POLICY BRIEF

AUGUST 2017

200 DAYS & COUNTING

ENVIRONMENTAL LAW & THE TRUMP ADMINISTRATION

A COMPILATION OF BLOG POSTS FROM LEGAL-PLANET.ORG

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Summary

August 7, 2017, was Donald Trump's 201st day as President of the United States. Eric Biber and Dan Farber marked the occasion with an analysis looking back at the Trump Administration's impact on environmental law in the United States during its first 200 days and exploring the most likely future developments that we may see in the remaining years of its term. Approaching its subject primarily by channels of government decision-making – legislation, budget, enforcement, executive orders, and state and local action – *200 Days & Counting* reviews the Administration's environmental proposals and offers a prognosis of what may come next.

200 Days & Counting: Environmental Threat Assessment			
	Probability of Harm/Action	Degree of Harm/Benefit	Reversibility of Change
Legislation	LOW	POTENTIALLY HIGH	POTENTIALLY LOW
Budget	HIGH	MEDIUM TO HIGH	POTENTIALLY HIGH (WITH IMPORTANT EXCEPTIONS)
Pollution & Climate Change	MEDIUM	POTENTIALLY HIGH	MEDIUM
Enforcement	HIGH	MEDIUM	HIGH
Public Lands	HIGH	MEDIUM	MOSTLY HIGH
Executive Orders	MEDIUM	LOW TO MEDIUM (EXCEPT FOREIGN AFFAIRS)	HIGH
State & Local Action	HIGH	MEDIUM	MEDIUM TO HIGH

Acknowledging that there is still significant uncertainty regarding the ultimate impact of the Administration's environmental policies, the authors conclude that major statutory revisions are unlikely; significant regulatory rollbacks will be slow; federal agency and research budgets may be substantially reduced; and enforcement of existing laws will likely be relaxed. A combination of legal, procedural, and political constraints will hamper the Administration's efforts, slow them down, and in some cases block them. Nevertheless, the damage is likely to be substantial.

About this Policy Brief

This Policy Brief is a compilation of a series of *Legal Planet* blog posts written in August 2017. *Legal Planet* is a collaborative effort of the UC Berkeley and UCLA Schools of Law and is accessible at www.legal-planet.org. The original posts were compiled here and edited for consistency.

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I. Introduction

The future of environmental law after 200 days of the Trump Administration.

As of August 6, 2017, President Trump has been in office for 200 days. When he was elected and inaugurated, there was a great deal of concern about what his Presidency might mean for environmental law.[1] He has now completed over one eighth of his first term, so we have a little better sense of what the future might have in store.

In this paper, we review what has happened so far and what the next three and one half years are likely to produce for environmental law in the United States. Environmental law is a very broad field, encompassing pollution, toxic chemicals, natural resources, biodiversity, and much of energy and water law. Rather than going by topic area (water, air, climate change, biodiversity, hazardous waste), we generally organize our analysis by channels of federal government decision-making such as legislation, budget and enforcement. In trying to understand how future developments will play out, understanding the channels of decision-making is actually much more important than looking at specific topic areas. It may be hard for us to know right now what the political prospects will be for a proposal to, for example, revise a particular provision of the Clean Water Act, or modify regulations implementing the Clean Air Act. But we do have a decent sense of what appear to be the plausible prospects for any significant environmental legislation to pass through Congress right now, or what we know so far about how the Trump Administration has been effective in repealing Obama Administration regulations. There are two exceptions to this approach. First, we give an overview of what we think might happen in the pollution control and climate change context. Second, we specifically focus on federal public lands, because they have such a different decision-making process than many other areas of federal environmental law.

We hope our overview will be informative to our readers, and give a sense of what may be likely to transpire between now and January, 2021. One theme that we think will become clear in our overview is the low probability of major revisions to the statutory structure of environmental law in the United

[1] *See, e.g.*, Ann Carlson, "Making America Great Again for Dirty Energy", Legal Planet (Feb. 3, 2017), *available at* http://legal-planet.org/2017/02/03/making-america-great-again-for-dirty-energy/; Ann Carlson, "Trump and Climate Change", Legal Planet (Nov. 9, 2016), *available at* http://legal-planet.org/2016/11/09/trump-and-climate-change/; Eric Pooley, "The 4 Worst Things Donald Trump Has Done to the Environment", Time (Apr. 27, 2017), *available at* http://time.com/4756797/environment-donald-trump-100-days/; Steven Mufson and Brady Dennis, "Trump Victory Reverses U.S. Energy and Environmental Policies", Washington Post (Nov. 9, 2016), *available at* https://www.washingtonpost.com/news/energy-environment/wp/2016/11/09/trump-victory-reverses-u-s-energy-and-environmental-priorities; Michael Greshko, "The Global Dangers of Trump's Climate Denial", National Geographic (Nov. 9, 2016), *available at* http://news.nationalgeographic.com/2016/11/president-trump-global-climate-change-denial-environment/; Evan Halper, "Trump Stumbled on Healthcare and Immigration, but He's Been 'a Wrecking Ball' on the Environment", Los Angeles Times (Apr. 29, 2017), *available at* http://www.latimes.com/politics/la-na-pol-trump-climate-20170428-story.html; Julie Leibach, "What to Expect from Trump's Environmental Policy", Science Friday (Mar. 14, 2017), *available at* https://www.sciencefriday.com/articles/what-to-expect-from-trump-era-environmental-policy/; Robinson Meyer, "How the U.S. Protects the Environment, from Nixon to Trump", The Atlantic (Mar. 29, 2017), *available at* https://www.theatlantic.com/science/archive/2017/03/how-the-epa-and-us-environmental-law-works-a-civics-guide-pruitt-trump/521001/.

States – a potential concern early on. In addition, it seems like the Trump Administration will have to take more time and effort, and may be less effective, than predecessor administrations in rolling back or changing regulations. We do see major possibilities for changes in the areas of budgeting for federal environmental agencies and research, and in enforcement. Even here, the range of outcomes includes something looking a lot like the status quo.

II. Legislation

What are the prospects for major environmental legislation in the near future?

