the president's inherent power to appoint or remove agency heads and other officials. But to bind government agencies and withstand judicial review, executive orders must be consistent with and operate within the limits of applicable law, whether found in the Constitution or statute. An executive order can be revoked or modified by the president who issued it or a successor president; by an act of Congress, if the president was acting on authority granted by Congress; or by a court ruling that the order was illegal or unconstitutional.

Discussion. Especially in times of political gridlock, the idea of making sweeping changes "with the stroke of a pen" can be appealing, and presidents do advance some substantive policy goals through their orders affecting agencies' structure, statutory interpretations, enforcement priorities, or contracting and procurement. But it is equally easy for a successor administration to alter or reverse these policies, and such changes routinely occur with a change of parties.

A new administration typically also takes executive action to temporarily freeze still-pending agency rules, but longer or indefinite delays may be subject to challenge in court.¹ Executive orders cannot unilaterally revoke an agency rule that is already on the books, but they may direct the agency to begin the process of reviewing the rule and revising or withdrawing it through a subsequent rulemaking (see Fact Sheet 5).

Opportunities for Public Engagement. There is minimal opportunity for interested parties to engage in the development of presidential actions, and often no recourse afterwards in the courts. The only direct channel for affecting executive action is through discussions with White House staff. Congressional engagement is another possibility, but Congress rarely intervenes, and any resulting legislation would be subject to a presidential veto. Courts may be called upon to review the legality of executive orders; but the mere revocation of existing orders is unlikely to provide a legal basis for a lawsuit, nor is it clear who would have standing to sue.

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

Action Areas to Watch. Executive Order No. 13547, “Stewardship of the Ocean, Our Coasts, and the Great Lakes” (2010); Executive Order No. 13653, “Preparing the United States for the Impacts of Climate Change” (2013); Executive Order No. 13693, “Planning for Federal Sustainability in the Next Decade” (2015); Presidential Memorandum on Power Sector Carbon Pollution Standards (2013); President’s Climate Action Plan (2013); CEQ Guidance on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews (2016); Interagency Working Group on Social Cost of Carbon.

Relevant Trump Administration Executive Actions (see also Fact Sheets 3, 5, and 7). Presidential Memorandum on “Regulatory Freeze Pending Review” (Jan. 20, 2017); Executive Order Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects (Jan. 24); Presidential Memoranda Regarding Construction of the Keystone and Dakota Access Pipelines (Jan. 24); Executive Order Reducing Regulation and Controlling Regulatory Costs (Jan. 30); Executive Order on Enforcing the Regulatory Reform Agenda (Feb. 24); Executive Order on Reviewing the “Waters of the United States” Rule (Feb. 28).

FACT SHEET 2: Undoing Presidential Actions Protecting Public Lands and Resources
ACTORS: President, Congress

Presidents have statutory authority to set aside federal lands and waters to create national monuments or otherwise protect environmental, cultural, and other resources. These actions may be challenged or affected by subsequent actions of a president or by congressional legislation.

National Monuments. Sixteen presidents, including Presidents Barack Obama and George W. Bush, have used their authority under the Antiquities Act of 1906 to create national monuments by “public proclamation.” 54 U.S.C. § 320301. These proclamations set aside federal lands and waters that contain “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest,” and protect these resources from incompatible activities such as mining, leasing, logging, grazing, collecting, commercial fishing, and other uses. Under the Act, these monument reservations are to be the “smallest area compatible with the proper care and management of the objects to be protected,” which courts nonetheless have recognized can include huge acreages.

Leasing Withdrawals. In addition, Section 12(a) of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1341(a), grants the president authority “from time to time, to withdraw from disposition any of the unleased lands” of the outer continental shelf. This authority has been used by six presidents to establish and maintain temporary oil and gas leasing moratoria as well as to create permanent protected areas. President Obama recently withdrew certain areas of the OCS, including large portions of the U.S. Arctic and the underwater canyon complexes off the Atlantic Coast, from leasing for exploration, development or production “for a time period without specific expiration.” Section 12(a) does not provide explicit criteria for the exercise of this withdrawal power.

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

On occasion, a president has diminished the size of an existing monument or changed the regulations governing uses on a monument, although this authority is in dispute. Unlike certain other statutes, the Antiquities Act does not expressly include a power to modify. The last diminution of an existing monument by executive action occurred in 1960 under President Eisenhower. In general, presidential authority to diminish the area protected by a previous monument proclamation has been grounded on assertions that the area is no longer, per the Act, the “smallest area” compatible with protection of the monument’s objectives. The 1938 Attorney General opinion observed that the president can diminish the area of an existing national monument; however, the rationale for this part of the opinion has been questioned in view of several changes in the laws and precedents it relied on.²

¹ Congressional Research Service, *National Monuments and the Antiquities Act* (Sept. 7, 2016).

² See M. Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, Georgia L. Rev. (2003); Congressional Research Service, *Authority of a President to Modify or Eliminate a National Monument* (Aug. 3, 2000).

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

Similarly, OCSLA provides no express language authorizing a president to terminate a leasing withdrawal. No president has ever revoked an open-ended withdrawal under Section 12(a), and it is legally untested whether a president can terminate a previous withdrawal. However, in 2008, President George W. Bush by order did rescind time-limited withdrawals issued by President Clinton that were designed to end in 2012, bringing them to an end immediately; but he left in place permanent marine sanctuary withdrawals that were without expiration dates.

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

Discussion. Possible actions by President Trump might include the first-ever attempt to revoke a monument designation by proclamation. This would prompt litigation by users and beneficiaries of the monument, challenging his authority to do so under the Antiquities Act. Alternatively, the President might attempt to diminish the size of monuments or to change the use limitations within those monuments; such actions might have some support in prior practice, but no firm legal backing. Moreover, the President’s statements related to proper size of the area and the reasons for the changes in usage limitations would need to serve the core objectives of the monument’s creation. The President also may attempt to terminate or modify OCSLA § 12(a) withdrawals. This would likewise invite litigation challenging his authority to do so under OCSLA.

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

Opportunities For Public Engagement. Interested stakeholders may advocate to the White House and Congress in relation to possible presidential or congressional action to revoke these protections. One would expect such appeals to focus on the values being protected, the question of precedent for an exercise of executive authority of this kind, and the business case for continued protection of these areas, including economic benefits from prior designations, as well as modeling potential oil and gas impacts/spills in OCSLA withdrawal areas.

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

Stakeholders may also wish to focus attention on the question of funding for the monuments and withdrawal areas through the Congressional appropriation process, as most conservation actions that were once under attack (national parks, marine sanctuaries) eventually became supported by congressional endorsement or budget action.

Action Areas to Watch. Numerous national monuments, including Bears Ears National Monument, Gold Butte National Monument, and the marine national monuments; OCSLA leasing withdrawals, including the Chukchi and Beaufort Sea and Atlantic Canyons withdrawals. On February 17, Utah's governor signed a resolution of the Utah legislature calling on President Trump to modify the 1996 Grand Staircase-Escalante National Monument by shrinking its boundaries. On the same day, timber companies filed a federal lawsuit in Oregon contending that President Obama's expansion of the Cascade-Siskiyou National Monument could not include certain federal lands (O&C lands) previously dedicated to sustained yield of timber; an association of Oregon counties has filed a similar suit.

FACT SHEET 3: Fast-Tracking Projects That Require Federal Approval

ACTORS: President, Council on Environmental Quality, Department Secretaries, Congress

The Trump Administration may seek to fast-track infrastructure or other projects that ordinarily would undergo extensive environmental and permitting review. Federal agencies have authority to approve or reject construction projects that cross international boundaries, occupy federal lands and waters, or require federal permits or easements. These approval activities can be advanced either by the executive branch or by Congress, but executive actions must follow procedures set out in current laws.

Process. *Infrastructure Projects.* On January 24, 2017, the President issued an Executive Order entitled “Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects.” The Order directs the Chair of the Council on Environmental Quality (CEQ) (position currently operating with an acting career official) to determine, within 30 days after a request from any state governor or the head of a federal agency, whether a proposed infrastructure project is a “high priority” project, taking into account its importance to the general welfare, value to the nation, environmental benefits, and any other factor the Chair deems relevant. For any project so designated, the Chair must coordinate with the “relevant” federal agency head to establish expedited procedures and deadlines for completion of environmental reviews and approvals. Federal agencies then must give highest priority to meeting the deadlines, and must explain in writing any failures to meet deadlines and steps to complete the required reviews. The Order must be implemented “consistent with applicable law and subject to the availability of appropriations.”

Presidentially-Preferred Projects. The President can direct executive branch agencies to carry out review and approval procedures expeditiously, but cannot waive or supersede federal laws and regulations, unless given the authority to do so by Congress. On January 24, the President issued two memoranda advancing processes for approving the Keystone XL Pipeline (KXL) and Dakota Access Pipeline (DAPL).

