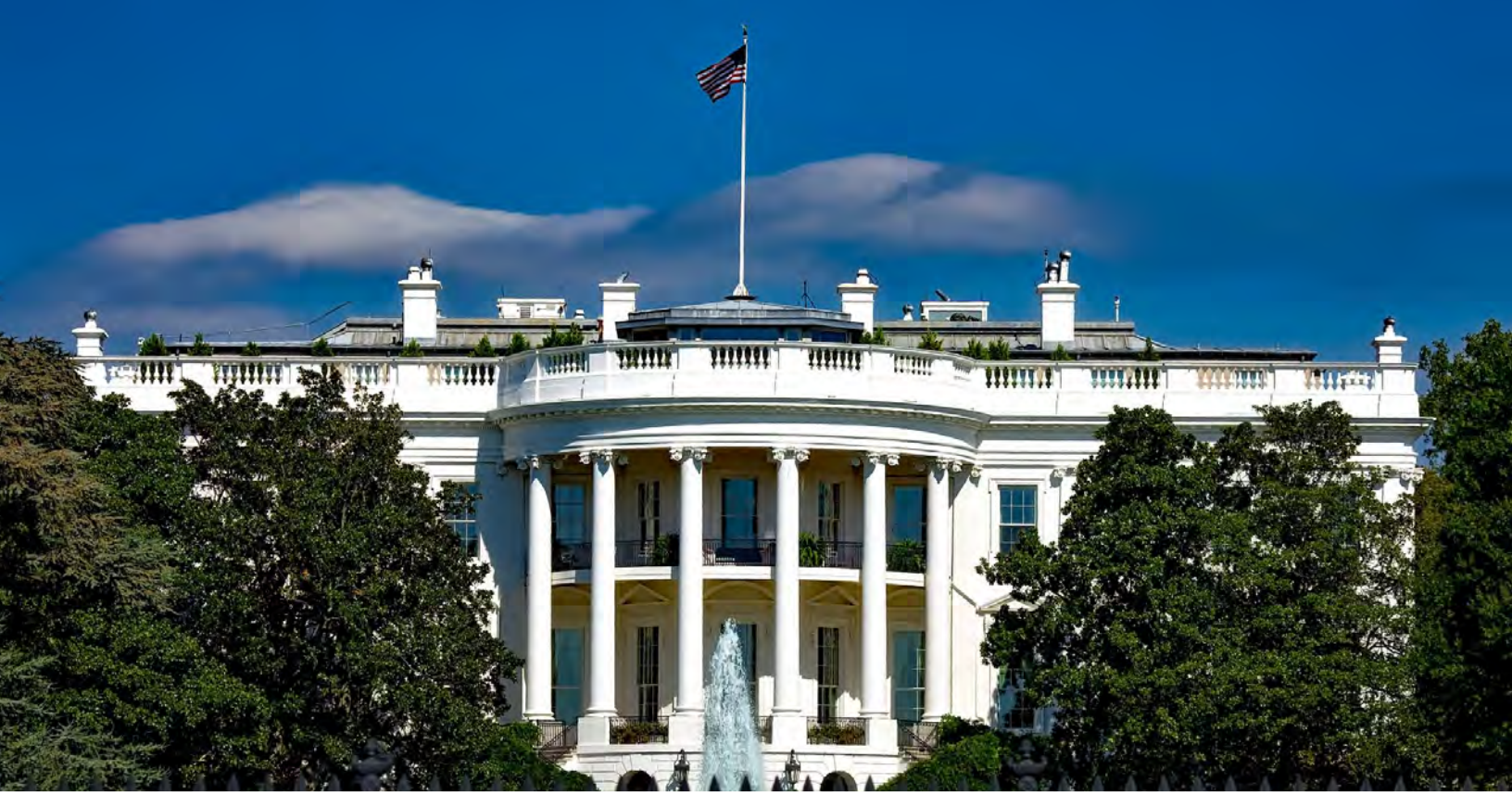

Environment 2021: What Comes Next?

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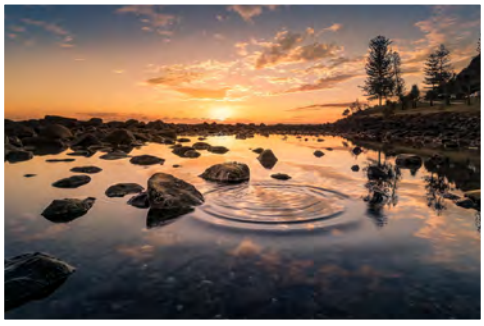
JULY 2020



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, non-partisan research and education center working to strengthen environmental protection by improving law and governance worldwide.

This publication is a project of the Environmental Law Institute (ELI). ELI is solely responsible for the content of this report. The report was authored by James M. McElfish, Jr., with contributions from Jay Austin. ELI gratefully acknowledges the assistance of many individuals who provided information for this report and reviewed earlier drafts.

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Environment 2021: What Comes Next?

Environmental Law Institute

July 2020 (updated)

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Foreword

In the first half of the Donald Trump Administration, the Environmental Law Institute, with initial support from the Walton Family Foundation and the Civil Rights and Social Justice Section of the American Bar Association, issued two reports describing the regulatory reform efforts of the Trump Administration in the environmental setting. Our purpose, consistent with the Institute's nonpartisan identity, was to bring understanding to the measures being taken and their relative significance. In late 2019, we began hearing from the ELI community a desire for an update. The ELI Board of Directors discussed this growing interest at its 2019 year-end meeting and agreed to underwrite such an analysis. This report is the product of that decision. It is well worth reading, as it speaks clearly to the dramatic and sweeping efforts of this Administration to curtail federal environmental regulation.

The ELI community is of course a big tent that includes interests on all sides of the question of environmental regulation. How one sees the initiatives described here will depend to a large degree on how one views the regulatory machinery that has thus far defined society's approach to our environmental challenges. Those who see a strong linkage between the environmental quality we enjoy today and the regulatory apparatus that the Trump Administration inherited, may see the Administration's agenda as a fundamental threat to the country's natural resource future. Those who believe our system of environmental measures and controls has become too intrusive, burdensome, or costly may see the agenda as fundamentally positive. Some may find themselves somewhere in the middle, for example, those members of the regulated community who, on one hand, may be glad to have fewer environmental requirements with which to contend, but on the other may be concerned that, having made the investments needed to succeed under the existing system, a hard-won advantage over less-evolved competitors might start to slip, internal commitment to compliance and sustainability imperatives may start to slide, and the like. State leaders may welcome the prospect of less federal oversight but also may worry about their ability to fill the gaps left by a diminishing federal presence.

Whether the Trump deregulatory agenda is ultimately successful will turn on factors beyond the purview of this report, including whether the various initiatives survive judicial review—far from certain, given the rigorous and fixed nature of the federal laws to which these deregulatory efforts correspond. The durability of these reforms will also turn on whether the Administration continues into a second term, or is more immediately succeeded by an administration that is inclined to reverse some or all of these changes.

However one sees the Trump deregulatory agenda, and whatever the future will have to say about its durability, the Trump agenda must be understood for what it is—the most significant offensive mounted on the federal environmental regulatory system in the history of environmental law, unprecedented in its ambition and scope.

Scott Fulton, President

Introduction

In this year of momentous change, it is time for a look over the horizon to 2021. U.S. environmental laws, regulations, and policies are in flux, and environmental professionals and members of the public will be thinking about where environmental protection should be focused going forward.

Currently, the U.S. governance, economic, and social systems are under serious strain from the COVID-19 pandemic and its associated dislocations. Many traditional expectations about budgeting, the roles of state and federal governments, forms of public engagement, and even how to organize and implement policies will be altered for years. Public demands for justice in policing and law enforcement have energized communities across the nation. People are demanding systemic institutional changes to root out racism, a recognition that may intersect with recognition of environmental injustices including climate change, air pollution, and drinking water contaminants that disproportionately affect communities of color. At the same time, 2020 is an election year, which creates not only opportunities for political change, but also dynamics that are driving rapid implementation of policy actions by the current Administration.

Complicating the picture are the many fundamental changes already made or still underway. Recent *substantive changes* in federal regulations and policies have affected the nation's ability to address climate change, air pollution including hazardous air pollutants, which waters are subject to federal regulation, management of public lands and endangered species, coal ash disposal, and chemical substance regulation, to name only a few. Some of these have re-ordered the relationships between federal and state governments, sometimes by limiting state authority. Others have expressly limited the reach of federal authority to address environmental concerns, even in areas where federal authority has been exercised previously.

Numerous Executive Orders and federal agency actions have also instituted *process changes*, including changes in rulemaking, cost-benefit analysis, use of scientific information, the role of federal advisory committees, and enforcement policy. Indeed, the procedural landscape is in greater flux than at any time since the early 1970s. The responses of federal courts, as they review many of these actions while revisiting doctrines of administrative deference and as they apply case law to limit standing to challenge agency activities, make the outcomes of contested actions even less predictable.

This ELI Report is intended to aid practitioners and policymakers who are seeking ways to think about what lies ahead, looking particularly at effects on the regulatory system and the ability to address new problems and meet the needs of environmental justice. The Report is not intended to be a comprehensive "tracker" of regulatory developments. There are several of these in existence, including the *New York Times* environmental rollback database, the Sabin Center/Columbia Law School's Climate Deregulation Tracker and its Silencing Science Tracker, Harvard Law School's Energy and Environment Law Program EPA Mission Tracker and Regulatory Rollback Tracker, the Brookings Institution's Deregulatory Tracker, the New York University Institute for Policy Integrity's Agency Policy in the Courts Roundup and its Environmental Enforcement Tracker, as well as Western Priorities' 2020 public lands policy tracker.

Rather, this Report identifies key categories of action affecting environmental regulation, summarizes what is important about them, and examines some possible future outcomes. It follows in the footsteps of two previous ELI reports: *Regulatory Reform in the Trump Era* (2017) and *Environmental Protection in the Trump Era* (2018) (ELI, with the ABA's Section of Civil Rights and Social Justice). This Report addresses some new developments and, while it does not comprehensively update all matters addressed in the earlier reports, does include some material that appeared there.

Amid the many changes in environmental law, this Report seeks to help the general public, students, and environmental practitioners seeking to see the forest rather than the countless individual trees. It begins with a set of chapters focusing on regulatory processes, including both familiar Administrative Procedure Act processes and changes to these processes, followed by chapters on proposed or recently adopted changes dealing with issues such as use of science, enforcement, and use of environmental information. The remaining chapters examine recent efforts to limit federal and state authority in substantive areas of law, some developments and potential activities in chemical regulation, federal natural resource management decisions and changes, and environmental justice.

Each chapter explains the law and recent regulatory and deregulatory activities, identifies why these have significance and how they relate to other aspects of environmental governance, and offers some observations about future alternative paths. The Report makes no assumptions about electoral outcomes, but does explore the shape of likely alternative responses to the environmental policy areas discussed.

Chapter 1: Regulatory Process

Much of federal environmental law is the law of administrative practice and procedure. In looking ahead, it is important to understand the requirements that control how environmental rules are proposed, revised, and adopted, as well as how they are reviewed by federal courts when challenged by interested parties. This chapter summarizes the relevant procedures and also highlights recent changes that affect the environmental regulatory and deregulatory process.