From the perspective of environmental law, one of the most important questions is whether full Republican control of Congress and the White House would lead to fundamental changes to significant environmental laws. These are the kinds of changes that would be most important over the long-run, from a legal perspective. Laws are hard to pass in our system, and thus any changes made by the GOP now might not be undone for a long time, if ever.

However, while the Republicans do have majorities in the Senate and the House, they only have 52 votes in the Senate. That is important because, in general, passing substantive legislation in the Senate requires 60 votes. At least 60 votes are required to cut off debate on any piece of legislation; otherwise opponents can require debate to continue in perpetuity via the filibuster.[2] Thus, for the passage of most substantive legislation, at least eight Democratic votes (or six to seven Democrats plus one or both of the Democratic-aligned independent Senators) would be required to move the legislation forward.

In January, it was conceivable that the GOP might get those eight Democratic votes. Ten Democratic Senators come from states that President Trump carried in the 2016 election.[3] Five of those Senators (Joe Manchin of West Virginia, Heidi Heitkamp of North Dakota, Joe Donnelly of Indiana, Claire McCaskill of Missouri, and Jon Tester of Montana), represent states that Trump carried by at least double-digits. For many of the others, Trump barely carried the state (Wisconsin, Michigan, Pennsylvania and Florida). Nonetheless, if Trump were a popular president, then these Democratic Senators might have no choice but to endorse GOP legislation supported by Trump.

Trump has not turned out to be a popular president so far.[4] Thus, these Democratic Senators have had little pressure to go along with the President. Even Senator Manchin, from a state that Trump carried by 40 points, has stuck with his Democratic colleagues on health care legislation, for instance. It seems

[2] For a description of the filibuster, *see* Valerie Heithshusen and Richard S. Beth, "Filibusters and Cloture in the Senate", United States Congressional Research Service ("CRS") (Apr. 7, 2017), *available at* https://fas.org/sgp/crs/misc/RL30360.pdf (PDF download).
[3] Susan Davis, "Will Senate Democrats Work with Trump? The 10 Senators to Watch", NPR (Feb. 9, 2017), *available at* http://www.npr.org/2017/02/09/514381973/will-senate-democrats-work-with-trump-the-10-senators-to-watch.
[4] *See* FiveThirtyEight, "How Popular is Donald Trump?" (interactive), *available at* https://projects.fivethirtyeight.com/trump-approval-ratings/ (accessed Aug. 8, 2017).

highly unlikely that the GOP will get enough Democratic votes to override the filibuster on substantive legislation. As a result, so far there has been very little significant legislation enacted in 2017,[5] and the legislation that has been enacted has primarily been bipartisan, low-profile consensus legislation on veterans affairs and space policy.

That leaves two alternatives. First, Senate Republicans might try to eliminate the filibuster in the Senate entirely. Democrats eliminated it for confirmation of nominations to executive branch positions and lower federal courts in 2013; Republicans recently eliminated it for Supreme Court nominations. As with the prior changes, this likely could be done with a simple majority vote. However, despite pressure from President Trump, a clear majority of Senators have come out against eliminating the filibuster for legislation.[6]

Second, Senate Republicans might use a tool called reconciliation, which allows the passage of certain types of legislation through the Senate with a simple majority.[7] Reconciliation is a process by which the Senate enacts fiscal legislation (e.g., taxes, spending, debt limit changes) to reconcile existing law with instructions in a budget resolution. Budget resolutions are passed by the House and Senate without the President, and reconciliation bills are not subject to the filibuster in the Senate. Reconciliation is the method the Republicans have tried to use to pass health care legislation that would require only 50 votes in the Senate.

Could reconciliation be a vehicle for changing significant environmental laws? The most important difficulty for using reconciliation is that legislation cannot contain provisions that are not germane to spending, taxes, or debt limits, and such provisions can be struck out of a reconciliation bill in the Senate via the "Byrd Rule."[8] Thus, changing the underlying substance of environmental laws through reconciliation would be difficult.

However, temporary changes to substantive law can effectively be made in reconciliation through what are often called "appropriations riders." These are provisions that would prevent the expenditure of funds to undertake certain activities; by defunding those activities, an appropriations rider can effectively terminate a program, at least temporarily. For instance, in the mid-1990s, Republicans in Congress prohibited the listing of additional species for protection under the Endangered Species Act (ESA) for over a year through an appropriations rider.

What is the border between a legislative provision that is not germane to fiscal matters, and an acceptable provision that relates to spending? That is a tough call, and here having a majority in the

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[5] Michael D. Shear and Karen Yourish, "Trump Says He Has Signed More Bills than Any President, Ever. He Hasn't", New York Times (Jul. 17, 2017), *available at* https://www.nytimes.com/2017/07/17/us/politics/trump-laws-bills.html.

[6] See Elana Schor, "Bipartisan pitch to save filibuster gets 61 seantors' endorsements," Politico (April 7, 2017), *available at* http://www.politico.com/story/2017/04/senators-urge-save-filibuster-237014

[7] For an overview of the reconciliation process, *see* Megan S. Lynch and James V. Saturno, "The Budget Reconciliation Process: Stages of Consideration", CRS (Jan. 4, 2017), *available at* https://fas.org/sgp/crs/misc/R44058.pdf (PDF download).

[8] For a description of the Byrd Rule, *see* Bill Heniff Jr., "The Budget Reconciliation Process: the Senate's 'Byrd Rule'", CRS (Nov. 22, 2016), *available at* https://fas.org/sgp/crs/misc/RL30862.pdf (PDF download).

Senate can provide some leverage since majority votes can have a role in making that call. For instance, does opening up the Alaska National Wildlife Refuge to oil and gas development constitute fiscal legislation? On the one hand, it is about environmental protection and land-management, not spending. On the other hand, that oil and gas production will produce revenue that has fiscal impacts. Expect to see a number of these fights happen in the next few months. But using reconciliation as a tool for significant overhaul of major environmental laws is unlikely to qualify.

One last challenge for the Republicans, however, in using reconciliation for these purposes is that there may be significant barriers to using reconciliation at all to avoid needing Democratic votes in the Senate. We discuss that issue next.