The KXL memo directed the Secretary of State to accept a re-submitted application from the pipeline developer and to reach a final determination within 60 days, including any permit conditions. It directed the Secretary, to the “maximum extent permitted by law,” to consider the environmental impact statement (EIS) and supporting documentation for the prior rejected application as satisfying all applicable requirements under the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and other laws, and to allow any previously issued permits or authorizations to remain in effect. The memo directed the Secretary of the Army to take all actions necessary to “review and approve as warranted, in an expedited manner” KXL’s requests to use Clean Water Act Nationwide Permit 12 to authorize stream crossings, and the Secretary of the Interior to take all steps necessary to “review and approve as warranted, in an expedited manner,” right-of-way applications, Migratory Bird Treaty Act requirements, and other approvals, again “to the maximum extent permitted by law.” KXL promptly re-filed its application.

The DAPL memo likewise directed the Secretary of the Army to “review and approve in an expedited manner” easements and other authorizations for the pipeline “to the extent permitted by law and as warranted”; and in so doing to consider whether to rescind or modify the prior Secretary’s December 4, 2016 order initiating a new EIS process, and to consider prior NEPA documents and environmental reviews as satisfying all applicable requirements of NEPA, the ESA, and consultation requirements. On January 31, the Acting Secretary of the Army directed his subordinates to carry out the reviews and considerations “fully and unequivocally.” On February 8, the Army granted the easement, incorporating only standard permit conditions.

Congressional Actions. Congress can, by law, add or remove environmental review and permitting requirements for individual projects or for entire categories of projects. Congress can also suspend the application of environmental laws, or deem them satisfied, as it did in the many appropriations “riders” affecting forest activities in the Pacific Northwest in the 1990s. Congress can also empower federal agencies to waive federal laws under some circumstances, as it did in 1996 in authorizing construction of fences along the U.S.-Mexico border. The 2005 REAL ID Act authorized the Secretary of Homeland Security to waive numerous environmental and regulatory laws to support border activities (including all EPA-administered pollution control laws, and all of the public land laws administered by the Department of Interior and the Forest Service); DHS used this latter authority in 2008 to waive more than 30 laws.

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

Discussion. President Trump’s Executive Order on infrastructure directs the use of authority that already exists in CEQ regulations that allow federal agencies to set time limits for environmental review (40 CFR 1501.8). It is less specific than President Obama’s much more detailed infrastructure permitting order, E.O. 13604 (March 22, 2012), which created the federal permitting “dashboard” to track such projects; and it duplicates to some degree agencies’ frequently updated infrastructure approval implementation memos, as well as the procedures created by the FAST Act for transportation projects. It is not yet clear whether the new Order adds anything other than prominence to certain projects.

The two pipeline memoranda did not change the substantive and procedural legal requirements applicable to those projects. They remain subject to litigation on the same grounds as before. For DAPL, the Army must explain its decision, which may create new issues that can be raised in litigation. On February 17, the Army published a Federal Register notice of its decision to terminate the EIS process, citing only “in light of the President’s memorandum.” For the transboundary KXL there is an open legal question as to whether the Secretary of State’s approval authority can be litigated, as it originates in presidential delegation of foreign policy authority rather than as a typical “agency” action. The permits issued following such an approval, however, remain subject to administrative procedures and litigation.

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

Opportunities for Public Engagement. Interested parties will have various opportunities to engage agencies and Congress about the possible administrative actions, ranging from direct communication, to participation in administrative notice-and-comment procedures, to litigation. As to the infrastructure Executive Order, some questions remain that may be of interest to stakeholders, including whether the Order could be used to advance renewable energy or other environmentally-friendly infrastructure projects, and whether public-interest criteria will factor into what constitutes a “high priority” under the Executive Order. These may be the subject of further public engagement with the White House.

Action Areas to Watch. Pipelines and other infrastructure projects requiring federal approval.

FACT SHEET 4: “Cancelling” the Paris Agreement on Climate Change

ACTORS: President, Senate

On the campaign trail, candidate Trump threatened to “cancel” the Paris Agreement on climate change, implying this could be done through unilateral action; he now says he has an “open mind” on the issue. But the Agreement has entered into force and is now binding on the U.S. and other signatory nations (although there are few compulsory actions within it). Withdrawal from the Paris Agreement and/or the parent U.N. Framework Convention on Climate Change is governed not only by U.S. law, but by the terms of those international agreements.

Process. On December 12, 2015, 195 countries reached the Paris Agreement, which commits to holding the global average temperature increase to “well below” 2°C and includes intended target emissions reductions for the signatory nations. The United States signed the Agreement on April 22, 2016, submitted its formal acceptance on September 3, and the Agreement entered into force on November 4 (after it was ratified by at least 55 countries producing 55% of global greenhouse gas emissions). As of December 2016, 192 countries and the European Union have signed the Agreement, and 128 of those have ratified or acceded to it, including the U.S., E.U., China, and India.

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

The U.S. Constitution provides no specific process for withdrawing from treaties, but the general rule is that they should be amended or terminated in the same manner they were made.¹ Thus, under U.S. law the President may be able to unilaterally withdraw from the Paris Agreement. But he also must follow the withdrawal procedure in the Agreement itself, which requires a “cooling-off” period of at least three years from its entry into force, and another year before a notice of withdrawal takes effect. Alternatively, he could attempt to withdraw entirely from the UNFCCC, but would need Senate approval (presumably by a two-thirds majority) to do so. Regardless of how a party withdraws from the Agreement, it remains binding on the other signatory countries.

Discussion. Unlike the Trans-Pacific Partnership Agreement, from which President Trump immediately withdrew, the Paris Agreement has been signed by the U.S. and entered into force. Given Trump’s campaign promise to “cancel” the Agreement, he could issue an immediate executive order stating his intent to withdraw, which would at a minimum signal to executive branch agencies that they should not attempt to implement it. He has also proposed to defund U.S. financial commitments under the Agreement. But a formal notice of withdrawal could not be sent until November 4, 2019, and would not go into effect until November 5, 2020 – two days after the next presidential election.

¹ See John Pendergrass, “Rhetoric or Reality: What Would Withdrawal From the Paris Agreement Require?”, <https://www.eli.org/vibrant-environment-blog/rhetoric-or-reality-what-would-withdrawal-paris-agreement-require>.

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

Another possibility is that the Administration may choose to remain part of the Paris Agreement, while doing little to implement it. At his confirmation hearing, Secretary of State Rex Tillerson said, "It's important that the United States maintains its seat at the table about how to address the threat of climate change, which does require a global response." The Agreement's target emissions reductions are non-binding, and failure to meet them would carry no official sanction. But the loss of U.S. leadership on the world stage would deal a significant blow to the Agreement's ambition of even greater global reductions.

Action Areas to Watch. The Paris Agreement, UNFCCC, Clean Power Plan and other domestic measures to implement Paris greenhouse gas commitments. Note that the Obama Administration also agreed to the Kigali Amendment to the Montreal Protocol, governing phase-out of hydrofluorocarbons (HFCs); but that treaty has not entered into force and likely would require Senate ratification.

FACT SHEET 5: Reversing or Revising Agency Regulations, Generally
ACTORS: Federal Agencies, Department of Justice, Congress

Most environmental regulation takes the form of detailed rules promulgated 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 challenged in court, amended or reversed through a subsequent agency rulemaking process, or revoked by congressional act. Many Obama Administration rules, including the Clean Power Plan and Waters of the United States (“WOTUS”) Rule, are vulnerable to each of these forms of revision, and more than one might get attempted at the same time.

Process. 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 the statute, which may even set out specific deadlines. Others are developed over time or in response to new information or events, allowing the agency to bring its expertise to bear in interpreting its congressional mandate.

Most regulations go through a formal 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 an explanation of whether and how they were taken into account. 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 promulgated by the executive branch, agency rules cannot simply be undone by executive order or other presidential action. Agencies remain governed by their underlying statutory mandates, and must still follow the procedures established by the APA. Thus, while the president may direct agencies to begin the process of reversing or revising an existing regulation, they generally must go through another full rulemaking. More immediately, where an existing rule has been challenged in court, the Department of Justice may decline to appeal an adverse ruling, or 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.

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

Reversing Rules Through Subsequent Rulemaking. In general, formal agency rules can only be amended or reversed through another rulemaking, including a notice-and-comment period and development of a full administrative record. In order 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.¹ Key Obama Administration rules that relied on reams of scientific evidence and months of public procedure, like the Clean Power Plan or WOTUS Rule, might require an equally laborious effort to undo. It will be even harder to vacate something like EPA’s “endangerment finding,” the 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 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. For pending challenges – including to the CPP and WOTUS Rule, both currently stayed – DOJ might petition the court to delay its decision schedule (which has already occurred in several cases), or to remand the rule to allow the agency to reconsider it.