Background

Regulatory and deregulatory activities affecting the environment are carried out by federal agencies in accordance with the federal Administrative Procedure Act (APA) and rulemaking provisions under specific environmental laws. Development of regulations also follows procedures administered by the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs (OIRA), including policies and procedures established by presidential Executive Orders.

Agencies have rulemaking authority to define compliance obligations or manage natural resources where federal legislation has conferred upon the agency the power to make rules with binding legal effect. Such legislation typically defines the goals that regulation must meet, sets parameters for the regulations (such as protection of human health "with an adequate margin of safety"), and prescribes process requirements (such as time limits, hearings, findings, and the location and timing of judicial review).

In addition to the environmental laws, the APA provides procedural and judicial review requirements that apply to most federal rules, unless specific legislation provides otherwise. These include required publication in the *Federal Register* of the content of a proposed rule, a period for receipt of public comments on the proposal, review of comments by the federal agency, and issuance of a final rule, with an effective date typically 30 days or more after publication of the final rule. The final rule is published in the *Federal Register*, accompanied by a preamble explaining what is in the rule and what changes were made from the proposed rule; it includes responses by the agency to the public comments, explaining how and to what extent these were taken into account in the final rule. The APA provides for judicial review of the final rule, as do most federal environmental laws.

A federal agency cannot adopt, amend, or suspend a rule without observing these procedures, except under certain emergency circumstances—and even then only as an interim final rule pending receipt of public comment. An agency or the president cannot unilaterally suspend rules currently in effect, or extend the relevant compliance dates within such rules, but must go through the notice-and-comment rulemaking process to make the change.

The final rule must be accompanied by and supported by an "administrative record" that consists of the scientific, legal, administrative, and other information relied upon by the agency in crafting the rule, including the comments and materials submitted by the public and by other agencies during the rulemaking process.

Various presidential Executive Orders have defined the regulatory development process within the federal government. These include, since 1981, a requirement that agencies develop cost-benefit analyses to accompany rules, as well as procedures for review by OIRA of proposed and final "significant regulations." These are defined as those having an annual economic effect of $100 million or more, creating a conflict with actions of another agency, affecting the impact of certain programs on program beneficiaries, or raising novel

legal or policy issues. OIRA approval is required before the regulatory action can occur. E.O. No. 12866, as amended; E.O. No. 13563. Unlike the public notice-and-comment process carried out by federal agencies under the APA, the review of proposed and final rules at OIRA is generally not a public process. However, if OIRA staff meet with third parties, E.O. No. 12866 directs them to post on the web the date, participants, and subject matter of the meeting. The $100 million review threshold has never been updated or adjusted for inflation, so these procedures apply to many regulatory actions.

Cost-Benefit Analysis in the Review and Approval of Proposed and Final Regulations

Agencies have developed, subject to OMB guidance, procedures for determining the anticipated costs and benefits of proposed and final rules. Under E.O. 12866, rulemaking packages are accompanied by Regulatory Impact Analysis (RIAs) including cost-benefit calculations using various methodologies. OIRA exercises substantial authority in reviewing these determinations and deciding which rules can move forward and with what conditions. Because these analyses are part of the administrative record, and because in general regulations will be seen as rational where their anticipated benefits exceed their societal costs, courts often look to the cost-benefit analysis when evaluating whether a regulation accords with the APA. Even where a statute does not expressly reference consideration of costs, federal courts have evaluated cost-benefit as a factor in determining whether to uphold a regulation as rationally based, although it cannot be applied to setting national ambient air quality standards (NAAQS).

Recently, EPA has decided to overhaul its approach to cost-benefit analysis in the regulatory process. It has drafted a comprehensive rewrite of its methods of economic analysis of regulations, last revised in 2010. It expects to finalize the new statement of methods in 2020.

EPA is also specifically considering narrowing its measurement of the benefits of rules to control air pollution. In June 2020, the Agency issued a proposed rule, entitled "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process." The proposal would limit or exclude consideration of "co-benefits" when developing air regulations. It would require only direct benefits of controlling target pollutants to be presented in the preamble summary of such rules and their separate identification from other effects. The limitation would be consistent with the narrow approach EPA took in its April 2020 final regulatory review of the Mercury and Air Toxics Standard for stationary sources. There, excluding co-benefits resulting from control of particulate matter as a result of mercury controls, EPA concluded that regulatory and compliance costs exceed the remaining direct benefits (see Chapter 6 below).

The "social cost of carbon" is another instance in which cost-benefit practices will significantly affect what future regulations will and will not be adopted by federal agencies and approved by OMB. Essentially, this concept assigns dollar values to the damage that will be caused by each additional ton of carbon dioxide-equivalent greenhouse gases emitted (or controlled, as the case may be). The federal government was obliged to make this determination in its rulemakings following the U.S. Court of Appeals for the Ninth Circuit's 2007 decision in *Center for Biological Diversity v. National Highway Traffic Safety Administration*. The court held that, in setting fuel economy standards for model years 2008-2011, NHTSA's "failure to monetize the value of carbon emissions" in determining costs and benefits of the rule was arbitrary and capricious under the APA. Subsequently, the federal Interagency Working Group on the Social Cost of Carbon was tasked with and developed a uniform estimate in 2009 and updated it in 2016. The National Academy of Sciences published its findings as to methods and approaches for determining the social cost of carbon, to support the Interagency Working Group.

In 2017, President Trump issued Executive Order No. 13783,"Promoting Energy Independence and Economic Growth." The Order disbanded the Interagency Working Group, and withdrew the documents it had produced, as well as related documents concerning calculation of climate costs. The Order instructed federal agencies to prepare their own estimates, if needed, in accordance with general OMB cost-benefit procedures. EPA and other federal agencies have subsequently produced "interim" estimates for social cost of carbon for use in rulemakings. These have derived far lower numbers than the Interagency Working Group. The current approach now provides that federal agencies will determine "domestic" U.S. climate damages (social cost to the United States) rather than global damages, and it allows agencies to select an annual discount rate as high as seven percent in determining present value, which also produces lower values.

Regulatory cost calculations are also significant under President Trump's 2017 Executive Order No. 13771. That Order, discussed in Chapter 2, requires agencies to repeal two existing regulations for every new one adopted. However, it also requires agencies to structure their planned regulatory and deregulatory actions to achieve a specified level of regulatory *cost savings* each year. OMB establishes in consultation with each agency a "regulatory budget" that caps the level of costs regulations may impose on society (and which may require reductions each year). Unlike E.O. No. 12866, E.O. No. 13771 and OMB's implementing procedures consider the costs of new regulations and cost savings from repealing regulations, but do not consider benefits at all.

Judicial Review

Under the APA, a final agency rule may be challenged in federal court on the grounds that it is "arbitrary and capricious, an abuse of discretion or otherwise not in accordance with the law." 5 U.S.C. §706(2)(A). Rules may be invalidated by federal courts for failure to follow required notice-and-comment procedures, inadequate justifications for the final rule, or inconsistencies with the statutory requirements. If a plaintiff challenges a rule in court based on inconsistency with the underlying statute, the court will first examine the statutory language. However, if the statutory provision is ambiguous or uncertain, the court will accept any agency interpretation that is "reasonable." This judicial approach is known as *Chevron* deference, named for the 1984 U.S. Supreme Court case that defined it. If *Chevron* deference is applied, this generally results in the court upholding an agency rule even if it is not the best or even the most likely reading of the statutory authority.

More recently, the Supreme Court has recognized a particularly assertive version of *Chevron* deference in which the courts defer to an agency rule that gives a different construction to a statute than a previous decision by a *court* interpreting the statute. This *Brand X* deference was defined by the Supreme Court in a 2005 case, in which the court deferred to a Federal Communications Commission rule that defined regulated entities differently than a previous decision by a U.S. court of appeals. Recently, the Trump Administration has explicitly asserted *Brand X-Chevron* deference to support its changes to environmental rules under §401 of the federal Clean Water Act and under NEPA that would effectively supersede previous decisions of not only the courts of appeals, but also the Supreme Court interpreting those laws. The durability of the *Brand X* form of deference remains uncertain going forward. While several Justices have expressed interest in revisiting the *Chevron* doctrine, Justice Clarence Thomas, who wrote the majority opinion in *Brand X*, announced in a statement appended to a denial of review in another case in 2020 that he no longer believes in the validity of the *Brand X* doctrine.

Another form of deference may also be employed by the federal courts when reviewing federal regulations. *Auer* deference allows courts to defer to agencies' interpretations of their own regulations. Although questioned by some Justices, it was preserved in narrowed form in 2019's *Kisor v. Wilkie*.

Agencies may change interpretations of statutes via subsequent rulemakings. This occurs most often when one administration is succeeded by another of a different party. However, the APA rulemaking procedures must be followed. The agency cannot simply declare a new interpretation, but must follow notice-and-comment rulemaking to revoke or supersede the prior regulation. Moreover, the Supreme Court has made clear that a change in agency position reflected in a new regulation must be supported by evidence in the administrative record providing a "reasoned explanation" of the basis for the change. *Encino Motorcars v. Navarro* (2016). When combined with *Chevron*, this doctrine generally means that agencies may adopt regulations at odds with the approach of a prior administration, but that they will bear a slightly higher burden of explaining why the change is supported by law and has a rational basis than if they were regulating for the first time.

While judicial review is extremely important for holding agencies accountable and to rein in procedural and substantive errors, it is not a remedy for all such actions. The courts have created and applied an array of judicial doctrines as a basis for refraining from deciding cases challenging regulatory actions. This means that even where there may be legitimate concerns about the legality of an executive branch action, there is not always a case raising the issue that a court will be willing, or even able, to address.

Doctrines that keep courts from hearing and deciding environmental cases frequently involve whether the party challenging the action has "standing" to bring the case. The Supreme Court has defined a three-part requirement for a party to show standing to maintain a federal court case under the U.S. Constitution, and has held that a party's standing must be maintained throughout the entire course of the court action including appeals. The three "irreducible" requirements are (1) that the plaintiff has suffered an injury-in-fact to the plaintiff's own interests, (2) that the injury is "fairly traceable" to the governmental act complained of, and (3) that the injury is "redressable" by a court. See generally ELI's recent review of standing in environmental cases. *Developments in Standing for Public Lands and Natural Resources Litigation* (ELR, Dec. 2018).

The standing hurdle can be difficult to clear. For example, two recent district court decisions denied the standing of environmental organizations and states to challenge the effect of President Trump's E.O. No. 13771 requiring that two regulations be repealed for every one adopted and that regulatory costs be offset, because they could not show conclusively that particular regulatory actions had been withheld because of the Order. Likewise in 2020, the Ninth Circuit in *Juliana v. United States* held that the juvenile plaintiffs in a suit against the U.S. government for failing to control greenhouse gas emissions and hence injuring their life and liberty lacked standing as they could not demonstrate that a court order could redress their injury.

Repealing Regulations

The normal manner of repealing a regulation is for the issuing agency to propose its repeal and conduct notice-and-comment rulemaking under the APA. However, Congress also has legislative power to repeal any regulation by enacting legislation that is then signed into law by the president.