III. Budget

What are the implications of changes to the federal budget for environmental law?

The Trump Administration has proposed significant cuts to a range of environmental and science agencies, including the Environmental Protection Agency (EPA), the Department of the Interior, NASA's climate science work, and the National Oceanic and Atmospheric Administration's science and regulatory programs.[9] Here we discuss the implications of potential dramatic budget cuts, and then the likelihood they will occur in the upcoming fiscal year.

The budget cuts that are proposed are truly draconian. They would eliminate a wide swath of regulatory,[10] science,[11] and environmental management programs that have been operating for many years. There would be a direct short-term impact from losing these programs: enforcement will not occur; new rules will not be issued, nor old rules updated, repealed or amended; scientific research will be terminated or not initiated; restoration programs will be halted; and more.

But there are much more harmful long-term impacts from these cuts. First, there would be a mass exodus of personnel from the relevant agencies – damaging institutional memory, and creating a significant loss of expertise that is essential to well-functioning agencies. Second, from a scientific and management perspective, the loss of information could have critical long-term effects. Monitoring is most effective and useful when it provides continuous information without significant interruptions.[12] Failure to protect the environment today could result in irreversible damage such as species extinctions or destruction of wilderness. Budget cuts that create monitoring gaps can hamstring regulators' ability

[9] *See* Dan Farber, "Trump's Environmental Budget", Legal Planet (Mar. 16, 2017), *available at* http://legal-planet.org/2017/03/16/env-budget-update-trumps-proposal-much-worse-than-predicted.
[10] *See* Dan Farber, "Trump's EPA Budget in Perspective", Legal Planet (Mar. 24, 2017), *available at* http://legal-planet.org/2017/03/24/trumps-epa-budget-in-perspective.
[11] *See* Dan Farber, "Escalating the War on Science", Legal Planet (Jul. 20, 2017), *available at* http://legal-planet.org/2017/07/20/escalating-the-war-on-science.
[12] *See* Eric Biber, "The Problem of Environmental Monitoring," 83 U. Colo. L. Rev. 1, 23-26 (2011).

to make informed choices (whether to regulate or to deregulate) in the future. Failure to invest in scientific research has long-term implications down the road, both because scientific research can take time to produce results, and because it is generally cumulative in that new research necessarily builds on prior research.

So given that these large budget cuts could be potentially devastating, how likely are they to occur?

First, there is a political reality that even the House GOP – the most conservative part of Congress – has rejected cuts on the scale proposed by the White House.[13] (The appropriations committees have passed legislation with smaller cuts, but these bills have not proceeded to the House floor yet.)

But second, and far more important, is that any significant budget changes between now and fiscal year 2021 (the end of the current presidential term) will probably have to be bipartisan. The reason requires a fair amount of explanation of the details of congressional procedures.

In general, as noted previously, legislation requires 60 votes to proceed through the Senate because of the filibuster. Given the current composition of the Senate, that means at least eight Democratic Senators have to agree to anything that would go through. That would normally include appropriations bills (by which spending proceeds through Congress).

There is an exception to the filibuster requirement in the Senate: the reconciliation process. As discussed previously, this is a process by which certain legislation that increases revenue, reduces spending, changes debt limits, or otherwise reduces the deficit can be passed through the Senate with just 50 votes. At first glance, this would be a way for budgets to be passed through the Senate without Democratic support, and thus for party-line environmental budget cuts or spending cuts to be enacted.

However, there are important limitations to the use of reconciliation legislation.[14]

First, both the House and the Senate need to enact a budget resolution that provides the framework for reconciliation: basically, instructions on how much revenue to create or spending to cut and from which congressional committees. This can be passed with 50 votes in the Senate.

Then, the committees need to implement those instructions through bills, whether spending, revenue, or a combination. Those bills then must be passed through the House and the Senate. In the Senate, the general understanding appears to be that only a limited number of reconciliation bills can be passed without a filibuster – one each for spending, revenue, and debt limit – in a fiscal year.[15] That means

[13] Devin Henry, "Committee Approves $31.4B Budget on Interior, EPA Spending Bill", The Hill (Jul. 18, 2017), *available at* http://thehill.com/policy/energy-environment/342654-committee-approves-314b-interior-epa-spending-bill.
[14] For a description of the timing of reconciliation, *see* Megan S. Lynch, "The Budget Reconciliation Process: Timing of Legislative Action", CRS (Feb. 23, 2016), *available at* https://fas.org/sgp/crs/misc/RL30458.pdf (PDF download).
[15] *See* Ben Casselman, "How to Know When the GOP Is Serious About Tax Reform", FiveThirtyEight (Aug. 2, 2017), *available at* https://fivethirtyeight.com/features/how-to-know-the-gop-is-serious-about-tax-reform.

Congress has one shot (the spending bill) for using reconciliation for budget cuts in the upcoming fiscal year. Moreover, it means that one single bill has to be used for all the relevant budget cuts, which make the politics much more complicated – or requires leadership to pick and choose which spending areas it wants to focus on for the reconciliation bill.

So far so good. But as an artifact of the debt limit showdown in 2011, Congress enacted the Budget Control Act, which imposes strict limitations on domestic discretionary defense and non-defense spending (what is colloquially known as "sequestration").[16] (Discretionary spending refers to all spending that is not set annually by a formula that produces automatic federal expenditures, which is how Social Security, Medicare and Medicaid, and certain other social welfare expenditures are determined.) Changing the requirements of the Act apparently is subject to the filibuster and cannot be done through reconciliation.[17]

Here is the political reality. Conservative GOP members really want to increase defense spending above the caps in the Act. Many are talking about not supporting any budget resolution at all, or any resolution that does not change those caps by allowing for an increase in the defense budget under the Budget Control Act. Without a budget resolution, no reconciliation bill can pass. Republicans may have difficulties reaching consensus on the budget even among themselves, which could prevent passage without a filibuster.

To get those changes, Democratic votes in the Senate are required.[18] And the Democratic Senate caucus has made clear that if defense spending goes up, so should non-defense discretionary spending.