If a court reaches a decision invalidating (and vacating) all or part of a 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 often seek intervenor status, 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 Fact Sheet 6, but via regular congressional procedures); or a broader repeal of the agency’s statutory authority to issue a rule.

For example, the “Stopping EPA Overreach Act of 2017” would completely remove carbon dioxide and other greenhouse gases from EPA’s Clean Air Act jurisdiction, while expressly disapproving the Clean Power Plan and new EPA methane standards for the oil and gas industry. H.R. 637 (Jan. 24, 2017). 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. Similarly, H.R. 1105, introduced February 16, would negate the WOTUS rule and its protections for seasonal or isolated waters and wetlands. The status of these and similar bills may ultimately depend on the fate of the Senate filibuster.

Opportunities for Public Engagement. Interested parties can participate in public notice-and-comment procedures for replacement rules, bring litigation challenges to replacement rules, and seek to intervene in challenges to administrative rules brought by other parties.

Action Areas to Watch. Clean Power Plan and/or EPA endangerment finding for greenhouse gases; Waters of the United States (WOTUS) Rule; EPA methane standards for the oil and gas industry; EPA mercury air toxics standards; EPA 2015 ozone standard; BLM rule governing hydraulic fracturing on public and tribal lands; many other Obama Administration rules, including more recent ones within the Congressional Review Act window (see Fact Sheet 6), if a CRA disapproval resolution is not enacted.

¹ *Encino Motorcars v. Navarro*, 136 S. Ct. 2117 (2016).

FACT SHEET 6: Invalidating Recent Agency Regulations Under the Congressional Review Act
ACTORS: Congress, President

The Congressional Review Act (CRA) provides a blunt, powerful tool for Congress to invalidate regulations that were recently issued by any federal agency. It is blunt because it allows Congress to wholly invalidate any regulation subject to the CRA, but not to partially disapprove or modify them; and because any regulation invalidated by this process is considered never to have taken effect. It is also powerful because, once a regulation is disapproved, the agency is barred from reissuing it or another regulation that is “substantially the same” without express authorization from Congress. Congress and the President have already taken action on CRA resolutions invalidating 2016 regulations, including the Department of Interior’s Stream Protection Rule and the Securities and Exchange Commission’s reporting rule for extractive industries, with several other resolutions pending.

Process. Reach-back Date. The CRA allows Congress to use a streamlined procedure to invalidate any final agency rule after it is promulgated, subject to a presidential signature or veto. A critical question is the reach-back date for which 2016 regulations may be subject to CRA disapproval in 2017: Which are beyond reach and which are vulnerable? Any rules submitted to a session of Congress within the final 60 “legislative days” in the House of Representatives or within the final 60 “session days” in the Senate are subject to invalidation in the next congressional session. *Id.* § 801(d)(1). In a January 3, 2017 report, the Congressional Research Service (CRS) estimated the current reach-back date is June 13, 2016. 163 Cong. Rec. H80. *That is, any agency final rules submitted to Congress on or after June 13, 2016, may be subject to a joint resolution of disapproval by Congress.*¹

Time for Action. Generally, Congress can introduce a disapproval resolution within 60 *calendar* days of a rule’s issuance (excluding certain days when Congress is adjourned). 5 U.S.C. § 802(a). But the CRA adds an additional window for congressional disapproval of regulations that were finalized toward the end of a session of Congress. This window opens approximately 15 days into the next session of Congress, and a CRA resolution can only be introduced within 60 calendar days of that date. *Id.* § 801(d)(2). *This year, the window for introducing a CRA resolution runs from January 30, 2017 to March 31, 2017.*

In addition, to take advantage of expedited Senate procedures discussed below—particularly the inability to filibuster—the Senate must pass a CRA resolution within 60 *session* days from the opening of the review period, which can extend far longer than 60 calendar days because of numerous days the Senate is not in session. *Id.* § 802(e). *This year, the window for Senate action opened on January 30 and could run as late as May, depending on the Senate’s actual calendar.*

This opportunity to invalidate regulations at the beginning of a session of Congress is most relevant when the White House changes parties. If, as now, the current Congress and the current Administration are both opposed to portions of the previous Administration’s agenda, then regulations passed at the end of the prior Administration are particularly vulnerable. Simply put, the new President may not be inclined to veto any disapproval resolutions passed by Congress. Indeed, the only previous time the CRA had been used successfully was in similar circumstances: in 2001, when the George W. Bush Administration succeeded the Clinton Administration, and the Republican-led Congress invalidated an OSHA regulation setting workplace ergonomic standards, with President Bush’s assent.

¹ However, as the CRS itself notes, “CRS day count estimates are unofficial and non-binding; the House and Senate Parliamentarians are the sole definitive arbiters of the operation of the CRA mechanism.” *Id.*

Discussion. *No Filibuster.* The CRA’s procedural innovations relate particularly to Senate procedure. Most important, the Act eliminates the filibuster for any resolution that fits within its criteria; thus, a simple Senate majority is sufficient to pass a resolution of disapproval. The CRA also sets a maximum of 10 hours of Senate floor debate on each resolution, *id.* § 802(d)(2), and allows for a nondebatability motion to further limit debate below 10 hours. But regardless, each individual CRA resolution will still require a significant commitment of time and focus.

One Regulation Per Resolution. The main limitation of the CRA, as it currently exists, is that each regulation Congress seeks to disapprove requires a *separate* resolution. Given that this Congress has a particularly full agenda, the competition for scarce floor time will require tradeoffs in terms of which regulations are subject to resolutions. This constraint will likely limit the number of disapprovals far below the number of regulations potentially subject to the CRA’s reach. (Indeed, this tradeoff is the motivation for bills like the Midnight Rules Relief Act of 2017 (H.R. 21), which would allow Congress to bundle multiple regulations into a single resolution of disapproval. That bill recently passed the House.)

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

Opportunities for Public Engagement. Interested parties’ primary opportunity for engagement is to appeal to members of Congress who will be voting on CRA resolutions. Stakeholder engagement may be most influential in the Senate. If a disapproval resolution passes, there will be future opportunities to engage agencies regarding new regulations that will replace the invalidated regulations; to participate in challenges to new regulations in court, including on the question of whether they are substantially similar to an invalidated regulation; and to reengage Congress if new or clarified authority to regulate in that area is needed.

Action Areas to Watch. *Completed Actions.* Congress has already taken action on several resolutions invalidating Obama Administration regulations. President Trump has signed a resolution invalidating the SEC’s reporting rule for extractive industries and a resolution invalidating the Department of Interior’s Stream Protection Rule. Congress has passed resolutions invalidating the Bureau of Land Management’s “Planning 2.0” rule and a regulation regarding hunting in Alaskan national wildlife refuges, which are both awaiting the president’s signature. The House has passed several additional CRA resolutions that are now ready for Senate consideration, including one invalidating the Bureau of Land Management’s methane rule. Additional CRA resolutions have been introduced in one or both houses, including ones that would invalidate a rule governing drilling on the outer continental shelf, a regulation regarding on-shore oil and gas production, rules regarding the valuation and measurement of fossil fuels extracted from federal lands, and the update to EPA’s Cross-State Air Pollution Rule.

Other Potential Actions. Other Obama Administration regulations that fall within the reach-back period and could be targeted include certain energy efficiency rules, EPA’s aircraft emissions endangerment finding, EPA/NHTSA greenhouse standards for medium- and heavy-duty vehicles, methane standards for new and existing landfills, and the Federal Highway Administration greenhouse gas reporting rule.

FACT SHEET 7: Implementing the New “Two-for-One” Executive Order on Federal Regulations
ACTORS: Office of Management and Budget, Federal Agencies

On January 30, 2017, the President issued an Executive Order directing executive branch agencies and departments to repeal two regulations for every new regulation promulgated. The Order also directs that the costs of new regulations in FY2017 be completely offset by the repeal of existing regulations, and in future years be offset within a regulatory budget to be prescribed for each agency by the Office of Management and Budget (OMB). This Order creates huge uncertainty in selecting regulations to adopt and repeal, discourages new regulations even if they offer large benefits in excess of their costs, and vests huge discretion in the OMB Director.

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

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

Cost Offset Requirement. In FY2017, the “total incremental cost” of all new regulations to be finalized by each agency, “including repealed regulations,” shall be “no greater than zero.” Moreover, all “new incremental costs associated with new regulations” must be completely offset by the “elimination of existing costs associated with at least two prior regulations.” For each future fiscal year, the OMB Director will identify for each agency “a total amount of incremental costs” that will be allowed for issuing and repealing its regulations. The head of each agency must include in the agency’s annual “regulatory plan” the incremental costs of all new regulations and total costs or savings associated with regulations targeted for repeal. No regulations exceeding the agency’s approved total incremental cost allowance will be allowed, “unless required by law or approved in writing by the Director.”