Because the legislative process to repeal regulations can be complex and slow, Congress has enacted an expedited process under the Congressional Review Act (CRA). This legislation, enacted in 1996, had only been used once in 2001 before it was used in 2017 by the Trump Administration and Republican-controlled U.S. House of Representatives and U.S. Senate to repeal more than a dozen rules adopted by the Barack Obama Administration.

The CRA creates a streamlined procedure, not subject to filibuster and with limited time for debate, to invalidate a final agency rule. Enactment of a disapproval resolution under the CRA, when signed by the president, invalidates the rule and prevents the agency from ever reissuing the disapproved regulation "in substantially the same form," or another regulation that is "substantially the same," without express authorization from Congress. The Ninth Circuit decided a case upholding the constitutionality of the CRA in 2019.

The CRA provides for introduction of a disapproval resolution within 60 calendar days of a final rule's issuance (excluding certain days when Congress is adjourned). A separate resolution is required for each rule. The CRA provides an additional window of time for review and repeal of rules that were adopted toward the end of a prior session of Congress. The reach-back period applies to any final rule that was adopted and submitted to Congress within the final 60 "legislative days" in the House or the final 60 "session days" in the Senate. 5 U.S.C. §801. The window for action by the new Congress opens approximately 15 days into the new session of Congress, and a CRA resolution can be introduced for the next 60 days after that.

Because the actual length of the reach-back period depends on which days the bodies were in session the prior year, its precise beginning cannot be defined until very late in the session. The Trump Administration has attempted, therefore, to finalize as many of its rulemakings as possible before the end of May 2020 in order to avoid the possibility of CRA action in 2021 if the other party takes the presidency and both houses of Congress. However, the actual reach-back date may fall in June: for example, the CRA reach-back date for the last year of the Obama Administration was June 13, 2016.

The CRA is of interest not only because of its potential to undo completed regulatory actions of the executive branch following a political change, but also because its demonstrated power is likely driving much of the current pace of rulemaking. Previously, most presidents apparently felt that they had until January of their terms to finish agenda items and adopt rules with sufficiently robust administrative records. In 2020, however, it appears that the time line has been greatly accelerated, with the idea of completing most rule changes and regulatory repeals a full eight months prior to the potential conclusion of the current presidential term. Federal agencies may rely to a greater extent on doctrines of judicial deference to make up for any weaknesses in the record or processes occasioned by the swift pace.

2021 Outlook

This chapter is a reminder of the regulatory administrative law framework that will be in place in 2021 regardless of electoral outcomes.

If the president is re-elected, it can be expected that additional deregulatory acts will continue apace. The revision of cost-benefit analysis and the emphasis at OMB and the agencies on setting regulatory budgets will mean that regulatory impact analyses accompanying regulations will further increase the priority given to avoiding costs to regulated industries. As to pending court challenges, the returning Administration will likely lean heavily on deference doctrines, and standing arguments, to sustain the decisions it will be defending.

In contrast, if there is a change in administration, it can be expected that incoming officials will seek to undo rapidly many of the regulatory actions completed within the last year or two. Final regulations cannot be suspended or revoked by presidential action, however. Instead, rulemaking in accordance with the procedures outlined in this chapter will be needed to reverse prior actions. However, as noted in Chapter 2, Executive Orders may direct agencies to begin the process of reviewing and revising rules, and proposing repeals, revisions, or replacements through the notice-and-comment process. Alternatively, Congress could repeal or revise regulations through legislation signed by a new president, either using the expedited

processes of the CRA if the final regulation is of recent enough vintage and the House and Senate both take up and pass such measures, or using the normal legislative process.

Courts may continue to consider pending challenges to final regulations, and a new administration may change the government's position. It may, for example, ask that a court stay litigation while a new rule is developed; concede error or decline to defend the rule; and/or engage in settlement discussions leading to proposal of some alternative rule typically pursuant to a schedule agreed to by the settling parties. Of course, parties that support the extant rule may oppose these actions and seek to keep the current rules in place.

None of these processes is quick, other than the expedited CRA process—which requires action by both houses of Congress acting in coordination. And because of the time limits, use of the CRA would require regulatory repeals to be specifically prioritized among all the other business potentially facing a new Congress—which seems likely to face many health care issues, economic recovery and appropriations issues, racial justice and social reform issues, and an array of challenges not even readily foreseeable at the moment.

Chapter 2: Executive Orders

Presidents issue Executive Orders, proclamations, memoranda, and other documents that vary widely in their purpose and effect. These include both management directives and changes in policy. In the environmental and natural resources field, Executive Orders have long been a favored tool of presidents seeking to put their own stamp on administration of the nation's laws, and particularly operation of the process for developing and issuing regulations.

Except in the unusual case where Congress has authorized the president to make decisions having direct legal effect, presidential Executive Orders are not lawmaking in the ordinary sense. Rather, they are directives to the heads of agencies and the Executive Office of the President, including OMB.

An Executive Order can be revoked or modified by the president who issued it, by a successor president, by an act of Congress if the president was acting on authority granted by Congress, or by a federal court decision that the order was contrary to law or unconstitutional.

President Trump has issued a great many Executive Orders establishing policies for environmental and natural resources agencies (including Orders dealing with rulemaking, infrastructure, jurisdiction over the waters of the United States, climate change, the fossil fuel industry, and others). Many of these Orders have defined national objectives and changed regulatory procedures in profound ways. Among the Orders significant for environmental policy and rulemaking are:

E.O. No. 13771 "Reducing Regulation and Controlling Regulatory Costs"

E.O. No. 13777 "Enforcing the Regulatory Reform Agenda"

E.O. No. 13778 "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule"

E.O. No. 13783 "Promoting Energy Independence and Economic Growth" (which also revoked E.O. No. 13653 "Preparing the U.S. for the Impact of Climate Change" (2013) and numerous climate-related memoranda)

E.O. No. 13792 "Review of Designations Under the Antiquities Act"

E.O. No. 13795 "Implementing an America First Offshore Energy Strategy"

E.O. No. 13807 "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects"

E.O. No. 13840 "Ocean Policy to Address the Economic, Social, and Environmental Interests of the United States"

E.O. No. 13867 "Issuance of Permits With Respect to Facilities and Land Transportation Crossings at the International Borders of the United States"

E.O. No. 13868 "Promoting Energy Infrastructure and Economic Growth"

E.O. No. 13875 "Evaluating and Improving the Utility of Federal Advisory Committees"

E.O. No. 13891 "Promoting the Rule of Law Through Improved Agency Guidance Documents"

E.O. No. 13892 "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication"

E.O. No. 13921 "Promoting American Seafood Competitiveness and Economic Growth"

E.O. No. 13924 "Executive Order on Regulatory Relief to Support Economic Recovery"

E.O. No. 13927 "Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities"

A substantial number of these Orders defined or redefined regulatory and administrative processes. Others set in motion new policies or directed agencies to commence deregulatory efforts. The Trump Administration has made far more use of Executive Orders than previous administrations in publicly directing actions to adopt or repeal specific environmental regulations.

Substantive Impacts of Executive Orders

President Trump issued several Executive Orders that set in motion substantive changes in environmental regulations. While Executive Orders frequently define policy goals and changes in approach, many of these Orders defined specific results for rulemaking or executive processes. This use of Executive Orders is more prescriptive than in many previous administrations, evidently reflecting the desire of the president to put his stamp on substantive results across a broad array of topics.

E.O. No. 13778, for example, directed EPA to rescind via rulemaking the Obama Administration regulations defining the "waters of the United States" subject to regulation under the Clean Water Act. The Order told the agency to produce new regulations and directed it to "consider interpreting" the law in "a manner consistent" with the construction given the Act by the late Justice Antonin Scalia and three other members of the Supreme Court in *Rapanos v. United States*. Likewise, in the climate change arena, E.O. No. 13783 directed EPA to propose rules to "suspend, revise, or rescind" the Clean Power Plan—EPA's primary regulations under the Obama Administration advancing the control of greenhouse gases. An order aimed at making natural gas pipelines easier to permit and construct, E.O. No. 13868, among its other provisions, directed EPA to propose and adopt final regulations that would limit the ability of states to condition or deny water quality certifications to federally permitted activities under §401 of the Clean Water Act. It also directed the U.S. Department of Transportation to relax regulations affecting safety for liquified natural gas (LNG) facilities.

Other Orders limned substantive goals for federal natural resources management. E.O. No. 13792 directed the Secretary of the Interior to review all national monuments of over 100,000 acres created by previous presidents since January 1, 1996, and to recommend which ones President Trump should downsize or release from protection. E.O. No. 13795 launched an earlier-than-required review process to advance new offshore oil and gas leasing and development. E.O. No. 13873 rescinded natural resource mitigation requirements that the U.S. Department of the Interior had defined for development activities on public lands. E.O. No. 13867 directly granted presidential approval for the Keystone XL pipeline to enter the United States from Canada (after previous Orders and presidential memoranda had not entirely cleared its legal pathway). E.O. No. 13921 directs expedited development of permitting and approvals for aquaculture in marine waters.

Procedural Impacts of Executive Orders

In addition to the many Executive Orders that directed substantive outcomes, several Executive Orders put in place new procedural requirements that directly affect rulemaking and policymaking mechanisms. These include E.O. Nos. 13771, 13777, 13807, 13875, 13891, 13892, 13924, and 13927.

E.O. No. 13771, issued only a week after the inauguration in 2017 directs executive branch agencies and departments to repeal two regulations for every new one adopted. The Order requires that when proposing

a new "significant" regulation, an agency must identify to OMB two that it will be repealing, although repeals may be banked for future use. The Order also directs that the costs of new regulations must be offset by eliminating existing regulations, and that in each succeeding fiscal year, costs of new regulations must be offset using a *regulatory budget* for the agency prescribed by OMB. This budget may be negative, meaning that net cost reductions must be achieved through deregulation, even in the absence of new regulation.

In December 2017, OMB announced that the government had rolled back 22 regulations for every one adopted that year. It announced a goal of achieving a 3-for-1 repeal ratio for the following year, and subsequently reported achieving a 4-to-1 repeal ratio. For FY2019, OMB announced that it had achieved a 4.3-for-1 repeal ratio. Agencies identify regulations for repeal using any process, but many use the agency regulatory reform task forces mandated by E.O. No. 13777 (see below) to identify candidates. Agencies do not publish in the *Federal Register* which deregulatory actions they are using for offsets.

The annual "regulatory budget" is perhaps the most significant feature of E.O. No. 13771. It considers only costs imposed or avoided and does not consider benefits at all. For FY2020, OMB determined that EPA's projected net deregulatory actions must produce $40 billion in cost savings. Environmental groups and states brought separate civil actions challenging E.O. No. 13771. The U.S. District Court for the District of Columbia dismissed these cases in 2019 and 2020 (*Public Citizen v. Trump* and *California v. Trump*) for lack of standing, holding that neither the organizations nor the states could prove that any specific action on pending or expected proposed regulations had been withheld because of the 2:1 order rather than for some other reason. Hence, they could not meet the standing requirement of showing that the order "caused the relevant agency to act or decline to act."

E.O. No. 13777 launched broad regulatory review across the government, directing federal agencies to identify existing rules for repeal, replacement, and modification. It instructed them to establish internal regulatory reform task forces to carry out that task, and to improve implementation of cost and benefit evaluation approaches. This Order led to the development of substantial lists of deregulatory targets for each agency. These are used in establishing the annual regulatory agenda required under E.O. No. 12866.