Thus Democrats have leverage to protect environmental programs from cuts, if they want to make them a priority. The question is whether they will do so. We are cautiously optimistic that is the case, but we will see how this all plays out over the next several months.

IV. Pollution and Climate Change

Trump and Pruitt want to take an ax to EPA regulation. That will be harder than they think.

Rolling back EPA regulations is one of the Trump Administration's priorities. The most notable example is President Obama's Clean Power Plan, which aimed to cut carbon dioxide emissions from power plants. The other rule that has gotten considerable attention is the so-called Waters of the United States rule, which defines federal jurisdiction to regulate wetlands and watersheds. But these are not the only rules in the crosshairs. EPA has announced plans to reconsider a rule limiting emission of toxic substances from power plants, rules dealing with methane emissions from oil and gas operations and from landfills,

[16] 2 USC §§ 901 et seq.
[17] *See* Annie Lowry, "Why Sequestration Is Poised to Kill Trump's Budget", The Atlantic (Mar. 16, 2017), *available at* https://www.theatlantic.com/politics/archive/2017/03/donald-trump-meet-sequestration/519798.
[18] *Id*.

a chemical plant safety rule, and a rule dealing with water pollution from power plants. EPA plans to replace some of these rules and eliminate others altogether. Some of these rules are still the subject of litigation, so EPA is seeking to have the court proceedings put on hold, or to have the courts send the rules back to the EPA for reconsideration. But even without this additional procedural wrinkle, EPA faces a long and complicated process.

The press devotes significant attention whenever Trump holds a press conference or sends a tweet demanding repeal of a regulation. But these don't have any legal significance. He has also issued executive orders about regulatory rollbacks, but those don't actually change the regulations. They merely suggest that an agency start the process of actually making a regulatory change. (His immigration orders are different because Congress has specifically given the President power to do certain things in that area – but environmental regulation is assigned entirely to agencies like EPA, not to the President.) The agency then faces a long, complicated road before there is actually a permanent change in regulations. One lesson of the Trump experience, as Dan discusses in a forthcoming paper,[19] is that these procedural requirements are an important check on politicized decision-making.

Under the Administrative Procedure Act (APA), the procedure for adopting or rescinding a rule appears straightforward. The agency first issues a public notice of its proposal, then receives public comments, and ultimately issues a final rule along with a concise explanation of its reasons. But due to a combination of Congressional mandates, executive branch requirements, and judicial interpretations, the actual process is far more difficult than it sounds.

Apart from the special requirements in some of the pollution laws (e.g., the Clean Air Act or the Clean Water Act), Congress has added several general requirements to all rulemakings, such as a requirement that the agency analyze the effect of a regulation on small businesses.

The executive branch has also done its part to make the process more complicated. Every president beginning with Reagan has required agencies to submit a cost-benefit analysis of any major final rule to the Office of Information and Regulatory Affairs (OIRA) within the White House. OIRA can nitpick the cost-benefit analysis and often has demanded changes in the agency's analysis or in the rule itself. OIRA also acts as a funnel for comments from other agencies – for instance, since many environmental regulations impact the domestic operations of the Department of Defense, the Department often submits comments through OIRA.

Much of the complexity has been added by the courts, however. In order to allow meaningful public comment, the courts require agencies to provide the data and analysis on which it relies. When a rule is issued, an agency has to give a detailed response to any significant criticism of its analysis or any new evidence or arguments raised by industry or environmentalists. The agency also has to be very careful if

[19] Daniel A. Farber, *Presidential Administration Under Trump* (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015591.

it makes changes in response to comments; if the changes are too substantial a court may hold that another round of notice and comment is necessary.

In reviewing an agency rule, courts look to see if all these procedures have been followed. But courts require that an agency do more than just check the boxes. Instead they require a reasoned explanation of all significant issues. Under the *Chevron* test, an agency's interpretation of a statute will be upheld if the statute is ambiguous and the agency's interpretation is reasonable.[20] That gives the agency some flexibility, but an unsympathetic court may conclude that the statute just does not leave that much room for interpretation. Conservative judges have been talking about decreasing the amount of deference given to agencies – but that was under Obama, and it remains to be seen whether they will feel the same way about Trump's efforts.

The upshot is that a significant regulatory measure is a major undertaking. Environmentalists have been wont to complain of "ossification" of the regulatory process – but right now, all these hindrances may seem much more a benefit than a cost.

The Administration has been trying to short-circuit this process by temporarily suspending rules while they are under reconsideration, using a variety of statutory justifications to avoid the usual complexities of repealing a rule. The D.C. Circuit Court of Appeals overturned one of those efforts. As Dan has previously discussed,[21] the court was sharply critical of the weakness of EPA's arguments for putting on hold a rule limiting methane emissions from oil and gas facilities. It remains to be seen what will happen with EPA's other efforts, which involve different statutory provisions, but we suspect that EPA will have a hard time justifying those delays as well. One open question is the extent to which a change in presidential policies can help support a change in an agency's general approach, but there is little indication that courts are prepared to allow such considerations to eliminate the agency's duty to ground a decision in the facts.

In short, EPA will probably find rescinding or replacing these existing regulations a fraught process. The process may be even more of a challenge than usual, because Administrator Scott Pruitt and the other political appointees at EPA are trying to cut staff and have alienated many of those who will remain.

The Administration's goals are clear. It wishes to carry through on Trump's withdrawal from the Paris Agreement by eliminating restrictions on emitting greenhouse gases. It also aims to help industry by loosening air and water pollution regulations. With luck, the administrative process – with some help from the courts – will slow this effort long enough for the political winds to shift.

[20] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
[21] Dan Farber, "A Case of Administrative Bad Faith", Legal Planet (Jul. 5, 2017), *available at* http://legal-planet.org/2017/07/05/a-case-of-administrative-bad-faith.

V. Enforcement

Don't expect the Administration to take the lead in enforcement. Others will need to step up.