Interim Guidance. By Memorandum dated February 2, the Acting Administrator of OMB’s Office of Information and Regulatory Affairs (OIRA) issued interim guidance to agencies. The interim guidance provides that in FY2017 the regulations subject to the Order will include all “significant regulations.” These are the 300 or more regulatory actions each year currently subject to OIRA review, that have an annual effect on the economy of \$100 million or more, or that may adversely affect in a material way the economy, any sector thereof, productivity, competition, jobs, the environment, health or safety, or other units of government; that create serious inconsistency with other agency actions; or that raise novel legal or policy issues. (See Fact Sheet 12.) The guidance exempts rules affecting transfer payments.

The interim guidance provides that the most expansive definition of costs, “opportunity costs,” will be used to determine the incremental costs of new regulations and offsets from repeals. It provides that in calculating offsets from repeal, agencies may not use the Regulatory Impact Analysis that supported the regulations’ original adoption but must conduct a new analysis; and agencies may not consider sunk costs of compliance with these existing regulations, but only prospective savings. Benefits are not to be considered in any determinations under the Order, only costs.

Constraints. The Order has six similar provisos: “unless prohibited by law,” “unless otherwise required by law,” “to the extent permitted by law,” “unless required by law,” “implemented consistent with applicable law and...the availability of appropriations,” and not “construed to impair or otherwise affect

the authority granted by law to an executive department or agency or the head thereof.” However, the guidance takes a narrow view of what is exempt, and says OIRA must in each case determine whether to grant a waiver based on critical issues, and/or the need to comply with an imminent statutory or judicial deadline (while stating that offsetting repeals will still need to be identified).

Discussion. The effect of this broadly drafted Order will be largely determined by OIRA definitions and internal implementation practices. Periodic discussions between agencies and OMB about which rules to propose or to forego for lack of offsets, which rules to target for repeal, prescribing or negotiating an agency’s annual “total incremental cost allowance,” and deciding on waivers as well as whether a rule is “required by law” or otherwise exempt, may occur outside of public view. Notably, an agency can be assigned a *negative* incremental cost budget by OMB, requiring it to find repeals in excess of any new regulations, or even in the absence of any new regulations.

The effect on federal agency operations will be significant. It will be difficult for agencies to project costs and offsets before launching rulemakings, and finding candidate regulations for repeal will be difficult given existing statutory mandates and the scarcity of sufficiently “costly” repeals. One member of the Administration’s OMB landing team predicted that adopting the cost definitions and applying them to significant regulations, as the interim guidance does, will impose “high” additional demands on federal staff workloads.¹ Implementing the Order will be challenging and may not be possible in many instances. Existing regulations’ costs have often been internalized into industry’s standard operations and new equipment, so there may be little if any cost savings available to offset new regulations.

Repeals will require rulemaking in accordance with all statutory and regulatory procedures: notice and comment, cost-benefit analysis, paperwork reduction, federalism analysis, and justifications for changes in agency position, and in many cases compliance with NEPA, ESA, and other requirements. An agency cannot simply say “we’ve decided training of pesticide applicators is no longer needed,” or “exploration permits are no longer required on federal lands,” without justifying its change in position and a repeal’s consistency with the statutes. Rules whose adoption was expressly required by law, including pursuant to court orders, would need to be replaced by rules that meet the same statutory and judicial standards.

Opportunities for Public Engagement. The Order itself does not *create* any right enforceable against the U.S. However, litigation challenging its application to specific repeals or delays in new regulations may be brought under the APA and substantive laws, and the Order would provide no defense. Stakeholders wanting to contest the Order’s impact can be expected to bring targeted litigation to compel agencies to add regulations to their regulatory agendas even if not offset. Public Citizen, NRDC, and the Communications Workers of America filed a lawsuit in February challenging the Order on its face, and alleging that the Order adds requirements that are not allowed by underlying statutes.

Interested parties will likely press agencies to identify and justify their regulations as “required by law,” as well as to identify repeal targets and cost estimates long in advance of discussions with OMB, so that tradeoffs are in public view. They can also be expected to highlight rules that get lost in the limbo of agency compliance with the Order and to push for disclosure of, and an opportunity to comment on, periodic agency negotiations with OMB.

Action Areas to Watch. All environmental, health and safety, and natural resources rules issued by executive branch agencies will be assessed under this Order.

¹ Marcus Peacock, Implementing a Two-for-One Regulatory Requirement in the U.S. (Dec. 7, 2016).

FACT SHEET 8: Rolling Back Public Lands Plans

ACTORS: President, Department Secretaries, Congress

Federal land management agencies determine resource protection and manage development activities through public land management plans. These plans can be changed by the executive branch, following administrative procedures, or may be modified or overturned by Congress.

Process. Public lands planning processes are subject to changes in direction. Planning processes similar to those described below are used by the Forest Service and other management agencies, and apply to different types of resource uses – such as grazing, logging, outdoor recreation, and wildlife protection.

Coal Leasing. The Secretary of Interior has discretion to defer federal coal leasing under the Mineral Leasing Act and the Mineral Leasing Act for Acquired Lands. 30 U.S.C. §§ 201, 351. In January 2016, Secretary Jewell announced a temporary moratorium on new coal leases pending the Bureau of Land Management’s (BLM’s) preparation of a Programmatic Environmental Impact Statement (PEIS) under the National Environmental Policy Act (NEPA) to evaluate needed changes to the leasing program. The moratorium follows the pattern of two prior moratoria: one was ended after issuance of a 1979 PEIS; another from 1983-87 ended after a supplemental PEIS.

The President can direct the Secretary to end the present coal leasing moratorium. The Secretary could then terminate the ongoing PEIS process and re-start leasing; continue the current PEIS process and re-start leasing in whole or in part during the environmental review; or limit the scope of the PEIS process and re-start leasing in whole or in part. In any of these cases, the Department of Interior would need to provide adequate explanation for the change in direction. This might include reference to coverage of future leasing by previous NEPA documents, a statement that there is no new “federal action” under contemplation for which NEPA analysis is needed, or some combination of new NEPA analysis and continued activity under prior analyses. Congress can also enact legislation directing the Secretary of Interior to re-start the coal leasing program, with or without NEPA compliance.

Offshore Oil and Gas Leasing. The Secretary of Interior can offer submerged lands for oil and gas leasing only in compliance with a five-year planning process required by the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1344. Preparation of each plan must be supported by completion of a PEIS. In 2016, Secretary Jewell removed Atlantic and Arctic waters from the next five-year leasing plan, so these cannot be offered for exploration and leasing unless the new Administration amends the plan, an action that would require new NEPA documentation and a new record of decision. (Most of these same waters are also permanently withdrawn from leasing by President Obama under OCSLA Section 12(a), see Fact Sheet 2, so a new plan would not by itself be sufficient to allow leasing.)

Federal Lands Management Plans. The Federal Lands Policy Management Act (FLPMA) requires the BLM to prepare Land Use Plan Amendments (LUPAs) in order to justify substantial changes in activities on federal lands. 43 U.S.C. § 1712. These resource management and other plans address logging, mining and mineral activities, energy siting, grazing, conservation, species management (e.g. sage grouse protection) and other topics; they must be adopted with public input as provided for by regulation, and with NEPA compliance. An agency effort to amend or replace these plans must utilize the same public processes that supported the plans. Congress can by legislation supersede such plans or direct the Secretary to amend such plans. BLM amended its planning processes for resource management plans by a rule finalized in December 2016; this “Planning 2.0” rule is subject to congressional revocation under the Congressional Review Act (see Fact Sheet 6).

Discussion. Revised Plans Require Additional Process. Most federal lands and resources are managed by agencies that must issue periodic plans in accordance with planning requirements laid out in their governing statutes. The agencies' subsequent management actions must be consistent with the adopted plans. Any planned change in course with respect to resource activities will require them first to amend the plans. New agency-initiated actions to amend plans must comply with the underlying resource management statutes, NEPA, the Administrative Procedure Act, and the Endangered Species Act, among other laws, unless Congress otherwise directs by legislation signed by the President.

Since the coal leasing moratorium is a secretarial action, ending it would be simpler, as resumption of leasing could occur under existing plans, regulations, and prior NEPA documentation; but it would still require justification and documentation under the relevant laws, including NEPA. A re-start would have to address whether the PEIS process (which produced a massive two-volume scoping report in January 2017) would continue, and it would need to take into account the public comments received and issues raised during the scoping period.

Opportunities for Public Engagement. Changes in public lands activities require the re-start of planning processes where the previous plans do not fully cover the activity. Interested stakeholders will have opportunities for administrative participation, lobbying, and litigation.

Action Areas to Watch. Federal coal leasing moratorium, OCSLA offshore leasing plans, BLM "Planning 2.0 Rule," and amendment of LUPAs.