E.O. No. 13807 set in motion a great many changes affecting the review and approval of federal projects and permitting actions. Among the most far-reaching consequences of this Order is the proposal by the Council on Environmental Quality on January 10, 2020, to revise and replace the regulations that have governed the administration of the National Environmental Policy Act (NEPA) across the entire federal government for the last 42 years. As discussed in Chapter 5 below, these proposed changes, if adopted, will exclude many federal actions from environmental impact assessment requirements, and will limit both the alternatives federal agencies must consider and the scope of impacts they analyze.

E.O. No. 13807 also referenced and endorsed efficiency procedures and reforms created by the Government Performance and Results Act Modernization Act of 2010, the Fixing America's Surface Transportation (FAST) Act of 2015, and the Water Resources Development Act of 2014, and directed federal agencies to coordinate and expedite review of infrastructure projects. It directed OMB to set a Cross-Agency Priority (CAP) goal for infrastructure permitting modernization in consultation with the Federal Permitting Improvement Steering Council, and to adopt guidance for federal agencies. The Order also directed federal agencies to complete all federal environmental reviews and decisions on "major infrastructure projects" within two years of the beginning of such reviews; required agencies to use a system leading to "one Federal decision" in actions where there are multiple federal agencies involved; and directed agencies to issue a single federal "Record of Decision" unless the project sponsor or lead federal agency determines that this would not best promote completion of the authorization process. (The Order also revoked President Obama's Executive Order No.

13690, which had required federal agencies to use a federal flood risk management standard that includes climate change-induced sea-level rise when designing and evaluating federally funded construction projects.)

E.O. No. 13875 directed federal agencies to terminate 1/3 of their advisory committees by September 30, 2019, and to limit the total number of advisory committees governmentwide, and it conferred on OMB greater authority to determine the value and need for advisory committees. This has had effects on scientific committees and other committees dealing with public lands, environmental health, and other subjects.

E.O. No. 13891 regularizes public access to agency guidance documents, which often provide very influential interpretations of federal laws and regulations. It required all federal agencies by February 28, 2020, to identify all extant guidance documents and to publish them in a publicly searchable database. This is intended to provide an important aid to the public and regulated entities in determining what the relevant "law" is with respect to many activities. The Order also imposed requirements similar to APA requirements for agencies to adopt significant guidance documents in the future. On October 31, 2019, OIRA issued a memorandum to federal agencies outlining how to implement E.O. No. 13891. On May 19, 2020, EPA took the additional step of signing a proposed rule that would require the Agency to solicit public comment on all proposed significant guidance. EPA would also create procedures for the public to petition for the withdrawal or modification of guidance documents.

E.O. No. 13892, discussed in Chapter 4 below, creates some additional procedures and prerequisites related to enforcement activities. It requires development of opportunities to self-report and receive penalty reductions in return, as well as opportunities for preenforcement consultation with agencies.

E.O. No. 13924,"Executive Order on Regulatory Relief to Support Economic Recovery," issued May 19, 2020, in response to the economic fallout from the COVID-19 pandemic, directs federal agencies to "identify regulatory standards that may inhibit economic recovery and . . . consider taking appropriate action, consistent with applicable law, including by issuing proposed rules as necessary, to temporarily or permanently rescind, modify, waive, or exempt persons or entities from those requirements, and to consider exercising appropriate temporary enforcement discretion or appropriate temporary extensions of time as provided for in enforceable agreements." The Order further instructs agencies to identify temporary modifications or suspensions that should be made permanent. On June 9, OMB directed federal agencies within two weeks to provide lists of specific rules for repeal, waiver, or other action, and to identify "any good cause, exigent circumstance, or emergency authorities the agency intends to invoke," as well as to provide a draft enforcement policy and other information.

E.O. No. 13927, issued June 4, 2020, cites the economic effects of the COVID-19 pandemic and directs federal agencies to examine their emergency procedures and expedited processes to identify ways to move forward infrastructure, waterways and civil works, and public lands projects to support economic recovery "consistent with applicable law." The Order singles out NEPA, the Endangered Species Act, and permitting under §404 of the Clean Water Act as specific targets for expedited processes. An ELI analysis explained that while the Order establishes a recurring 30-day reporting requirement for all federal agencies to identify projects eligible for expedited treatment, it does not itself waive any regulatory requirements.

2021 Outlook

Executive Orders may be revoked or amended by a president or subsequent president at the stroke of a pen. Because these Orders typically control only actions within the president's authority, they typically do not fall under judicial review. They are not, for example, subject to review under the APA, which applies to federal agency action. Recent case law (under E.O. No. 13777) also suggests that obtaining standing to challenge a

procedural Executive Order may be difficult because of the difficulty of demonstrating that the Order rather than some intervening act produced harm to the plaintiff.

Presumably, a returning Trump Administration will continue to carry forward the policies and practices specified in the first term orders. Indeed, the president's preference for high-profile signing of Orders suggests that many additional actions will be commenced or endorsed by presidential documents.

Conversely, a different administration is likely to end many of the Orders identified in this chapter, including both the procedural orders affecting rulemaking, enforcement, regulatory review, and advisory committees; and those Orders initiating substantive policy changes in environmental law.

Revocation or amendment of an Executive Order does not unwind all of the actions that flowed from it. Thus, EOs that resulted in rulemakings will continue to have consequences even if a subsequent president revokes the relevant Orders. It is the resulting regulatory actions themselves that must be modified or reversed to produce a change in outcome. Such changes will (absent congressional use of the CRA or other legislation) necessarily require using the mechanisms provided by administrative law for rulemaking: public notice and comment, reasoned decisionmaking, and provision of a record rationale for changes in direction.

Chapter 3: Science in the Regulatory Process

The Trump Administration has set in motion a series of actions designed to change the ways in which science and scientific information may be used in developing and carrying out environmental policy and regulation. There are two major areas of recent activity. Each of these would constrain the range of scientific input and data affecting federal environmental regulatory processes:

- Rulemaking by EPA to restrict the use of science in the regulatory process in instances where underlying data and models are not publicly available; the Department of the Interior is considering similar requirements.
- Limitation of who can serve on EPA federal advisory committees, and limitations on the ability of EPA's science advisory board (SAB) to set its own agenda.

First, in April 2018, EPA proposed a rule ("Strengthening Transparency in Regulatory Science") that would preclude the Agency from relying on scientific data or scientific models unless they could be made available to the public. This proposal led to substantial adverse comment, relating to instances in which relevant exposure and health data had been collected under conditions of confidentiality or where models had or contained certain proprietary elements. Over 600,000 comments were submitted on the proposal, and EPA followed up with a lengthy effort to develop a supplemental proposed rule to modify the initial proposal in several ways. The supplemental proposal was released March 18, 2020, with a comment period through mid-May 2020. It would allow some consideration of confidential data and models; however, it would also expand the coverage of the rule to apply limitations on data and models used as "influential scientific information" and not just to EPA's "regulatory" processes. It would consider alternatives that would give "greater consideration" to studies where underlying data and models are available for validation, either because public or made available through tiered access. During the regulatory development process, the appropriations bill enacted for FY2020 was accompanied by agreed report language that advised EPA to seek the view of its Science Advisory Board on the proposal, and directed EPA to enter into a contract with the National Academy of Sciences to review the rule. These had not occurred as of the release of the proposed supplemental rule.

The Department of the Interior launched its own similar proposal to limit the ability of departmental agencies to rely on scientific studies that do not make all underlying data public. Rather than a rulemaking, the Department issued a more limited directive as a Secretarial Order 3369 in September 2018, requiring its agencies to make underlying data and analytic methods publicly available "to the extent permissible by law." Because such orders can be amended or revoked by subsequent Secretaries, the Department began developing its own proposed rule in early 2020, sending the proposal to OIRA for review in February.

Second, EPA has undertaken several efforts limiting the roles and scope of its outside scientific advisors. In October 2017, the Administrator ordered that EPA's advisory committees exclude from appointment any member that receives or benefits from any EPA grant. Members and interested parties objected that this would result in exclusion of many of the most knowledgeable academic researchers from such committees, and skew them toward private industry-funded members who are not subject to such disqualification. Several court challenges were launched. In March 2020, the U.S. Court of Appeals for the First Circuit, reversing a district court, found that the EPA Administrator's order was reviewable under the APA and the Federal Advisory Committee Act. *Union of Concerned Scientists v. Wheeler*, No. 19-1383, (1st Cir. Mar. 23, 2020). In April 2020, the U.S. District Court for the Southern District of New York vacated the EPA directive, holding that the Agency could not implement it without notice-and-comment rulemaking. *NRDC v. EPA*, No.

1:19-cv-o5174-DLC, (S.D.N.Y. Apr. 15, 2020). And the D.C. Circuit, reversing a district court, held that the Administrator's directive was reviewable under the APA, with FACA providing the relevant standard, and further held that the directive was invalid because EPA had failed to provide any explanation for its change in position and because it had failed to follow required procedures of the Office of Government Ethics for review and publication in the *Federal Register*. *Physicians for Social Responsibility v. Wheeler*, No. 19-15104 (D.C. Cir. Apr. 21, 2020). The Agency in June decided not to further defend or implement the policy.

EPA also eliminated and downsized several of its scientific panels, and in February 2020 removed the ability of its flagship Science Advisory Board (SAB) to determine its own docket—and, specifically, to decide what proposed rules to review. By memorandum, the Administrator assigned that sole responsibility to the chair of the SAB, who would participate in a monthly non-public briefing by administration officials, with the ability to name up to eight members to participate in ad hoc review of particular regulatory actions.

The diminished role for the SAB is perhaps noteworthy in view of the body's recent questioning of the scientific bases for several of EPA's high-profile regulatory rollbacks:

- The SAB found that EPA's rollback of the definition of "waters of the United States" (WOTUS) in a set of rulemakings was not consistent with scientific understandings of the aquatic sciences. In addition to a lengthy report it issued during the rulemaking process, the SAB published a further Comment after the final redefinition rule was released: "The Board concluded that the proposed WOTUS rule does not incorporate best available science and as such we find that a scientific basis for the proposed Rule, and its consistency with the objectives of the Clean Water Act, is lacking."
- Likewise, the SAB issued draft and final reports identifying substantial methodological problems with EPA rule rolling back fuel economy/auto emissions standards. The SAB reiterated these concerns in its 02/27/2020 "Consideration of the Scientific and Technical Basis of the EPA's Proposed Rule Titled the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks." EPA issued the final rule March 31, 2020.
- The SAB also continued to question EPA's plan to withdraw the "risk finding" supporting the Agency's 2012 regulation of mercury and air toxics emissions from fossil fuel-fired power plants, an action EPA nevertheless finalized April 16, 2020. SAB Comments ("SAB's recommendations do not seem to have been taken into consideration.").
- In April 2020, EPA proposed to maintain the primary and secondary NAAQS for particulate matter ($PM_{2.5}$) at current levels, despite scientific research supporting tightening these standards to protect human health. The Administrator had, in 2018, disbanded the 20-member Clean Air Scientific Advisory Committee (CASAC) *PM Review Panel* that advises the Agency on such matters, despite the pendency of the $PM_{2.5}$ review. The discharged PM Review Panel members convened themselves in 2019, and submitted their recommendations—recommending that EPA tighten the NAAQS. EPA's remaining official seven-member nonspecialist CASAC submitted comments in 2020 that were divided, but that called for more review by EPA before issuance of the proposed rule. The comment period on the April 30 proposal closed June 29, 2020.