As the George W. Bush Administration learned, it can be difficult to pass new legislation or enact new regulations. But another way of gutting environmental rules is much easier: just stop enforcing them. An agency's enforcement decisions receive essentially no judicial review and precious little publicity. Cuts in enforcement budgets receive even less public notice and are completely unreviewable, though they require congressional action. It is no wonder that criminal cases against violators of environmental laws decreased 30 percent after President Bush took office, and civil enforcement went down even more.[22] We can expect to see the same thing happen again under Trump, probably even more so. Indeed, a recent report shows that enforcement is already down sharply compared with previous administrations.[23]

Federal pollution laws have some unusual features. One is the role of the states in implementing federal regulations. States are not compelled to do so, but they have the option of taking over implementation and enforcement of many environmental requirements from the federal government. EPA is supposed to supervise them to ensure they are doing so effectively. In practice, it is difficult under the best of circumstances for EPA to demand stringent enforcement by the states. As a result, as Dan discusses in a recent paper,[24] there have been big disparities between states, depending on how much they care about environmental quality.

Given EPA Administrator Scott Pruitt's express desire to give states more leeway in implementing environmental rules, the situation will only get worse. States that choose to do so will continue to engage in serious enforcement. But others will give up the right.

Obama's EPA was considering new approaches to enforcement, taking advantage of new technologies for monitoring and data analysis in order to maintain enforcement levels despite increasingly stringent budgets. The odds that Pruitt will pursue these efforts are slim to none.

Fortunately, the federal pollution laws contain a fallback when state and federal government enforcement falters. One of the distinctive features of U.S. environmental law is the use of citizen suits for enforcement purposes. These citizen suit provisions allow any person who can demonstrate harm to commence an action against a violator. Available remedies include injunctions against noncompliance; orders requiring the defendant to pay civil penalties to the government; and attorneys' fees. With the exception of the federal pesticide law, all of the major environmental statutes authorize citizen suits,

[22] John Solomon and Juliet Eilperin, "Bush's EPA Is Pursuing Fewer Polluters", Washington Post (Sep. 30, 2007), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/09/29/AR2007092901759.html.
[23] Valerie Volcovici, "Trump EPA Lags Behind in Environmental Enforcement: Report", Reuters (Aug. 10, 2017), *available at* https://www.reuters.com/article/us-usa-epa-enforcement-idUSKBN1AQ24I.
[24] Dan Farber, "The Implementation Gap in Environmental Law", Journal of Korean Law, Vol. 16, No. 3 (2016), *available at* http://scholarship.law.berkeley.edu/facpubs/2811/.

including those regulating air pollution, water pollution, waste sites, endangered species, and toxic substances.

There are some limits on citizen suits that sometimes prove troublesome. The statutes require plaintiffs to give notice, usually 60 days prior to filing suit, to the alleged violator and to federal and state authorities. Most of the statutes specify that if federal or state authorities are diligently prosecuting compliance actions, citizen suits are barred, though citizens are authorized to intervene in federal enforcement actions. Polluters and state governments sometimes try to game these rules. But these are probably less important constraints than budgetary limits. Environmental groups simply don't have the kinds of resources that a government has to pursue enforcement, and thus are only a partial substitute for state and federal enforcement. However, these groups can maintain enforcement efforts in targeted cases, even when state and federal governments default. During the Bush Administration, there was a sharp increase in the number of citizen suits, and we can expect to see that happen again.

Thus, the situation is not as dire as it could be. But this is one area where the Trump Administration's efforts to torpedo environmental protection will be difficult to combat. At least non-enforcement is a problem that can be corrected later with a new Administration.

VI. Public Lands

The potential impact of the Trump Administration on our federal public lands.

The federal government owns almost one-third of the land in the United States, primarily concentrated in the Western states.[25] In addition, the federal government is the primary manager of the oceans off the coast of the United States (with the exception of oceans within three miles of the coastline, which are primarily under state authority).[26] Decisions about how to manage these resources will have significant impacts on the environment today and in the future. In particular, public lands and ocean management decisions might affect, among other issues:

- Climate change, to the extent that leasing of federal lands for oil, gas, and coal production continues or increases;
- Biodiversity protection, since a significant number of endangered species have their habitat on federal lands; and
- Recreation, since many federal public lands are key destinations for local, national, and international recreational users.

[25] *See* Eric Lipton and Clifford Krauss, "Giving Reins to the States over Drilling", New York Times (Aug. 23, 2012), *available at* http://www.nytimes.com/2012/08/24/us/romney-would-give-reins-to-states-on-drilling-on-federal-lands.html.
[26] *See* United States Bureau of Ocean Energy Management, "Federal Offshore Lands", *available at* https://www.boem.gov/Federal-Offshore-Lands/.

Federal management of the public lands is guided by a complicated legal framework. Each of the four major federal land management agencies (the National Park Service (NPS), the U.S. Forest Service (USFS), the U.S. Fish and Wildlife Service (USFWS) (which manages National Wildlife Refuges), and the Bureau of Land Management (BLM)) manages their lands under a legal framework established by Congress. Those legal frameworks (often called organic acts) set up procedures the agencies must follow and substantive standards they must comply with. In general, all the land management agencies must promulgate plans that will guide how they manage their lands over the medium-term (typically a 10- to 15-year time frame). Plan development or updates generally must provide for public participation. The different agencies must meet different substantive standards in managing their lands. USFS and BLM operate under a multiple-use standard in which they are supposed to facilitate a wide range of uses for their lands, ranging from logging, grazing, mining and oil and gas development to outdoor recreation and protection of biodiversity and other environmental resources. NPS and USFWS are supposed to prioritize particular uses in managing their lands: conservation and public enjoyment for the parks (with a requirement that any management cannot impair park resources), and protection of wildlife and ecosystems for wildlife refuges.

For offshore areas, the main issues relate to leasing of offshore lands for oil and gas development under the Outer Continental Shelf Leasing Act (OCSLA). This is also a fairly broad balancing statute, similar to those guiding USFS and BLM.

In addition to the organic act frameworks, each agency must also comply with the National Environmental Policy Act (NEPA) when it makes important management decisions for its lands. Generally, NEPA requires the agency to assess the potential environmental consequences of its decisions and publicly disclose those consequences. Finally, the ESA restricts the ability of agencies to take actions that might significantly harm endangered or threatened species on federal lands.