FACT SHEET 9: Cutting Back on Federal Enforcement of Environmental Law

ACTORS: EPA, Department of the Interior, and other Federal Agencies; Department of Justice

Federal agencies and Department of Justice attorneys have considerable discretion in deciding whether, when, and how to enforce regulatory requirements, and enforcement priorities often change with a new administration. Although the Trump Administration has not yet defined its approach to environmental enforcement, the President's and his cabinet members' stated support for deregulation, along with the administration's stated plans to dramatically cut EPA's enforcement budget, suggests likely cutbacks in federal enforcement, and federal oversight of state enforcement, in the coming years.

Process. Federal environmental laws establish a broad array of enforcement tools to help ensure compliance, including: agency notices of violation; agency orders requiring cleanup, compliance, or assessing civil penalties; and judicial proceedings for civil penalties, cost recovery, injunctions, or criminal sanctions. The agency charged with administering a specific statute determines whether to initiate an enforcement action. If the case involves judicial proceedings (civil or criminal), the Department of Justice (DOJ) represents the agency in court and settlement negotiations. Most civil environmental enforcement cases are resolved by settlement between the parties.

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

Agency Discretion. Agencies and DOJ exercise prosecutorial discretion in deciding which enforcement cases to pursue with their limited resources and how to conduct those cases. In lawsuits challenging agency enforcement decisions, courts generally apply a presumption in favor of agency discretion, and look to the particular statute to determine whether Congress has constrained that discretion. Relatively few provisions in the major environmental laws have been found to impose a mandatory and enforceable duty to undertake enforcement action. In addition to exercising discretion in individual matters, agencies establish priority areas for enforcement. EPA, for example, selects "National Enforcement Initiatives" every three years.

Discussion. In short, federal agencies have considerable discretion as to whether and how to pursue enforcement of federal laws. The new Administration is likely to exercise this discretion by revising the enforcement priorities within each agency, pursuing a more limited environmental enforcement role across federal programs, and reducing its oversight of states' efforts to enforce those programs where states have primacy. The impacts of weaker federal enforcement will likely be greatest in states with less active enforcement programs and on issues where federal agencies have exclusive or near-exclusive authority to enforce federal requirements (e.g., Department of Interior regulation of offshore oil and gas development or illegal wildlife trade). Criminal prosecutions could be affected significantly by a smaller federal presence, given the prominent federal role in that area.

Opportunities for Public Engagement. Most major federal environmental laws authorize citizens to bring suit to enforce the laws themselves where the government has failed to take action (see Fact Sheet 14). Citizen enforcement can be expected to increase in the event of a decrease in government enforcement. Where federal or state government action has been initiated, citizens or environmental groups also may be able to intervene as a party and play a direct role in pursuing the violations, including involvement in settlement negotiations.

In addition, some federal laws allow the public to review and comment on the proposed resolution of an enforcement matter – e.g., the Clean Water Act requires public notice and an opportunity to comment on civil penalty orders, while RCRA (the federal solid waste law) requires notice and comment and an opportunity for a public meeting on proposed settlements. More generally, DOJ has issued by rule its formal policy of providing the public an opportunity to comment on a proposed consent decree before judgment is entered by the court. The public may also have an opportunity for input on an agency's proposed enforcement priorities. For example, EPA took public comment and solicited feedback from stakeholders prior to finalizing its 2017-2019 National Enforcement Initiatives.

Action Areas to Watch. While the Administration has not yet detailed its environmental enforcement approach, agencies will likely establish new enforcement priorities that refocus resources among regulated activities and industries. For example, current EPA priority areas that might be deemphasized include natural gas extraction/production and water pollution from animal waste. The Administration might also change course on federal agencies' efforts to integrate environmental justice considerations into enforcement and other regulatory actions – either informally or by revising existing agency plans implementing Executive Order 12898 (“Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” 1994).

In addition to revising their enforcement priorities, there are myriad ways in which DOJ, EPA, and other agencies might curtail federal enforcement. With respect to actions currently underway, the agencies might delay resolution of those cases or reach settlements that are less aggressive. Deregulatory pressures in the enforcement setting can take a number of different forms, including the initiation of fewer actions; slower schedules for bringing enforcement actions; decreased penalty demands or more relaxed compliance schedules in consent agreements; and decreased federal oversight of state permitting and enforcement efforts.

These actions can be advanced through written or informal policies, through reduction in agency enforcement staff, or through reorganization of enforcement responsibilities within the agency. On this last point, it is worth noting that new EPA Administrator Scott Pruitt eliminated the environmental enforcement unit within the Oklahoma Attorney General's office. Federal agencies might also reduce their funding and technical assistance to the states, making it more difficult for states to fill enforcement gaps.

Congress may also seek to weaken enforcement generally by continuing to cut federal agency budgets and staff (see Fact Sheet 10), or by enacting substantive legislation – to curtail existing enforcement authorities, reduce monitoring/reporting requirements, or limit citizen suit and other public participation mechanisms. For example, H.R. 622 (“Local Enforcement for Local Lands Act”), introduced in January, would terminate the law enforcement function from the Bureau of Land Management and U.S. Forest Service and authorize local law enforcement to carry out federal responsibilities.

FACT SHEET 10: Defunding Federal Environmental Protection Programs

ACTORS: Congress, President, Federal Agencies

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

Process. Congress' authority over the federal budget – the “power of the purse” – is provided in Article I of the U.S. Constitution. A number of federal laws govern how Congress implements this authority, including the 1974 Congressional Budget Act, which established the framework for the federal budget process in effect today. The Congressional Research Service characterizes federal budgeting as an “enormously complex” process that involves “dozens of subprocesses, countless rules and procedures, [and]....millions of work hours each year.”¹ Key elements of the process include authorizing legislation, which creates or modifies federal programs and activities; and appropriations legislation, which provides the funds for those programs. Below is a brief summary of the main procedural components expected to be followed in appropriating agency funds each fiscal year.

President's Budget. The President submits a budget to Congress that is non-binding but that puts forth the Executive's proposals and requests for funding levels and policy changes. Although the budget is supposed to be submitted by the first Monday in February, in transition years it is not unusual for the President to submit a budget outline in that month and a fuller proposal later in the spring. On March 16, 2017, the White House released its budget blueprint for Fiscal Year 2018 (which begins October 1, 2017). The blueprint is summary in nature, and contemplates submission of a complete budget to the Congress “later this spring.”

Congressional Budget Resolution. Under the Congressional Budget Act, the House and Senate are to develop a joint budget resolution by April 15th, which sets both aggregate amounts (total revenues, total new budget authority/outlays, surplus/deficit, and debt limit) and spending levels for each functional category in the budget (Natural Resources and Environment, Energy, Health, Transportation, etc.). The budget resolution does not include amounts for specific programs, but accompanying reports may include non-binding assumptions about major programs. Budget resolutions are not legislation, and thus do not require presidential action, can pass with a simple majority, and are not subject to the filibuster.

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

Appropriations bills originate in the House. Like other legislation, both houses must pass the same appropriations bill before it is sent to the President for approval. If Congress fails to act to provide

¹ Congressional Research Service, Introduction to the Federal Budget Process (2012), Summary.

funding by October 1 (the start of the fiscal year), most federal operations are subject to shutdown, as occurred for 13 days in October 2013. To avoid shutting down the government, Congress has resorted to continuing resolutions (CRs) to temporarily fund government operations, typically at existing levels. It is possible (but less likely) for a CR to be stopped by a filibuster or to include riders addressing contentious policy issues. The government is currently funded under a CR that expires on April 28, 2017.

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

Discussion. Generally, the federal budget process can be used to reduce an agency’s overall appropriation, to reduce or eliminate funding for certain programs, and to prohibit specific agency activities. All of these elements can be seen in the President’s budget blueprint for FY 2018, which contemplates deep cuts in environmental programs as part of a stated effort to mobilize additional funds for defense spending. Although a complete analysis of the budget is beyond the scope of this paper, the proposal for EPA is representative and worth noting. While the blueprint would largely maintain spending on water infrastructure programs administered by EPA, it would cut the overall agency budget by \$2.6 billion, or 31%, including the following:

- Cuts categorical grants to the states for environmental program administration, including permitting and enforcement activity, by \$482M – a 44.5% cut;
- Cuts EPA enforcement by \$129 million – a 24% cut;
- Cuts Superfund by \$330 million – a 30% cut;
- Cuts ORD (EPA’s core science program) by \$233 million – a 48% cut;
- Eliminates “more than 50 EPA programs” to save \$347 million, including the Clean Power Plan, Energy Star, and the Endocrine Disruptor Screening Program, and infrastructure assistance to Alaska Native Villages and the Mexico Border.