An additional regulatory action may affect the availability and use of science across an even broader range of federal decisions. As discussed in Chapter 5, *infra*, the Council on Environmental Quality concluded its complete rewrite of the NEPA regulations that govern the types of information-gathering and analysis required to prepare environmental impact statements and environmental assessments in connection with major federal actions having a significant effect on the environment. The July 16, 2020, final rule includes a substantial limitation on scientific inquiry in connection with these processes. In revised 40 C.F.R. §1502.23, new language says agencies shall "make use of reliable existing data and resources . . . Agencies *are not*

required to undertake new scientific and technical research to inform their analyses." In the final rule, CEQ added a proviso that the new provision is not intended to "prohibit" agencies from complying with other statutes pertaining to scientific research, but this proviso does not ensure gathering of needed scientific information.

The new science provision would produce a substantial change if interpreted to exclude the need for field work or study of resource environments that are not adequately covered by "existing data and resources." There are many settings in which existing scientific data are incomplete to support decisions, but where the methodologies to obtain such data are available. Historically, the NEPA rules have required filling of these gaps.

In its revisions to a separate section (§1502.21) dealing with incomplete or unavailable information, the CEQ would require an agency to obtain incomplete but available information essential to its analysis if costs are "not unreasonable," a reduction of the current requirement to obtain it if costs "are not exorbitant." This change is most likely to be relevant when approaching a new technology or unprecedented commitment of resources.

2021 Outlook

Changes in the intersection of science with environmental regulation will largely depend on two factors. First, the courts. Litigation over the composition of advisory committees may result in required changes. However, it is unlikely that a court would require the appointment of particular persons to serve these roles. In addition, litigation over regulations such as the SAFE car rule or PM NAAQS may result in a need for new science on remand, if, for example, the courts strike down the rules as arbitrary and capricious, or not in accordance with law. The NEPA rule is also likely to be the subject of litigation, although the science aspect of the rule may need to await application to a particular federal action in order for a court to have jurisdiction. If the EPA science rule on use of non-publishable information is finalized, it will undoubtedly provoke litigation.

Second, if there is a change in administration, it is likely that the policies on service on advisory panels, and the use of science in the regulatory process would be changed either by Executive Order or agency policy. This would likely entail new appointments and creation or recreation of advisory bodies. This might also lead to the administration directing agencies and their scientific advisory bodies to re-evaluate standards and regulatory options.

If EPA finalizes the science rule proposed in March 2020, the likely response will depend in part upon litigation likely to continue into 2021; if there is a change in administration, it may be the subject of a CRA resolution if Congress is amenable, or repeal or revision via notice-and-comment rulemaking.

Chapter 4: Enforcement

Federal agencies and the U.S. Department of Justice (DOJ) have considerable discretion in deciding whether, when, and how to enforce regulatory requirements. The Administration's priorities have led to a decrease in environmental enforcement actions, and it is likely that such reductions will continue—leaving it to state agencies and state attorneys general, in many instances, to step up enforcement when their authorities and staffing capacities permit.

Background

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 civil penalties; and court cases seeking civil penalties, remedial action orders, injunctions, or criminal penalties. The federal agency responsible for the environmental program determines whether enforcement is needed, and if the case will go to federal court, the government is represented by DOJ, which has substantial control over its direction and disposition. Most civil enforcement cases are resolved by settlement between the parties.

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

Agencies and DOJ determine how and whether to commence enforcement actions. Relatively few provisions in federal environmental law have been interpreted to require a mandatory duty to take enforcement action. However, most federal pollution control laws do provide for citizen suits to enforce violations, subject to the government's ability to forestall such suits by taking enforcement action itself against the violator. In addition to exercising enforcement discretion in individual instances, agencies establish priority areas for focus of enforcement resources, such as EPA's "national enforcement initiatives."

Recent Activities

Among the significant moves of DOJ is a series of decisions and memos leading to a determination that the federal government would no longer accept supplemental environmental projects (SEPs) in negotiated settlements of environmental cases. SEPs are agreements by an alleged violator to fund, as part of a settlement of an enforcement action, projects that provide environmental benefits to communities and ecosystems adversely affected by the violation. SEPs have been used in settlements since at least the mid-1980s and have been formally recognized in EPA policies since 1991, with updates to the policy in 1995, 1998, and 2015. The original SEP policy was developed during a Republican administration, and the policy has been measured by each succeeding administration against essentially the same set of laws. However, the Trump Administration's DOJ has issued a series of opinions characterizing SEPs as unlawful.

In a memo issued August 21, 2019, the Assistant Attorney General (AAG) for the Energy and Natural Resources Division (ENRD) extended the reasoning of the Attorney General's November 7, 2018,

Memorandum limiting the scope of civil consent decrees and settlement agreements. The AAG interpreted SEPs as unlawful even for state and local governments settling their own violations of water pollution laws. Then, on March 12, 2020, the AAG, citing both legal interpretive and supervisory authorities, banned the use of SEPs with private parties, while affirming that DOJ would not reopen past decrees and settlement agreements. DOJ now takes the position that SEPs violate the Constitution's power of the purse (reserved to Congress with signature by the president), as well as the Miscellaneous Receipts Act and the Anti-Deficiency Act. EPA has announced that it will follow DOJ's lead by excluding SEPs in all of its negotiated administrative enforcement activities.

Recent Executive Orders have also affected the enforcement landscape. E.O. No. 13892, "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication" (Oct. 9, 2019), provides that federal agencies may not rely on or "cite" a guidance document in an enforcement action to define noncompliance without prior notice. In addition, agencies must propose and adopt procedures that: encourage voluntary self-reporting of violations in exchange for waivers and reductions in civil penalties; encourage voluntary disclosures by regulated parties; and provide preenforcement rulings on request to regulated parties. The same Executive Order also prohibits an agency from taking any action with a legal consequence without providing a preenforcement opportunity for the regulated entity to contest the agency's proposed legal and factual determinations. [This provision extends to a no-action letter, notice of noncompliance, and similar notices, but not to litigation or emergency action.] Essentially, this provides an additional pre-administrative enforcement step whereby the agency will not be able to act until the regulated entity takes its opportunity for informal resolution. The agency is required to provide written reasons for its action after this opportunity and before proceeding with enforcement.

The Executive Order further requires each agency to promulgate an agency rule defining its civil administrative inspection process within 120 days, and thereafter to conduct inspections of regulated entities in compliance with the rule.

In January 2020, citing this Executive Order, OMB issued a request for information seeking additional recommendations to "protect Americans against the unjust or arbitrary exercise of governmental power," including, among others, proposals to ensure that American companies never have to prove their lack of liability, practices to prevent coercive settlements, and to consider whether agencies should have to "show cause" before commencing an investigation. 85 Fed. Reg. 5483 (Jan. 20, 2020).

While the Executive Order itself is not enforceable as to self-reporting and waivers and preenforcement rulings, once adopted by federal agencies through rulemaking, the procedures presumably will be.

EPA has also proposed to change its approach to administrative review and appeals of permit decisions, reducing the authority of its own Environmental Appeals Board (EAB). The EAB was created in 1991 to provide a less expensive and more accessible administrative alternative to federal court for challenging EPA administrative decisions. It has served as an independent review tribunal through five presidential administrations. In December 2019, EPA issued a proposed rule to exclude *amici* from participating before the EAB and eliminating appeals of permits by members of the public to the EAB. The proposal, "Modernizing the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals," provides for alternative dispute resolution (ADR) as a mandatory prerequisite to any EAB appeal, but further provides that ADR can occur only by mutual consent. This means that a permit applicant can skip EAB review if desired and go to federal court, or require opponents to go to federal court.

EPA also proposed to change its rules so that the Administrator can issue a "dispositive legal interpretation" in any matter before the EAB (not just permitting cases), determining its outcome. The proposed rule also

limits the EAB to determinations of facts and law, while expressly removing any policy considerations from the board's authority in rendering its decisions (possibly including issues such as consideration of environmental justice). It also would allow the Administrator to determine which of the EAB's decisions are precedential and which are not, thus allowing the Administrator to determine the effect of decisions on future cases.

While the proposed rule stops short of elimination of the EAB, it appears little would be left of many EAB functions if the rule is finalized as proposed. Because of the expense and time associated with federal court litigation, it may reduce the number of permit challenges, the range of stakeholders involved in such challenges, and the number of EPA permit decisions subjected to review.

Enforcement Discretion and Forbearance

During the onset of the COVID-19 pandemic, EPA's Office of Enforcement and Compliance Assistance issued a memo on March 26, 2020, announcing its intention to exercise enforcement discretion (retroactively to March 13) with respect to permit requirements on sampling and reporting. The memo says EPA may not enforce requirements that these occur or timely occur, if the company determines not to do so because of constraints related to the pandemic. Companies are to "make every effort" to "act responsibly under the circumstances" to maintain information not reported to the Agency. The memo did not apply to CERCLA/RCRA remediation requirements.

While EPA described this as a responsible approach to practical limitations in companies' abilities to carry out requirements safely, some outside organizations and former EPA officials stated that the memo went farther than necessary in curtailing permit responsibilities and did not require sufficient showings of incapacity or specific safety concerns to benefit from the blanket policy statement. On April 16, 2020, NRDC filed suit challenging aspects of the policy related to reporting of releases and discharges and seeking disclosures to protect fence-line communities during the affected period; on May 13, nine states also filed suit contending that the memo amounts to a legislative rule adopted in violation of APA requirements. *New York v. EPA*, No. 20-CV-3714 (S.D.N.Y.).

In May 2020, the president issued E.O. No. 13924, which provides for enforcement relief across the federal government to support economic recovery from the COVID-19 pandemic. It provides that agencies "shall accelerate" their procedures for providing preenforcement rulings on request without regard to the requirements of §6(a) of Executive Order No. 13892. It also directs the heads of agencies to "consider whether to formulate, and make public, policies of enforcement discretion that, as permitted by law . . . decline enforcement against persons and entities that have attempted in reasonable good faith to comply with applicable statutory and regulatory standards, including those persons and entities acting in conformity with a pre-enforcement ruling." The Order directs OMB, in consultation with Assistants to the President for Domestic and Economic Policy, to develop guidance and reporting mechanisms for federal agencies to provide regulatory and enforcement relief.

Certain other government actions may fall within the enforcement discretion basket, which, in the absence of total abdication of enforcement authority, is generally not subject to judicial review. For example, in *Bristol Bay Economic Dev. Corp. v. Hladick*, decided April 17, 2020, the U.S. District Court for the District of Alaska found that EPA's withdrawal of the prior administration's proposed determination to exercise a veto under §404(c) of the Clean Water Act to prevent discharge of fill by the Pebble Mine into waters of the United States was an enforcement discretion decision and thus not reviewable under the APA.

2021 Outlook

Enforcement activities are likely to fall to state agencies and state AGs unless and until EPA ramps up its own enforcement efforts. The Environmental Integrity Project issued a report in December 2019 documenting the substantial declines in state environmental agency staffing and budgets that might make this pick-up more difficult. EIP, The Thin Green Line.