There is one more important federal land management statute: Significant portions of the federal lands have been designated by Congress as wilderness areas,[27] and under the Wilderness Act these areas generally are off-limits to development and many forms of active management by land management agencies.

The Trump Administration has made clear that it wishes to rebalance how the federal public lands are managed, by increasing development on those lands, including leasing those lands for fossil fuel development; facilitating greater off-road vehicle use; and more actively managing federal lands to respond to challenges such as massive forest die-offs from climate change-facilitated beetle infestations.

How much leeway will the Administration have to pursue these options? To the extent it seeks to undo Obama Administration regulations – for instance, regulations of hydraulic fracturing development of oil

[27] *See* Wilderness Connect, "Summary Fact Sheet", *available at* http://www.wilderness.net/factsheet.cfm.

and gas resources on federal public lands,[28] or regulations of the release of methane from oil and gas development on federal public lands[29] – the same questions that would come up in general in administrative law would come up here. We discussed these issues in more detail in connection with pollution regulation: Has the agency adequately supported a change in the regulations based on the factual record before it and does the change comply with the relevant legal standards? Environmental groups and other plaintiffs will be able to sue under the APA to challenge rulemaking changes they do not agree with.

On the other hand, the Administration will also be changing outcomes on the public lands through individual management decisions: whether to lease particular parcels of federal lands for oil, gas, or coal development; whether to open an area to off-road vehicle use; whether to offer a timber sale on a particular section of a National Forest. For instance, the Administration has eliminated a moratorium on coal leasing that the Obama Administration put in place.[30] Relatedly, the Administration may also seek to revise the land management plans that guide individual management decisions on the public lands. Again, lawsuits under the APA may be available to plaintiffs to challenge management decisions they disagree with.

Whether it is considering regulations, individual management decisions, or land management plans, a key constraint for the Administration will be the statutory framework that it is operating within. For some agencies, such as USFS and BLM, the organic acts are broad enough that they likely do not constrain the Administration very much in what it wants to do. For NPS and USFWS, the organic acts do have significantly constrain agency decision-making, and the courts have (on occasion) enforced those constraints. That is also true of the Wilderness Act for designated wilderness areas.

Thus, the impacts of the new Administration will be most felt on the multiple-use lands – National Forests and BLM lands, which make up about two-thirds of the federal public lands. Here the agency will have more leeway. Likewise, there is substantial leeway in agency decisions about whether to lease off-shore areas for oil and gas development.

But even in those areas, both NEPA and the ESA may provide significant constraints. For instance, environmental groups have been involved in significant (and sometimes controversial) litigation over USFS logging projects in National Forests, using NEPA and the ESA as their primary litigation tools. Not all of these lawsuits will succeed, but they will provide some constraints on agency action.

Of course, not all agency decisions will be litigated in all places. Moreover, courts often tend to defer to agency interpretations and applications of statutes with ambiguous statutory language (as is true for

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[28] Juliet Eilperin, "Interior Department to Withdraw Obama-Era Fracking Rule, Filings Reveal", Washington Post (Mar. 15, 2017), *available at* https://www.washingtonpost.com/news/energy-environment/wp/2017/03/15/interior-department-to-withdraw-obama-era-fracking-rule-filings-reveal.

[29] Eric Biber, "Public Lands Watch: BLM Methane Rule", Legal Planet (Jun. 14, 2017), *available at* http://legal-planet.org/2017/06/14/public-lands-watch-blm-methane-rule.

[30] Devin Henry, "Trump Administration Ends Obama's Coal-Leasing Freeze", The Hill (Mar. 29, 2017), *available at* http://thehill.com/policy/energy-environment/326375-interior-department-ends-obamas-coal-leasing-freeze.

many of these statutes) or where significant expertise is required to implement the statutes (again as is true for many of these statutes). In addition, political leadership in the agencies can use internal agency guidance documents to shape how the governing statutes are interpreted and applied by agency employees. On the margins, this can make an important difference.

Another context in which the Administration can make a long-term difference is the revision of existing land-use plans to reduce protections for environmental resources and facilitate greater development. These changes can last a while, since plans may go many years, even decades, between revisions, and all management decisions must be consistent with the relevant plan. However, land-use planning is a resource-intensive process, requiring substantial public outreach, analysis, and NEPA and ESA compliance. An Administration that asks for significant budget cuts for the land management agencies is making it hard for those plan updates to occur.

Finally, there are particular statutory systems that do seem to give substantial unilateral power to the President without much room for judicial review. Designation of national monuments under the Antiquities Act is an example of this; courts have been very deferential in reviewing Presidential proclamations creating monuments. (Whether Presidents can eliminate or reduce existing monuments is a different question, and a legal one for which we expect close and careful judicial consideration.[31]) National monument designation creates protection for public lands from a range of development activities, and accordingly has been quite controversial. Similarly, there are provisions of OCSLA that give the President the power to set aside areas from oil and gas development.

All in all, there is substantial discretion for the executive branch in managing the public lands, in part because much of the decision-making does not require Congressional intervention. However, the relevant statutory schemes closely constrain some of the decision-making, and in most cases, there is at least some constraint imposed by overarching statutes such as NEPA and the ESA. And those constraints are often enforceable by courts in response to lawsuits.

VII. Executive Orders

Trump loves issuing executive orders. Mostly, they don't mean much legally.

Trump has issued a flood of executive orders. Many of them are, in Macbeth's words, "full of sound and fury . . . signifying nothing." They actually concern actions that he does not have the power to take himself. Instead, they relate to responsibilities that Congress gave to an administrative agency like EPA,

[31] *See* Nicholas Byner and Sean Hecht, "National Monuments: a Rebuttal to Commentators who Support Trump's Actions to Undo Public Lands Protections", Legal Planet (Aug. 3, 2017), *available at* http://legal-planet.org/2017/08/03/national-monuments-a-rebuttal-to-commentators-who-support-trumps-actions-to-undo-public-lands-protections. For the opposing view, see Todd F. Graziano and John Yoo, "Presidential Authority to Revoke or Reduce National Monument Designations", Yale Journal on Regulation, Vol. 35, No. 2 (2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004821.

not the White House. There are a few exceptions, but in the environmental area, they are not likely to have huge impacts.