Such cuts to EPA programs and to the state grants administered by EPA can be expected to have significant impacts on environmental protection programs around the country, including with respect to the timeliness and integrity of the various permit, license, and approval decisions needed to support commercial and development activities.

How Congress will respond to the blueprint remains to be seen. The federal budget process has become increasingly unpredictable and subject to brinkmanship over the past several years. The outcome – both in terms of the magnitude of budget cuts and the specific programs targeted – is determined by an array of political interactions and calculations among and within the White House, House of Representatives, and Senate.

Individual agencies also use internal budgeting decisions to achieve the Administration’s policy goals. Agencies exercise discretion in implementing their assigned budgets. Within the constraints established by Congress, EPA managers could, for example, cut or eliminate programs, shift staff from one program to another, or reduce staff by failing to fill vacancies or (less commonly) by implementing layoffs through reductions in force (RIFs).

Opportunities for Public Engagement. The primary action by interested stakeholders would be to seek to influence member voting on these budget bills.

Action Areas to Watch. Program areas that are likely points of focus include climate change mitigation (the President’s blueprint proposes to defund the Clean Power Plan, international climate change programs, climate change research and partnership programs, and related efforts), renewable energy, federal lands acquisition, scientific research, monitoring and data collection, environmental justice, and environmental enforcement at EPA, DOJ, and other agencies.

Budget Riders. The multitude of anti-environmental riders that have been proposed but not enacted in recent years illustrate the array of issues that members of Congress have sought to address through the budget process – e.g., blocking EPA from changing its rules defining which waters are protected by the Clean Water Act; prohibiting EPA from enforcing its lead paint rules; delaying EPA’s health standards for ground-level ozone; overriding species protections required under specific Endangered Species Act biological opinions; blocking funding for the President to use the Antiquities Act to establish new national monuments in certain areas; and preventing implementation of the National Ocean Policy. Over the past eight years, the vast majority of budget riders were defeated by the threat of presidential veto; the Trump Administration seems far less likely to serve as a check on budget riders of this kind.

A more obscure congressional tool for reducing agency resources – the “Holman Rule” – was reinstated through passage in January of a House rules package. This antiquated measure allows House members to propose amendments to appropriations bills that reduce the pay of an individual federal employee to \$1, providing a mechanism to target specific employees or to reduce staffing at programs and offices.

FACT SHEET 11: Preempting State Environmental Protection Requirements

ACTORS: Congress, Federal Agencies, Courts

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

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

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

The Supremacy of Federal Law. The Constitution’s Supremacy Clause (Article VI, clause 2) addresses the relationship between federal and state laws in areas of shared authority such as environmental protection: “The Constitution, and the Laws of the United States....and all Treaties made...shall be the supreme law of the land....” Thus, federal law may displace state (and local) law where Congress is acting within the sphere of its enumerated powers. Preemption occurs in three ways. First, “express” preemption exists when a federal statute includes provisions that explicitly preempt state law. Second, where a federal law does not explicitly address preemption, “conflict preemption” may be implied if the state law conflicts with (or impedes implementation of) the federal law. Third, “field preemption” is another form of implied preemption that may arise where federal law seeks to occupy a given field to the exclusion of state law.

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

Legislation. Congress can act to preempt state law by addressing preemption in a new federal law or by amending an existing law to include a preemption provision. Express preemption provisions are of three general types. First are provisions that preempt states from establishing requirements that are weaker than federal standards, but allow states to establish more stringent laws and regulations. The Clean Water Act and RCRA (the federal solid waste law) are prominent examples of this “cooperative federalism” approach. A second type of express provision – sometimes called “ceiling preemption” – simply prohibits states from adopting their own laws and regulations on the subject (unless identical to federal law), with or without an exemption for state laws already in place. For example, the federal GMO labeling law enacted in 2016 established labeling requirements throughout the U.S., but in the process preempted state laws, including Vermont’s existing, more stringent law.

Finally, where Congress enacts a broad preemption provision, it may allow states to apply to a federal agency for a waiver of preemption and approval to regulate. The Toxic Substances Control Act (TSCA) legislation enacted in 2016 establishes a detailed framework for preempting state law where EPA has acted to regulate chemicals, but also provides for certain mandatory and discretionary EPA waivers to allow states to regulate in certain situations.

Regulations and Executive Actions. The executive branch might advance preemption in a number of ways. Where there is an express statutory preemption provision that authorizes states to seek waivers and approvals to regulate, agencies might deny such requests; those decisions typically are subject to notice-and-comment requirements. In addition, the President may seek to guide the executive branch's approach to preemption by revoking, modifying, or issuing Executive Orders and Presidential Memoranda, both of which have the force of law if they exercise presidential powers granted by the Constitution or delegated by Congress. (See Fact Sheet 1.)

Federal agencies have in the past sought to advance preemption even in the absence of express statutory preemption provisions, for example as part of a regulation's preamble, a descriptive statement that is not subject to notice and comment. Concerns over such practices led Congress in 2008 to prohibit the Consumer Product Safety Commission from attempting to limit, expand or modify the preemption provisions of the laws it administers. President Obama's 2009 Memorandum for the Heads of Executive Departments and Agencies, titled "Preemption," was also a response to prior agency actions taken "without explicit preemption by the Congress or an otherwise sufficient basis under applicable legal principles." The Memorandum states the Obama Administration's policy that "preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption," and specifically eliminates the process of preemption by regulatory preamble.

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

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

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

New or amended federal laws that are enacted under Congress' broad commerce authority and that include express preemption provisions would pose a considerable obstacle to state regulation. Such laws would be especially problematic were they to create weak standards and requirements ("weak

preemption”). Congressional action may also result in “field preemption” when laws are enacted without express preemption provisions, but are nonetheless seen as “displacing” state regulations. The extent to which a state policy is preempted or displaced by a new or amended federal law would be subject to judicial interpretation. Even without new federal legislative or regulatory preemption language, states that enact new environmental policies can continue to expect legal challenges based on implied preemption analysis, perhaps with support from the new Administration – either via participation in litigation or by advancing preemption arguments in new federal rules or in other agency policies.

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

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

Agency Denial of State Preemption Waivers. The most highly publicized preemption issue involves Clean Air Act (CAA) emissions standards for new motor vehicles. The CAA generally preempts states from establishing their own standards, but the Act specifically allows California to request a waiver to enforce its own more stringent standards. EPA must publish a notice for a public hearing and written comments before making a waiver decision. The Act requires that the waiver be granted, unless EPA finds that California does not need the standards to meet “compelling and extraordinary conditions,” that the standards and enforcement scheme are inconsistent with the Act, or that California was arbitrary and capricious in determining that its standards are at least as protective as federal standards. When the waiver is granted, as it typically has been, other states also may adopt California’s more stringent standards, and currently over a dozen states have done so.

On March 15, EPA announced that it would “revisit the previous administration’s rule that finalized standards to increase fuel economy to the equivalent of 54.5 mpg for cars and light-duty trucks by Model Year 2025.”¹ At his Senate confirmation hearing, EPA Administrator Pruitt suggested that California’s current waiver governing such standards also would be reviewed by the new Administration. If EPA acts to withdraw or deny the waiver, California can be expected to challenge the decision in court.

Examples of other laws under which federal agencies exercise discretion to approve or deny state requests for preemption waivers include: TSCA (regulation of individual chemicals); the Consumer Product Safety Act (limits on chemicals in products and other safety standards); and the Energy Policy and Conservation Act (requirements for energy use, energy efficiency, or water use of residential appliances). Each statute establishes criteria that agencies must use in deciding state waiver requests.

¹ EPA News Release, “EPA to Reexamine Emission Standards for Cars and Light Duty Trucks” (March 15, 2017).

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

New Federal Legislation. As the 2016 debates over TSCA and GMO labeling showed, industry often turns to Congress for relief from potentially stronger state standards. For example, a recently introduced House bill, the Energy Efficiency Free Market Act of 2017, would repeal existing federal appliance efficiency standards and add a blanket state preemption provision: “No State or Federal agency may adopt or continue in effect any requirement to comply with a standard for energy conservation or water efficiency with respect to a product.” Similar provisions could emerge in new federal legislation in any number of areas. In addition, congressional rejection of agency rules through the Congressional Review Act (see Fact Sheet 6) or agency repeal of longer-standing regulations (see Fact Sheet 5) could result in “weak preemption,” where federal regulation is rendered inoperative but the relevant authorizing statute preempts additional state regulation.

FACT SHEET 12: Subjecting Agency Regulations to Additional Cost-Benefit Analysis
ACTOR: White House Office of Information and Regulatory Affairs

A series of Executive Orders reaching back decades, as well as several statutes, established a cost-benefit analysis for new and existing agency rules. These provisions give the Office of Information and Regulatory Affairs (OIRA), a branch of the White House's Office of Management and Budget, a central role in the issuance of regulations. Even without any changes to existing law, these processes will provide the new Administration with a set of tools for shaping and limiting proposed regulations. Moreover, it is possible that the Administration will alter the OIRA review process to further constrain the ability of agencies to regulate, and/or disallow consideration of the "social cost of carbon."