The EPA COVID-19 enforcement discretion memo is not binding on state environmental agencies that have authority to carry out their own and EPA-delegated programs. States are likely to set their own enforcement priorities and allow, or disallow, their own exercises of forbearance. If the current Administration is returned to office, E.O. No. 13924 may have longer-lasting impacts. It specifically institutionalizes federal limits on enforcement justified by economic recovery rationales, and it puts OMB and the White House more directly in charge of enforcement policies. This Order could have profound continuing effects as implemented in 2020 and thereafter.

On the broad enforcement policy front, E.O. No. 13892 is likely to have major effects, unless modified or revoked by a subsequent administration. It creates procedural expectations that will give regulated entities multiple opportunities to contest potential enforcement actions, as well as defined opportunities to self-disclose and be entitled to penalty reductions, setting in motion the adoption of specific policies agency-by-agency. Depending upon how these policies are adopted and institutionalized (viz. by informal policy or by rulemaking), this may create substantial expectations on the part of regulated entities that will, in turn, affect how enforcement cases are treated by courts and administrative tribunals, even if the policies are later revoked.

The Agency databases of guidance documents seem likely to continue under any administration. It is a matter of governance and transparency, reflecting the principle that regulated entities and the public should know what the regulators think the requirements of law mean and how to interpret them, rather than being surprised or uninformed.

Enforcement resources may well continue to be a challenge for both state and federal governments going forward. Enforcement is an inherently governmental function that, while subject to substantial discretion, is also resource- and personnel-intensive. Deciding how these resources should be targeted in a COVID-19 environment is likely to present profound challenges for any administration.

Chapter 5: Limiting Use of Environmental Information in Federal Decisions

Possibly the most consequential environmental regulatory action across the federal government is the total revision of the regulations of the Council on Environmental Quality implementing NEPA, finalized on July 16, 2020, and effective September 14, 2020.

NEPA requires federal agencies to identify and explain the environmental impacts of their proposed actions on the environment, to identify alternatives to the action and their potential impacts, to consider public comment and information, and to identify ways to mitigate or offset remaining adverse impacts.

The long-standing CEQ regulations, issued in 1978 after a collaborative process, have been among the most influential environmental regulations in the nation's history. They underlie a vast body of judicial and administrative decisions over four decades and inform the NEPA procedures adopted by scores of federal agencies to guide their own analyses. They define how every federal agency determines the likely impacts of its actions on the human environment, identifies and considers alternatives to the proposed action, considers cumulative effects of the proposed action together with other reasonably foreseeable effects, takes public and agency comment into account, and identifies mitigation of adverse impacts.

Acting in response to Executive Order No. 13807 ("Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure"), which directed CEQ to review these rules, CEQ published its proposal to substantially amend the rules on January 10, 2020. The comment period closed on March 10, and CEQ published its final rule on July 16, 2020

The final rule makes major changes to the regulations that have substantially defined NEPA's obligations for more than 40 years; the existing regulations have been afforded "substantial deference" in the interpretation of NEPA. *Andrus v. Sierra Club,* 442 U.S. 347, 358 (1979). Court decisions, guidance documents, manuals, and technical resources have applied the regulations to develop a mature body of administrative law and NEPA practice that affect tens of thousands of federal decisions each year. Each federal agency applies its own NEPA procedures, shaped in accordance with and applying the regulations. All of these will need to be substantially amended—the federal agency procedures within 12 months after September 14, as well as the CEQ guidance documents, which will be revoked.

The preamble to the final rule contains a pertinent warning (85 Fed. Reg. 43316, n. 71): "While the final rule retains, in large part, the numbering scheme used in the 1978 regulations, the final rule comprehensively updates the prior regulations . . . . Assumptions should not be made concerning the degree of change to, similarity to, or any interpretation of the prior version of the regulations." Indeed, the law's reach has been changed and constrained in significant ways. Among the important changes are:

- CEQ has redefined "effects" to eliminate any reference to "cumulative" and "indirect" effects, which have been core to the NEPA analysis for 50 years. The term "cumulative" has been excised from every point in the rule, appearing only in a new sentence stating, "Cumulative impact, defined in 40 CFR 1508.7 (1978), is repealed." CEQ states that only effects that are "reasonably foreseeable and have a reasonably close causal relationship" to the proposal or alternatives are subject to analysis, and further states that this is analogous to "proximate cause" in tort law. Similarly, categorical exclusions would no longer need to be evaluated for cumulative impacts.

These changes are explained as simplifying the definition and reducing confusion. However, CEQ also says, in its response to comments document, that "it is not possible to state affirmatively that a specific example [of a formerly cumulative or indirect effect] would be analyzed differently under the final rule." (Resp. to Comments, at 467). The changes portend that both consideration of climate change and environmental justice (see Chap. 13, *infra*) may be more uncertain in any future NEPA analysis. In the final rule CEQ made a couple of small accommodations. In prohibiting consideration of effects remote in time, geographically remote, or the result of a lengthy causal chain, the Council added a qualifier in 40 CFR 1508.1(g)(2)(A) that these are "generally" excluded, in order to reflect that there is "occasionally" a circumstance where such an effect should be evaluated. 85 Fed. Reg. 43343-44. CEQ also said "to the extent environmental trends or planned actions in the area(s) are reasonably foreseeable, the agency should include them in the discussion of the affected environment," rather than as environmental consequences. 85 Fed. Reg. 43331. This may allow some circumscribed consideration of what were formerly cumulative impacts: "Trends determined to be a consequence of climate change would be characterized in the baseline analysis of the affected environment rather than as an effect of the action." *Id*.

- The rule will, in contradistinction to the longstanding NEPA rules, prevent agencies from considering alternatives not within their own jurisdiction. The rule would also interpret the Supreme Court's decision in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), as the basis for CEQ's decision to prohibit agencies from analyzing or considering "any effects that the agency has no authority to prevent."

- The rule provides that a "major federal action" and the "significance" of its effects are two separate determinations, rather than one as under the existing regulations. The rule excludes from major federal actions, actions by agencies that are not subject to discretion, actions that do not constitute "final agency actions" under the Administrative Procedure Act, actions whose effects are located "entirely" outside the jurisdiction of the United States, and numerous federal funding programs where federal agencies exercise minimal control or responsibility over the outcome. 40 CFR 1508.1(q). The final agency action exclusion may undercut the basis for "programmatic" environmental impact statements, and the others are likely to raise legal issues that would, in the past, have been dealt with chiefly in defining categorical exclusions—a process that includes public comment.

- The rule allows applicants themselves to prepare EISs and EAs (under guidelines from federal officials and ultimately approved by a federal official); no longer requires the lead agency to select the contractors performing EISs and EAs; and would remove existing conflict-of-interest requirements for contractors—substituting a "disclosure statement…that specifies any financial or other interest in the outcome of the action."

- The rule removes almost all references to the policy provisions of NEPA (including but not limited to 40 CFR 1500.2), characterizing the law as entirely procedural. It states that "the purpose and function of NEPA is satisfied if Federal agencies have considered relevant information, and the public has been informed regarding the decision-making process." 40 CFR 1500.1(a). The rule specifically limits agencies' integration of the policies of the Act and their view of its "national environmental objectives" and implementation of Section 102 of the Act ("to the fullest extent possible the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act") to the procedural and substantive thresholds announced in the regulations. 40 CFR 1500.6, 1501.1.

- The rule requires the lead federal agency to issue a "certification" at the end of the NEPA process that it has adequately considered all "alternatives, information, and analyses submitted by public commenters." While the proposed rule stated that this self-certification would create a "conclusive presumption" binding on the courts, the final rule makes this a rebuttable presumption, and CEQ asserts its "intention" that this can only be overcome by "clear and convincing evidence that an agency has not properly discharged its duties." 85 Fed. Reg. at 43314-15.
- The rule sets firm time limits (two years for EIS; one year for EA) and page limits (150 for EIS, 300 if unusually complex; 75 for EA); these schedules and page limits could be adjusted by the responsible federal official.
- The rule would allow a wider use of "functional equivalent" substitutes for NEPA documents, allowing agencies to substitute other procedures for EAs and EISs. It would allow an agency to determine in its NEPA procedures that its regulatory processes or documents could satisfy "some or all of the requirements" of the regulations, and substitute them, subject to disclosure of which requirements are satisfied. 40 CFR 1506.9, 1507.3 (c)(5). CEQ did not finalize its proposal for a three-part test for functional equivalence.
- New language says agencies "are not required to undertake new scientific and technical research to inform their analyses." This provision would represent a substantial change if interpreted to deny the need for field work or study of particular resource environments that are not adequately covered by "existing data and resources." There are many environments in which existing scientific data are incomplete to support decisions, even though the scientific methodologies to obtain such data are adequate.
- Finally, the proposal would expressly preempt existing and future NEPA requirements applied by multiple federal agencies, thus effectively setting a ceiling on scope and procedure of federal environmental review: "Agency NEPA procedures shall not impose additional procedures or requirements beyond those set forth in the[se] regulations," except where needed to improve agency efficiency or as otherwise required by law. Federal agencies have one year to propose revisions to replace their agency NEPA procedures. CEQ revised the final rule to ensure that its rules would apply directly to agency actions as of September 14, 2020, and would preempt and supersede any inconsistent agency procedures as of that date.

For information relevant to the proposed rule, some of which remains applicable to the final rule, see the Environmental Law Institute's *Practitioners' Guide to the Proposed NEPA Regulations*.

2021 Outlook

The final rule will draw challenges in federal district courts across the country. In addition to substantive issues, it can be expected that there will be fierce contests over standing, ripeness, deference or lack thereof, retroactivity, and the relationship of current agency NEPA procedures (embodied in regulations, handbooks, and contracts) to new CEQ regulations. Different legal outcomes in multiple jurisdictions, including differences in the scope of remedial relief, may be further complicated by CEQ's own proposal that all sections of the new rule be deemed "severable." This raises the substantial prospect of great differences in NEPA applicability across different geographies, different federal agencies, and even different regions within agencies as injunctions are entered, modified, and appealed.

Almost all of CEQ's guidance documents will be revoked, as incompatible with the new regulations. This will create substantial interpretive and administrative issues in dealing with such important topics and resources

as Environmental Justice, Mitigation, Cumulative Impacts, Categorical Exclusions, Citizen Handbook, and others. The development of new guidance documents is likely to be a laborious and contentious process—particularly with the stronger OMB oversight of guidance documents and the public involvement provisions of recent Executive Orders.

Because the regulations expressly require the amendment of all agency NEPA procedures within one year, and limit the scope and content of those procedures, federal agencies may be stressed to the limit as they attempt to conduct their ordinary activities, apply the statute and their existing regulations, and apply the new CEQ standards—at the same time defending numerous court actions, administrative appeals, and plans—and rewrite their procedures and manuals. Litigation is likely to include substantial questions of when challenges are ripe, whether standing exists to challenge the regulations directly and if so when, as opposed to federal action by federal action. Coordination with states will also be rendered more complex—both with states that have their own environmental impact assessment law, which are usually coordinated with NEPA, but also states that are permittees, or that conduct NEPA analysis under provisions of the federal transportation funding law, the FAST Act.