Often, when the media says that Trump has "rolled back" regulations, nothing of the sort has happened. Rather, Trump has asked agencies to consider a rollback, and nothing will change legally until the agency has gone through the required procedures and been upheld in court. Thus, most of Trump's orders – and there are a *lot* of them[32] – do not have any actual legal effect. In fact, the executive orders are carefully drafted as suggestions rather than orders to agencies. Of course, since these nudges come from the boss, agency heads are going to pay a lot of heed. But Trump could have done basically the same thing with a tweet or a phone call to the agency head. In order for the agency to implement Trump's request and repeal an existing rule, the agency will have to go through the same procedures and court review required to pass a new rule. In terms of PR, however, it makes a bigger splash for a president to hold a public ceremony, sign an impressive looking document, and announce that he has just made a major policy change. Trump is not the first president to do that.

There are some executive orders that *do* matter. Some of Trump's more consequential orders rescind Obama's executive orders on subjects like climate change. A president cannot unilaterally repeal an agency regulation, except in the few cases where Congress has given him authority to do so. But a president *can* repeal one of his predecessor's executive orders. Obviously, that's one of the weaknesses of government by executive orders – they sometimes outlive the term of the president who issued them for only a few days. Along these lines, Trump disbanded a working group created by Obama to estimate the social cost of carbon, and he rescinded the working group's previous estimates. The working group had been a White House effort to provide guidance to agencies, and Trump was free to end it. But these orders are exceptions.

There is, however, one Trump order which tries to make major changes to the regulatory process. This particular executive order has been on the wish-list of conservatives who are eager to hobble new regulations. It requires agencies to repeal at least two existing regulations for every new regulation, and also caps the combined compliance costs of all the regulations that an agency issues in a given year. The goal, clearly, was to make it really hard to issue new regulations. Setting an even higher barrier to regulation, the cap for the first year is zero. That means that in order to issue a new regulation, an agency needs to repeal two existing regulations that have combined compliance costs equal to those of the new one.

Here is how this would work: Suppose that an agency is considering proposing a regulation that would produce $2 billion in benefits at a cost of $1 billion. It has to find at least two other regulations to repeal whose costs add up to $1 billion and whose benefits are less than that. Finding two or more such regulations may not be easy. Assuming it can find those regulations, it now finds itself in the position of having to run three rule-making proceedings instead of one, and to defend all three in court. So it is

[32] Avalon Zoppo and Amanda Proença Santos, "Here's the Full List of Donald Trump's Executive Orders", NBC News (Jul. 24, 2017), *available at* http://www.nbcnews.com/politics/white-house/here-s-full-list-donald-trump-s-executive-orders-n720796.

three times as hard to issue the rule the agency really wants to issue. That means that the effort will take much longer or never happen at all, postponing or eliminating the $1 billion in social benefits that the new regulation could create.

This is, to the say the least, a really bad idea. It also is a sign of the eagerness of conservatives to hinder any further regulations on business, regardless of how justified those regulations may be. Nevertheless, the immediate practical impact of Trump's executive order is likely to be limited. Under Trump, agencies will not take steps anyway to protect the environment if they can possibly avoid it. You do not really need a 2-for-1 rule or a cost cap – or executive orders in general – when you have people like Scott Pruitt running your agencies. So the order is fairly meaningless under this Administration. If a future president is open to the idea of new regulations, Trump's executive order would be immediately repealed or defanged.

Trump has already issued executive orders addressing most of the hot-button issues regarding environmental regulation. So we are likely to see fewer of these efforts going forward, simply because he has run out of politically appealing targets. And as we have explained, even the orders he has issued so far are mostly designed for public relations purposes as opposed to having any real legal effect.

VIII. State and Local Action

States and cities can do a lot to push back against Trump, but they do face some legal challenges.

In the Trump era, what avenues are open to state and local governments to use self-help to protect the environment?

Dan has written before about the opportunities for state and local governments taking action to protect their own environments.[33] Perhaps the most important recent development is the extension of California's cap-and-trade program to 2030, which our colleague Cara Horowitz has blogged about.[34] That is an exciting milestone, and a great example of what states can do. But a host of other states have taken actions: a longstanding cap-and-trade program among the Northeast states,[35] renewable portfolio standards to encourage wind and solar in many states,[36] and state laws limiting air and water pollution or toxic chemicals. Massachusetts decided recently to tighten its own regulatory scheme. The list could be much longer, but that is enough to give you the idea.

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[33] Dan Farber, "How States Can Defend Themselves against Trump", Legal Planet (Feb. 2, 2017), *available at* http://legal-planet.org/2017/02/02/how-states-can-defend-their-own-environments; "After Trump", Legal Planet (Jun. 22, 2017), *available at* http://legal-planet.org/2017/06/22/after-trump.

[34] Cara Horowitz, "California Extends its Cap-and-Trade Program Through 2030", Legal Planet (Jul. 17, 2017), *available at* http://legal-planet.org/2017/07/17/california-extends-its-cap-and-trade-program-through-2030.

[35] For more information on the Regional Greenhouse Gas Initiative, *see* RGGI, Inc., "Program Overview", *available at* https://www.rggi.org/design/overview.

[36] For an overview of state renewable portfolio standards, *see* National Conference of State Legislatures, "State Renewable Portfolio Standards and Goals", *available at* http://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx.

Rather than extend the list, we would like to discuss some of the potential legal barriers that these kinds of actions may encounter. Basically, they all involve the division between federal and state authority. In the case of cities, there are also questions about the division of authority between their governments and those of the state, but the rules governing those disputes vary a lot between states.

The first issue relates to federal activities taking place within a state or local jurisdiction. The rule is that the federal government is immune from state or local regulation unless Congress has consented. That being said, there are some situations where Congress has waived this immunity, including application of state water quality standards to federal projects. Moreover, states can generally regulate private activities that take place on public lands, unless doing so interferes with federal law.