Process. A series of Executive Orders issued by each president since the 1970s have required "regulatory analysis" of proposed rules; cost-benefit analysis has been required since 1981. Currently, Executive Order 12866, issued in 1993, governs this process, as supplemented by Executive Orders 13563 and 13579, both issued by President Obama in 2011. Together these Executive Orders establish the components of the regulatory analysis process, including (1) regulatory planning, (2) approval for new regulations, and (3) review of existing regulations.

Regulatory Planning Process. The Executive Orders mandate a uniform regulatory planning mechanism for *all* federal agencies, including "independent regulatory agencies" such as the Federal Energy Regulatory Commission or the Securities and Exchange Commission. Each agency is required to prepare a Unified Regulatory Agenda that briefly describes each regulation under development or review. The Unified Regulatory Agenda must include a Regulatory Plan that includes "the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form." E.O. 12866, Sec. 4(c)(1). That Order specifies the content of the Regulatory Plan and requires circulation of each Plan to other government entities.

Approval Process for New Regulations. Agencies are required to submit information to OIRA for every regulation deemed by the agency *or by OIRA* to be "significant." Significant actions are those (1) having an annual economic effect of \$100 million or more; (2) creating a conflict with actions of another agency; (3) affecting the impact of certain programs on beneficiaries' rights or obligations; or (4) raising novel legal or policy issues. For such regulations, OIRA approval is required before the regulatory action can occur. These requirements do not apply to "independent regulatory agencies."

For all significant regulatory actions, an agency must submit to OIRA an "assessment of the potential costs and benefits of the regulatory action." E.O. 12866, Sec. 6(a)(3)(B). For "economically significant" actions—those with an annual economic impact of \$100 million or more—a thorough cost-benefit analysis, including an analysis of alternatives, is also required.

Executive Order 13563 clarifies the criteria for agencies issuing regulations. To the extent allowable by the applicable law: (1) a regulation should be adopted only upon a reasoned determination that the benefits outweigh the costs; (2) regulations should be tailored to minimize the burden imposed on society; and (3) the regulatory approach chosen should maximize net benefits. Among other factors, OIRA considers these criteria in its review of each regulation.

Review Process for Existing Regulations. Executive Order 13563 requires agencies to develop a plan for periodic review of existing regulations. In developing such a plan, the agencies must consider whether to modify, expand, or repeal existing regulations, when warranted.

Statutory Requirements. In addition to the Executive Orders' requirements, the Unfunded Mandates Reform Act governs the issuance of regulations that may result in the expenditure of \$100 million or more, in total, by the private sector and by state, local, and tribal governments. For any such regulation, an agency must prepare a statement regarding the costs and benefits of the regulation, as well as regarding future compliance costs. OIRA is primarily responsible for monitoring agency compliance with these requirements. Under the Regulatory Flexibility Act of 1980, agencies are required to assess the impact of proposed regulations on small businesses and other "small entities." An expansion of this statute is currently proposed (see Fact Sheet 13).

Discussion. *Generally.* The regulatory analysis process provides the White House with a powerful tool to shape regulations issued by government agencies and to limit the issuance of those regulations in the first instance, if it so chooses. Different OIRA Directors have interpreted and implemented the Office's mandate in different ways, making that selection a key political appointment. Further, it is possible that the current Administration will introduce changes to the regulatory analysis process that further constrain the ability of agencies to regulate, as it did in issuing the "two-for-one" Executive Order (see Fact Sheet 7).

Social Cost of Carbon. The Obama Administration institutionalized an assessment of the "social cost of carbon" as a component of its cost-benefit analysis. To support that process, an interagency working group produced a technical support document with recommendations for monetizing the social cost of carbon, allowing climate change impacts to be weighed alongside other costs and benefits. The working group recommended a rate of \$36 per ton of CO₂ equivalent for 2015. Trump Administration officials have signaled their opposition to this approach. With respect to cost-benefit analysis required by Executive Order, the Administration could either eliminate assessing the social cost of carbon altogether, or alter the technique for calculating it, which could minimize the scale of those costs in the calculation. There would be few constraints on making these changes to the OIRA review process.

Agencies could also minimize or eliminate their use of the social cost of carbon in rulemaking. In doing so, the Administration would be constrained primarily by the legal bar on agency actions that are "arbitrary or capricious." Finally, an analysis of the social cost of carbon has also become established as part of the review under statutes such as the National Environmental Policy Act and the Energy Policy and Conservation Act, and some courts have concluded that such analysis is required. With respect to these requirements, the courts may well limit the Administration's ability to eliminate—legally—consideration of the social cost of carbon.

Action Areas to Watch. Even if these existing cost-benefit Executive Orders are not modified by President Trump, their processes will continue to affect the issuance of any regulations considered by administrative agencies under the Trump Administration. The social cost of carbon will almost certainly be targeted in some manner, either directly or through disuse.

FACT SHEET 13: Enacting New Procedures for Federal Regulation

ACTORS: Congress, President

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

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

All the legislation described here was introduced in previous sessions of Congress in the same or similar forms. Most passed the House of Representatives but died in the Senate, under the threat of a filibuster or of a veto from President Obama. Now that the White House has changed hands, these bills' prospects have improved.

Opportunities for Public Engagement. The primary action by interested stakeholders would be to seek to influence member voting on these bills. The Senate will be key, because to overcome a filibuster there, 60 votes would be necessary.

Action Areas to Watch. *Midnight Rules Relief Act of 2017 (H.R. 21).* This bill would facilitate the invalidation of agency regulations by Congress under the Congressional Review Act ("CRA," see Fact Sheet 6.) One key CRA limitation is that a separate disapproval resolution is required for each regulation, which requires a substantial amount of Senate floor time. For regulations promulgated toward the end of the last year of a President's term, the Midnight Rules Relief Act would allow multiple regulations to be bundled in a single disapproval resolution.

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

This bill was passed by the House of Representatives on January 4, 2017. It is now pending before the Senate Committee on Homeland Security and Government Affairs.

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

First, for all new regulations, the bill would implement a "regulatory cut-go requirement." Every agency issuing a new rule would be required to "identify a rule or rules that may be amended or repealed to completely offset any annual costs of the new rule to the United States economy." REINS Act, Sec. 3. The agency would also be required to "make each such repeal or amendment" before the new rule could take effect. *Id.* This requirement resembles—but is not identical to—President Trump's January 30

Executive Order (see Fact Sheet 7) creating a regulatory “budget” and requiring two regulations to be repealed for every new regulation. Notably, the provisions of the REINS Act would apply to all future administrations, while the new Executive Order could be rescinded by a subsequent president.

Second, the REINS Act would create a new process for the issuance of new “major rules,” which are currently defined as those likely to cause an annual cost of \$100 million or more; a major increase in costs or prices; or significant “adverse effects on competition, employment, investment, productivity, innovation,” or on the ability of American companies to compete with foreign companies. No major rule could take effect without a congressional resolution explicitly approving that rule. Moreover, such a resolution could only be passed within the timelines set by the Act; if no resolution were passed within the allowable time frame, the rule could not take effect at all.

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

Third, the REINS Act establishes a process for congressional review of all rules in effect when the legislation is enacted. This process would occur over ten years following the Act’s enactment, with one-tenth of existing rules reviewed each year. There is some ambiguity as to how the legislation’s provisions would apply to existing rules. It appears that, for each set of rules identified each year, Congress can approve all of the rules through a single resolution, attach conditions to the approval of certain rules, or separate out certain rules for individual approval or disapproval resolutions. Notably, any regulation not subject to an approval resolution within the 10-year review period is deemed not to continue in effect.

The REINS Act was passed by the House of Representatives on January 5, 2017. It is now pending before the Senate Committee on Homeland Security and Government Affairs.

Regulatory Accountability Act of 2017 (H.R. 5). This legislation is an omnibus bill that would add numerous steps to the regulatory process across all federal agencies.