It is likely that a Democratic administration would seek to reverse some or all of the new regulations, possibly using the CRA if available. However, the issue is complicated by the fact that the rewrite contains some generally accepted reforms together with provisions that are extremely controversial.

About one-third of the states have their own environmental impact assessment laws (or state NEPAs). However, only a few of these (in California, Hawaii, Massachusetts, Montana, New York, Washington) apply to a large number of activities and impose substantial obligations, while most others are limited to a small set of activities or have little effect on decision making. Moreover, state NEPAs apply to state and sometimes local decisions and actions and not to federal actions (unless these also have a state permitting dimension). As a result, state NEPAs, even where they exist or are subsequently enacted by state legislatures, cannot be expected to fill in the gaps that would be left by the changes in federal regulatory requirements.

Chapter 6: Curtailing Future Federal Authority Over the Environment

One set of administration actions that may have enduring impact on the shape of environmental protection is the practice of codifying narrow interpretations of the scope of federal authority. Such actions:

- Create or define limits on the authority of federal agencies, and
- Can make it more difficult for future administrations to assert or reclaim such authority.

In the absence of new legislation, the primary means of curtailing federal environmental authority is the adoption of a different interpretation of what existing law requires, accompanied by directions to line officials within agencies that the law be applied in that way. Issuing legal opinions is often an initial step in this enterprise. However, in a litigation setting (citizen suit, appeal, petition for review) such legal opinions are persuasive rather than authoritative. Such opinions may bind specific federal agencies by defining what they can and cannot do, but they cannot bind other actors or subsequent administrations—unless they have also been accepted by federal court decisions.

However, narrow interpretations of law can become entirely binding if codified into federal regulations via notice-and-comment rulemaking. Such rules remain in effect unless overturned by a court decision, or until lawfully repealed or replaced by a subsequent rulemaking.

The Trump Administration has employed this approach to limit federal authority by reinterpreting and issuing limiting regulations across a broad array of environmental and natural resource laws. A few of these are highlighted here.

Clean Water Act Jurisdiction

The Administration took several actions to constrain federal authority over the discharge of pollutants into waterways and wetlands. The most substantial was the two-stage repeal and replacement of the definition of waters of the United States subject to federal jurisdiction and permitting under the Clean Water Act.

Under the terms of the Clean Water Act, the "waters of the United States" protected by federal law have included various traditionally navigable waters, territorial seas, wetlands, tributaries, pond and lakes, interstate waters, and other waters. Since 1972, it has also been clear that some wholly intrastate waters, isolated wetlands, ditches, and the like are not subject to federal jurisdiction under the Act. However, jurisdiction over various waters has been contested. A series of Supreme Court decisions, culminating in the 2006 *Rapanos* decision with a 4-1-4 division of opinions, with none commanding a majority, threw the issue of what waters are subject to regulation into further contention. A plurality, led by the late Justice Scalia, would have held that jurisdiction is limited to traditionally navigable waters, their continuously flowing tributaries, and wetlands immediately adjacent to such waters. Justice Anthony Kennedy, writing for himself in arguably the controlling opinion, based jurisdiction on the "significant nexus" between various waters and wetlands and their "chemical, physical, and biological" effect on traditionally navigable waters. The four Justices in the minority would have recognized broad jurisdiction over waters and wetlands based on the terms of the Act.

Picking up on a suggestion of Chief Justice John Roberts in a concurring opinion, the Obama Administration decided to define waters of the United States (WOTUS) through a rulemaking process, producing a final rule in 2015. This process involved a substantial scientific literature review in addition to regulatory and statutory

interpretation, along with analysis of dozens of court cases from the U.S. courts of appeal applying *Rapanos*. The scientific documentation was to help EPA and U.S. Corps of Engineers (the Corps) determine where to draw lines based on the relationship of tributaries and wetlands to the physical, chemical, and biological impacts on traditionally navigable waters that are broadly recognized to be within the CWA. The resulting 2015 WOTUS rule was challenged in numerous federal courts across the nation, resulting in a patchwork of environmental regulation as injunctions were issued or denied.

On taking office, the Trump Administration pursued a number of approaches to overturn the 2015 WOTUS rule. In 2017, the president issued E.O. No. 13778, which directed EPA and the Corps to review the rule and to rescind and replace it with a narrower definition of regulated waters—closer to the late Justice Antonin Scalia's plurality view of what waters are subject to federal jurisdiction than to the more expansive view of waters held by Justice Kennedy's solo opinion or the view of the *Rapanos* dissenters.

After several false starts, the Administration adopted a two-pronged approach: first, it undertook notice-and-comment rulemaking to repeal the WOTUS rule and revert to the 1980s-era definition of waters that had preceded it. This repeal and reversion was finalized in October 2019. Second, EPA and the Corps promulgated a new rule, renamed the "Navigable Waters Protection Rule," signed January 23, 2020, and published in the *Federal Register* on April 21, 2020. It takes effect June 20, 2020. The new rule, which repeals the Ronald Reagan-era definition, is the narrowest reading of the Clean Water Act's scope since the 1972 Act. The rule defines waters of the United States to include just four categories of waters:

- The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide;
- Tributaries;
- Lakes and ponds, and impoundments of jurisdictional waters; and
- Adjacent wetlands.

Each of these terms is further defined: Adjacent wetlands are defined as wetlands that abut, or are inundated by flooding, by the first three categories of jurisdictional waters. Adjacent wetlands that are physically separated from jurisdictional waters by "a natural berm, bank, dune, or similar natural feature" or "only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a *direct hydrologic surface connection* between the wetlands . . . such as through a culvert, flood or tide gate, pump, or similar artificial feature" are also included. Adjacent wetlands remain jurisdictional "when a road or similar artificial structure divides the wetland, as long as the structure allows for a *direct hydrologic surface connection* through or over that structure in a typical year."

A tributary is a "river, stream, or similar naturally occurring surface water channel that contributes surface water flow" to a jurisdictional water *in a typical year* either directly or through another jurisdictional water. A tributary must be perennial or intermittent in a typical year. Intermittent means that the tributary has "surface water flowing continuously during certain times of the year and more than in direct response to precipitation."

The rule *excludes* all waters or water features not expressly included. In addition, it expressly excludes ephemeral streams ("surface water flowing or pooling only in direct response to precipitation"), and it excludes all wetlands not adjacent to jurisdictional waters. It also explicitly excludes all forms of groundwater, addressing another area of conflicted decision making (see below). In practical effect, the Navigable Waters Rule significantly narrows the reach of federal authority.

States and environmental organizations have filed cases in various federal district courts challenging the Navigable Waters Rule. Industry plaintiffs have filed in other federal district courts challenging the rule as still too expansive.

Part of the regulatory impact analysis issued in support of the rule asserts that waters excluded from federal regulation may still be protected by states, either currently or if states decide to enact new laws to replace the loss in federal coverage. Every state has at least some authority to regulate activities that affect "waters of the state," variously defined. Depending on state legislation, this may include some or any wetlands or waters excluded from the new federal rule.

However, many states do not regulate waters excluded from the current rule. For example, less than one-half the states now have permitting programs under state law that protect freshwater wetlands. Twenty-seven (27) states primarily rely on their ability to review and condition federal permits under Clean Water Act §401 or have extremely limited coverage of waters. The other 23 states have permitting programs that cover all or (more often some) freshwater wetlands and waters.

A substantial number of states also have regulatory limitations imposed by statute that either make it difficult or that do not allow state regulators to regulate more extensively than the federal government does. In short, it seems unlikely that many states will fill gaps in coverage resulting from the new federal rule.

Groundwater and Discharges Via Groundwater

The Clean Water Act does not protect groundwater quality from pollution. Nevertheless, discharges conveyed to surface waters via groundwater can be important for water quality. In practice, over the decades, some discharges reaching waters of the United States via groundwater have been subjected to permitting and enforcement under the Clean Water Act. The Trump Administration set out to ensure that the CWA could not be interpreted to extend this far.

A citizen suit challenging Maui County, Hawaii's, discharges of treated wastewater into a well from which pollutants reached the waters of the Pacific Ocean was heard by the Supreme Court. While the case was pending, EPA issued and published in the *Federal Register* an "Interpretive Statement" maintaining that a discharge of a pollutant that enters groundwater before reaching the waters of the United States can never be regulated by the CWA. On April 23, 2020, the Supreme Court decided *County of Maui v. Hawaii Wildlife Fund*, holding that the Act necessarily includes instances where there is the "functional equivalent" of a direct discharge—even if the pollutant travels via groundwater. The court expressly rejected EPA's "Interpretive Statement," finding EPA's reading of the Act "neither persuasive nor reasonable." The lower courts will need to revisit issues where such discharges frequently arise, such as spills of pollutants, discharges from disposal wells, leaks from coal ash ponds, and other sources; it can be expected that EPA may itself attempt to define functional equivalence.

Clean Power Plan and the Affordable Clean Energy Rule

What actions can be regulated by EPA under the Clean Air Act to control climate change? How limited is its authority? The Trump Administration repealed and replaced climate regulations adopted by the prior Obama Administration in ways that put a narrow construction on EPA's authority. But it remains to be seen whether its narrower approach will control future interpretation of the Act (either by the courts or by a future administration).

The major U.S. strategy for control of greenhouse gases (GHGs) from stationary sources under the Obama Administration was the Clean Power Plan (CPP) adopted by EPA by regulation in August 2015. This plan followed EPA's "endangerment finding" under the Clean Air Act, which obliged it to undertake to control

these emissions. The approach used in the Clean Power Plan was to establish state-specific targets and to use a technique of identifying "building blocks" of efficiency improvements, renewable energy, and other measures to calculate the targets. The Obama-era EPA took the position that controls could occur outside the facility fence line to meet goals, and did not limit the plan to facility-by-facility emission limits. As a practical matter, this allowed states to consider energy utilization choice (e.g., whether to rely more heavily on renewable energy than on traditional fossil fuel-based energy) as a control strategy, along with other cross-economy options, such as reliance on low-emitting or electric vehicles for transportation and logistics. Opponents of the CPP asserted that EPA had overreached its authority under the Act. Before the case could be heard in the D.C. Circuit, the Supreme Court stayed implementation of the CPP, and the incoming Trump Administration announced its intention to repeal and replace it. E.O. No. 13783, issued March 2017, directed EPA to review and revise the CPP.

In June 2019, the Trump Administration adopted final rules to accomplish this task. These combined the repeal of the CPP with adoption of the new Affordable Clean Energy (ACE) rule ("Final Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units") and implementing regulations for future emission guidelines for existing sources under CAA §111(d). These rules are now being challenged in court, while the prior court appeals of the CPP were dismissed as moot.

Pursuing E.O. No. 13783, EPA also undertook to revoke the 2015 greenhouse gas emissions regulations for new, modified, and reconstructed power plants. In December 2018, EPA issued proposed regulations, which are expected to be finalized in 2020.

The ACE rule takes the position that the Clean Air Act can only regulate emissions specific to a facility (within the fence line), adopting the legal position of the CPP opponents. By limiting focus to within the fence line, the rule would constrain consideration of broader alternatives, side-step questions about energy choice, take facilities at their stated purpose, and rely on efficiency measures and conventional controls to achieve GHG reduction or control. The ACE rule essentially is designed to lock in a narrow view of CAA §111 regulation and as such, it can be expected to be a less significant driver of GHG reductions than the Clean Power Plan it replaces. In court, the Administration is seeking judicial endorsement of its interpretation of the Act that, depending upon the outcome and reasoning of a court decision, could constrain federal regulation of greenhouse gases for administrations going forward—absent amendments to the CAA or enactment of other new federal climate legislation.