The second issue involves interference with interstate commerce. State laws cannot discriminate against out-of-state firms. Defining discrimination can be tricky, and it is an issue that has come up repeatedly in lawsuits by energy companies against state regulations. Even if a state law does not discriminate, it can still be struck down if it imposes an undue burden on interstate commerce. This is a fact-intensive issue that may require a trial, but states typically win cases that get to that point.

A less common issue is whether a state is invading the federal government's primacy in foreign affairs. This argument has been raised several times but so far states have fended off the challenges. The Supreme Court precedents dealing with this issue are a mess, so it is hard to have a lot of confidence about how this issue might evolve.

A final issue is whether a state law directly or indirectly conflicts with a law passed by Congress. This can be a very tricky issue because every federal statute is different. For example, the Federal Power Act gives federal regulators exclusive jurisdiction over wholesale electricity markets and interstate transmission, but it also gives states exclusive jurisdiction over the production and retail sale of electricity. But regulations in one sphere inevitably affect the other one, so the courts find it difficult to draw the boundaries.

It is inevitable that state and local regulations will be challenged on these grounds, as well as any other ground that industry can come up with. But in most situations, careful lawyering in the design of state and local laws can do a lot to control the litigation risks.

Overall, state and local action remains one of the most promising areas for progress while the federal government is largely in the hands of anti-environmentalists. One limitation is that so many states are currently under partial or complete control of conservative Republicans. But the 2018 elections could shift the balance substantially.

IX. Environmental Threat Assessment

The Trump Administration presents a barrage of threats to the environment. Which threats are worst?

We can classify threats along three dimensions: the probability of harm, the degree of harm, and the reversibility of the institutional or legal change.

Here is an assessment of our topics on that basis.

Legislation. Because of gridlock, it could be very difficult to reverse legislative changes, and they could potentially gut our environmental laws. But the same gridlock offers protection. It now looks very unlikely that there will be radical changes in the statutes, barring some major political shift in the Republican direction in the next few years. We might, however, see some less consequential changes via riders on other legislation, in particular temporary bans on using funds for some particular purpose.

Environmental Threat Assessment: Legislation

Probability of Harm	Degree of Harm	Reversibility of Change
LOW	POTENTIALLY HIGH	POTENTIALLY LOW

Budget. Many budget changes can be reversed later. Severe cuts that damage an agency institutionally may be very hard to reverse, since they may result in loss of institutional memory and under the best of circumstances will require a lengthy hiring process to reverse. And some budget cuts – say, for enforcement of the ESA – may result in irreversible environmental harm. Loss of vital information is also a problem, especially with cuts for environmental and energy research and of environmental monitoring. The risk of loss of continuity in monitoring data (particularly climate data) and loss of time in developing climate science are irreversible and are very high risks from budget cuts.

Environmental Threat Assessment: Budget

Probability of harm	Degree of harm	Reversibility of change
HIGH	MEDIUM TO HIGH	POTENTIALLY HIGH (WITH IMPORTANT EXCEPTIONS)

Pollution & Climate Change. Eliminating major regulations or issuing new ones is a time-consuming, labor-intensive process subject to substantial judicial review. Given enough time, there is a lot that agencies can do to eliminate regulations. Agencies are slowed down by procedural requirements of the APA, and they have to work within the confines of the pollution or energy laws they are supposed to implement. But given enough time, significant rollbacks are possible. These could result in significant harm to public health, especially in terms of air pollution and toxic substances. Carbon emissions are

nearly irreversible. Other actions, such as loosening pollution regulations on a particular industry, are generally reversible.

Environmental Threat Assessment: Pollution & Climate Change

Probability of harm	Degree of harm	Reversibility of change
MEDIUM	POTENTIALLY HIGH	MEDIUM

Enforcement. This is an area where the executive branch has huge discretion. These are retail-level decisions, so the harm is cumulative but potentially substantial. Usually, the harm can be reversed by later enforcement actions, and citizen suits provide some backstop against low enforcement.

Environmental Threat Assessment: Enforcement

Probability of harm	Degree of harm	Reversibility of change
HIGH	MEDIUM	HIGH

Public Lands. There are many different issues involving public lands, governed by many different laws. So generalizations are difficult. Many of the statutes give the agencies a lot of discretion but there are often procedural obstacles the government must overcome. Many of the legal changes that might be put in place would be reversible, though development activities on public lands might themselves cause irreversible harm.

Environmental Threat Assessment: Public Lands

Probability of harm	Degree of harm	Reversibility of change
HIGH	MEDIUM	MOSTLY HIGH

Executive Orders. Except in foreign affairs**,** Presidents can generally do little more than direct agencies to undertake actions such as regulation, which are then limited by the legal rules governing the agency. The next President can always reverse an order.

Environmental Threat Assessment: Executive Orders

Probability of harm	Degree of harm	Reversibility of change
MEDIUM	LOW TO MEDIUM (EXCEPT FOREIGN AFFAIRS)	HIGH

State and Local Action. Here it is the environmental side that has opportunities. There are legal limitations, but a lot can be accomplished at the state and local level. By their nature, these actions have less impact than a similar action at the federal level, but they can have significant positive effects.

Unfortunately, they can also be reversed by political changes in the jurisdiction or by federal actions to override them.

Environmental Threat Assessment: State & Local Action

Probability of action	Degree of benefit	Reversibility of change
HIGH	MEDIUM	MEDIUM TO HIGH

The Bottom Line. State and local actions are clearly the most promising avenues for forward motion during the Trump Era. The most likely threats are budget and enforcement efforts, but the slower and more difficult regulatory changes are likely to cause more harm if they succeed. Legislation making major changes in federal environmental laws has the most serious potential for harm. Fortunately, such legislation seems unlikely at present, barring a major political shift in favor of the GOP in 2018 or 2020.

Only time will tell whether our threat assessment was accurate. At present, at least, the overall picture is that Trump can cause major damage to environmental protection, but that many changes can only be made slowly and may be limited by legal and political obstacles.

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