- *Title I – Regulatory Accountability Act.* This title would add numerous obstacles—by some counts more than 80—to the regulatory process. These include additional required analyses and additional procedures for any “major rule” or “high-impact rule.” In addition, the Act establishes a default requirement to adopt regulations that are “least costly” to the regulated parties, setting aside the rule’s expected benefits. Adopting a rule that is not the “least costly” would require an explicit justification.
- *Title II – Separation of Powers Restoration Act.* This title abolishes *Chevron* deference, under which courts are required to defer to agencies’ legal interpretations in certain circumstances. Instead, courts would interpret legal provisions independently, without any deference to agency perspectives.
- *Title III – Small Business Regulatory Flexibility Improvements Act.* This title strengthens the provisions of the Regulatory Flexibility Act, which provides protections for small businesses and establishes additional required procedures for rulemaking.
- *Title IV – Require Evaluation before Implementing Executive Wish lists Act (or “REVIEW Act”).* This title postpones the effective date of any “high-impact rule,” defined as rules that would impose an annual cost of \$1 billion or more, “until the final disposition of all actions seeking

judicial review of the rule.” Regulatory Accountability Act, Sec. 402. Given the complexity and pace of litigation for most major regulations, this could stay a rule’s effectiveness for years. The legislation could also encourage litigation as a vehicle for postponing the implementation of rules.

- *Title V – All Economic Regulations Are Transparent Act (or “ALERT Act”).* This title would add multiple additional reporting requirements for each agency regarding ongoing rulemakings, including a requirement that the White House’s Office of Information and Regulatory Affairs post on the Internet information regarding individual rules. The bill also would impose a six-month delay after the posting of that information before any rule could become effective.
- *Title VI – Providing Accountability Through Transparency Act.* This title requires each agency to include the internet address for a 100-word summary of a proposed rule, to be posted on regulations.gov, in any notice of proposed rulemaking and in the docket for the proposed rule. (Currently, notices regarding rulemakings are already required to include a brief summary of the rule, see 61 C.F.R. § 18.12 (2015)).

This bill was passed by the House of Representatives on January 11, 2017. It is now pending before the Senate Committee on Homeland Security and Government Affairs.

Legislation on the Use of Science. On February 7, 2017, the House Science, Space and Technology Committee held a hearing, titled “Make EPA Great Again,” regarding the use of science by the EPA. The Committee did not directly consider any legislation, but the hearing built on themes addressed by legislation considered in prior sessions of Congress that has since been re-introduced during in the current session.

For example, the EPA Science Advisory Board Reform Act of 2017 (H.R. 1431), which the House passed in 2015, would change the membership of EPA’s Science Advisory Board and the procedures by which it operates; among other changes, it would require that “the scientific and technical points of view represented on and the functions to be performed by the Board are *fairly balanced* among the members of the Board.” H.R.1431, Sec. 2 (emphasis added). Similarly, the Act would make it easier for experts tied to regulated entities to serve on the Board. It also constrains the Board’s ability to set limits on the time for receiving public comments, potentially creating substantial delays for the Board’s work.

The Honest and Open New EPA Science Treatment Act of 2017 (H.R. 1430) (“HONEST Act”), which was passed by the House in 2015 as the Secret Science Reform Act, would require that all scientific and technical information on which an EPA action is based be publicly available before that action is taken. However, the bill does not adequately account for the privacy concerns that make it impossible to release certain data publicly; thus, the Act would appear to prevent EPA from issuing regulations in those circumstances. The bill would also require that the information made public allow “substantial reproduction of research results.” H.R. 1430, Sec. 2. This requirement seems likely to create another substantial obstacle to environmental regulation because many critical studies may not be reproducible—even though they are considered reliable. Looking beyond EPA, the recently-introduced Better Evaluation of Science and Technology Act of 2017 (S. 578) (“BEST Act”) would apply similar principles to all administrative agencies in the federal government.

In addition to these legislative efforts regarding science, it is possible that similar goals may be pursued through administrative action.

FACT SHEET 14: Enacting New Constraints on Citizen Enforcement of Environmental Law

ACTORS: Congress, President

Several pending bills would add significant hurdles to the long-standing system of citizen enforcement of federal law, including lawsuits by public interest environmental organizations. If there is a reduced government enforcement presence, enacting procedural barriers to citizen litigation would create additional obstacles to environmental accountability.

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

As noted in Fact Sheet 9, most major environmental laws authorize citizens to bring suit to enforce those laws against violators where federal agencies themselves have failed to take action. In addition, under the Administrative Procedure Act, citizens are generally authorized to bring suit against the federal government to challenge agency actions that are procedurally or substantively unlawful. Several bills passed by the House in recent years, and again pending in the new Congress, would threaten the ability of citizens and public interest groups to enforce environmental laws and to ensure that federal agencies are fulfilling their legal obligations.

Opportunities for Public Engagement. The primary action by interested stakeholders would be to seek to influence member voting on these bills. The Senate will be key, because to overcome a filibuster there, 60 votes would be necessary.

Action Areas to Watch. *Attorney Fees.* Many federal statutes allow successful private litigants to recover attorney fees when they succeed in certain types of cases against the federal government or to enforce federal environmental laws. These “fee-shifting” provisions are important to the ability of citizens and public interest groups to litigate to ensure that federal environmental laws are properly enforced and that federal agencies are acting lawfully. The concept has endured repeated attempts at reform bills that would constrain fee-shifting in a variety of ways.

For example, under the Equal Access to Justice Act, a statute first passed in 1980, plaintiffs that prevail in litigation against the federal government—where the government’s position was not substantially justified—can obtain reimbursement of their attorney fees from the government. The Act establishes a standard and a procedure for the payment of such fees, which are at the discretion of the federal district judge overseeing a case. Past bills have attempted to limit the size of these fee awards and to restrict larger environmental groups from receiving them at all. Presently, the “Open Book on Equal Access to Justice Act,” which has been passed by the House and is now pending before the Senate, would mandate the creation of an online, searchable database containing detailed information regarding all fee awards under the Equal Access to Justice Act.

Similar attempts to limit or eliminate provisions that allow plaintiffs to recover attorney fees under EAJA or substantive environmental laws have been introduced in Congress in the past, and may be expected to surface again.

Settlements and Consent Decrees. The majority of all civil cases are resolved by a voluntary settlement between the parties, which can reduce parties’ expenses in litigation and conserve judicial resources. (A

“consent decree” is simply a settlement where a judge agrees to and formally orders the terms of the settlement.) Notably, in many environmental cases, the settlement agreement consists of a promise by the government to take an action already required by law. Several pending bills would create additional limitations on settlements entered into by the federal government.

The “Stop Settlement Slush Funds Act” (H.R. 732) would constrain settlements entered into by the federal government in several ways. First, the bill would bar any settlement agreement that the government enters from including payments to third parties (with a few exceptions, such as payments that directly remedy harms caused by the party making the payment). This would curtail the practice of “supplemental environmental projects,” or SEPs, a mechanism where polluters pay some settlement funds to a third party to carry out environmental remediation or conservation work. Second, the bill requires each agency to file an annual report detailing the payments to third parties that would be allowed by the Act, such as those directly compensating victims.

The “Sunshine for Regulatory Decrees and Settlements Act” (S. 119) addresses so-called “sue-and-settle” tactics, the notion that environmental litigation can result in collusive agreements between citizen groups and government agencies. Among other changes to the procedures applicable to settlements and consent decrees entered by the government, it requires agencies to publicly post and report to Congress information regarding ongoing lawsuits, settlement agreements, or consent decrees. The bill then requires a mandatory period of public comment before the government may finalize a settlement or consent decree. Since many environmental lawsuits are filed to compel agencies to commence rulemaking or to require action on missed statutory deadlines, the bill would add yet another layer of process and delay, which may present conflicts with other statutory responsibilities.

Likewise, an additional bill, S. 375, specifically targets the settlement process under the Endangered Species Act. It would create a new process for the approval of settlements under the ESA.

Other Possible Barriers to Public Interest Litigation.

- The “Fairness in Class Action Litigation Act” (H.R. 985) would add new barriers to class action suits in federal court and to federal multi-district litigation—two different procedural pathways for grouping the claims of individual plaintiffs. The changes to the class action process include raising the bar for class certification and delaying or capping fees for class counsel. This bill was passed by the House on March 9 and is now pending before the Senate.
- The “Lawsuit Abuse Reduction Act” (H.R. 720) would modify the sanctions provision of the Federal Rules of Civil Procedure by making sanctions for “frivolous” lawsuits mandatory rather than a tool that can be used at the discretion of the district court judge. Under this bill, sanctions must include reimbursement of all reasonable expenses due to the violation necessitating the sanctions; the sanctions may also include case-specific consequences, such as dismissing a case, or the levying of additional penalties for deterrence purposes. The bill would also make it impossible for a party to avoid sanctions by withdrawing the objectionable claim or other action within 21 days, as can be done under the present rules. This bill was passed by the House on March 10 and is now pending before the Senate.

In the past, other bills have been introduced that would create additional barriers to public interest litigation. These include measures that would impose financial bonding requirements on plaintiffs for certain lawsuits that may delay or halt defendants’ business operations, thus increasing the cost of conducting environmental litigation and diminishing many plaintiffs’ ability to bring such lawsuits.



1730 M Street, NW, Suite 700
Washington, DC 20036
Tel: (202) 939-3800
Fax: (202) 939-3868
www.eli.org