Mercury and Air Toxics Standards (MATS)

In April 2020, EPA finalized a regulatory determination that removes the legal basis for its 2012 regulation of mercury and air toxics emitted by fossil fuel power plants. The Mercury and Air Toxic Standards (MATS) were supported by a determination under the Clean Air act that such regulation was "necessary and appropriate." The new determination *excludes* consideration of and reliance on co-benefits (such as avoided illness and deaths) derived from reductions in air pollutants such as particulate matter, associated with the reduction in hazardous air pollutants. In its new finding and rule, EPA states that the previous Administration's finding was legally erroneous, because it should have limited consideration of benefits only to those derived from reductions in hazardous air pollutants. Then, when comparing compliance "costs" with the risk reduction benefits limited to hazardous air pollutants, EPA finds the relationship upside down, stating that the compliance costs "dwarf" the benefits and that it therefore it is not "'appropriate and necessary' to regulate electric utility steam generating units under section 112 of the Clean Air Act." This removes the basis for the 2012 rulemaking. However, EPA has not proposed to revoke the MATS rule, although its finding renders it susceptible to legal attack.

EPA has also undertaken a broader evaluation of its approach to determining cost and benefits, which could produce similar results across the Agency's array of actions if finalized.

Methane Emissions From Oil and Natural Gas Industry

EPA adopted a final rule in 2016 regulating emissions of methane, a greenhouse gas, from new oil and natural gas facilities via CAA new source performance standards (NSPS). However, following issuance of E.O. No. 13783 ("Promoting Energy Independence and Economic Growth") in 2017, the Trump Administration proposed to suspend the methane regulations. When that was rejected by a federal court, it proposed to delay their application. EPA then settled on the approach of issuing a proposed rule on August 28, 2019, to rescind methane emissions regulations for new sources. EPA expects to finalize this rule in summer 2020.

EPA's proposed rule would entirely remove *pipelines* and *storage facilities* from regulation as "source categories" based on the rationale that the 2016 regulation of these sectors was not based on a *separate finding* that these sources specifically caused or contributed to air pollution that may endanger health and welfare. Thus, EPA concluded, there is no basis for regulation of these sources under the Clean Air Act. By removing these sources from the NSPS source category, the proposal would rescind the emissions limits that apply to them—including limitations on both methane emissions and emissions of volatile organic compounds (VOCs).

In the same proposal, EPA also proposed to rescind methane emissions limits for oil and gas *production* and *processing* facilities, stating that previously adopted limits for emission of ozone-forming VOCs would sufficiently reduce methane emissions from these sources. Alternatively, rather than distinguishing among sectors, EPA asked for comment on whether it should simply rescind methane emissions limits across the board.

Finally, in a further effort to cement its legal interpretation, EPA sought comment addressing its reading of §111 as requiring pollutant-specific endangerment findings for each greenhouse gas for each industry source category.

EPA's cost-benefit analysis states that although the adoption of the rule will *increase* annual emissions of methane to the atmosphere, this will be outweighed by cost savings to the industry. EPA further acknowledges that if it ceases to regulate methane from these new sources, this action functionally and legally undermines the basis for regulation of methane from *existing sources* under §111(d) of the Act. EPA states that this will be of little consequence in the long run, as most existing sources will go out of production at some point or will become new sources through modifications.

In sum, the proposed approach would forego regulations of these emissions based on a narrower interpretation of the CAA's NSPS requirements, as well as a cost-benefit analysis with a narrow focus on costs.

Major Sources of Hazardous Air Pollutants

Since at least 1995, EPA has held the position that under §112 of the Clean Air, once a source of hazardous air pollutants (HAPs) has been determined to be a major source (10 tons/year of any one HAP or 25 tons/year of multiple HAPs), it remains subject to obligations to apply maximum achievable control technologies even if its HAP emissions subsequently decline. This "once in, always in" interpretation was reversed by a memo issued January 2018 by the Assistant Administrator for Air. Several plaintiffs challenged the new interpretation as arbitrary and capricious and not in accordance with law. However, the D.C. Circuit dismissed the challenge, ruling on August 20, 2019, that the new guidance memo was not a final agency action subject to review under the APA. The full court denied rehearing en banc in January 2020. The court determined that while the

2018 memo did represent a final change in position by the Agency, it did not actually apply directly to any emitter, and so was not a final agency action. The court noted that the memo itself did not amend or revoke any permit nor did it oblige any state to take the same position. Because this change in interpretation might not bind future administrations in the application of §112, EPA in July 2019 published a proposed rule to lock in this interpretation (84 Fed. Reg. 36304, July 26, 2019).

Migratory Bird Treaty Act

DOI enforces the Migratory Bird Treaty Act's prohibitions on harm to migratory birds. The Obama Administration issued a legal opinion taking the position that the prohibited actions did not require a purpose to harm birds or their eggs or nests in order to establish a violation. The Trump Administration overturned that legal opinion with its own Interior Solicitor's Opinion M-37050 in December 2017, stating that only acts intentionally directed at migratory birds, eggs, and nests, were violations. This constituted a change from prior FWS practice.

In order to cement this interpretation more firmly in place, the U.S. Fish & Wildlife Service (the Service) proposed to adopt it by rulemaking, adding a new section 50 C.F.R. 10.14 ("Scope of the Migratory Bird Treaty Act"). The preamble to the proposed rule states that the Service agrees with the 2017 Solicitor's Opinion (of its own legal advisor), and states that "even if such a conclusion is not legally compelled, the Service proposes to adopt it as a matter of policy." The proposed rule was released in February 2020 for public comment.

2021 Outlook

If the current Administration is re-elected and continues in office, the applicable regulatory interpretations will remain in effect, setting limits on the extent of federal authority, unless overturned by a federal court or courts. Even if codifying rules are overturned, this will not necessarily reinstate prior regulations or interpretations of law without further action by the administrative agencies.

Contrariwise, if a new administration takes office, it is likely that it will seek to reverse these regulatory actions. Those that are embodied in regulations will need to be revoked and replaced via APA notice-and-comment rulemaking, subject to the judicial doctrines requiring adequate explanation of changes in interpretation. As for legal opinions, new agency counsel or a new Attorney General may withdraw a prior opinion; this will typically involve issuing a new, reasoned opinion reaching the opposite conclusion. An agency change in legal opinion cannot, however, supplant duly adopted regulations on the books. In the context of litigation, an agency and DOJ may seek to have a court remand a regulation, but in the absence of a stay, the regulatory interpretation embodied in the regulations remains in effect until replaced by another regulation.

This chapter highlights just a few of the scores of federal regulatory actions constraining the reach of federal environmental law in comparison with prior law. If regulations narrowing federal authority remain in place, then it will be up to states to regulate, if desired, in the areas of water pollution and wetlands, methane emissions, and other areas where states are free to be more stringent or expansive than federal baselines.

Chapter 7: Curtailing State Authority

Federal agencies have undertaken several explicit actions intended to limit the powers of states to engage in environmental protection activities. While the Supremacy Clause of the Constitution causes federal law to take precedence over state laws in case of a direct conflict, and the Commerce Clause allows Congress to preempt state laws that interfere with federal ability to regulate (or refrain from regulating) activities in commerce, the states retain substantial authority under the Constitution and their own state constitutional authority and police powers to protect the environment.

Moreover, in a large number of instances federal environmental law provides for federal regulation but reserves powers to the states to regulate where no less stringent nor inconsistent with federal law. Within delegated programs, state laws can generally be more stringent than federal environmental provisions. A few laws (Coastal Zone Management Act, §401 of the Clean Water Act) expressly provide for state regulation and provide that federal agencies will follow state requirements under specified circumstances.

In several instances, the Trump Administration has undertaken to remove or limit these state authorities by regulation—thus limiting the scope of state responses and actions.

Vehicle Fuel Economy and Emissions Standards

The Environmental Protection Agency's Light-Duty Vehicle Greenhouse Gas (GHG) emissions standards, the National Highway Traffic Safety Administration's (NHTSA's) Corporate Average Fuel Economy (CAFE) standards, and California's Advanced Clean Car Program constitute the "National Program" of fuel economy and tailpipe emission standards. These collectively make up the national regime that regulates fuel economy and automobile GHG emissions. Following the OPEC Oil Embargo of 1973-1974 the Energy Policy and Conservation Act of 1975 (EPCA) created the first CAFE standards and gave NHTSA the authority to update these standards. EPA has its own authority to regulate emissions from motor vehicles under the Clean Air Act of 1970.

In general, under the CAA, regulation of emissions from mobile sources is reserved to EPA, in order to prevent inconsistent and potentially conflicting standards applicable to vehicles across the country. However, Title II of the CAA provides an exemption to federal preemption specifically for California, which had a preexisting history of state air regulation and may request a waiver to set its own motor vehicle emission standards. The CAA states that if California meets the statutory requirements, its waiver "shall" be granted. If granted, other states may choose to adopt either California's standards or the federal emissions standards promulgated by the NHTSA and EPA. Over the years, California has been granted over 100 waivers under this provision of the CAA.

In 2009, EPA granted a waiver to California for its greenhouse gas emissions standards for vehicles. In 2012, the Obama Administration promulgated federal CAFE and EPA greenhouse gas emissions standards. These standards required vehicle fuel economy to improve by an average of 5% a year toward the federal goal of 54.5 miles per gallon (mpg) by model year (MY) 2025. In 2013, California was granted a waiver for its emissions standards. Those standards, by agreement with EPA and car makers, were consistent with the national standards.

In 2018, the Trump Administration proposed to roll back the standards for the 2021-2026 model years and to revoke California's waiver. For its part, California, seeking to ensure higher standards prevailed, struck a deal with four major car manufacturers (BMW, Ford, Honda, and Volkswagen) who agreed to a goal of 50 mpg by

MY 2026 (reducing emissions by approximately 3.7% per year). In September 2019, NHTSA issued a final rule "preempting" any state vehicle regulations, such as California's, addressing carbon dioxide or setting zero emission vehicle requirements, 84 Fed. Reg. 51312; and the same day, EPA finalized its revocation of California's 2013 waiver and disallowed other states from following California's lead. 84 Fed. Reg. 51350.

Twenty-four states, the District of Columbia, and the nation's two largest cities, as well as environmental organizations, filed suit in U.S. district court against the Secretary of Transportation, and California and others filed petitions for review in the U.S. courts of appeal challenging EPA's waiver revocation. A case was launched in U.S. district court challenging NHTSA's preemption rule.

In the meantime, NHTSA and EPA continued to pursue their proposed replacement of the rules in order to define lower greenhouse gas and fuel efficiency obligations for vehicle manufacturers. On March 31, 2020, EPA and NHTSA adopted the final SAFE vehicle rule, the "Safer Affordable Fuel-Efficient Vehicles Rule." It was published in the *Federal Register* on April 30. The rule limits improvements in vehicle fuel economy for model years 2021-2026 to about 1.5% per year, rather than the prior 5% per year (and rather than the 3.7% per year negotiated by California with certain automakers).

Together with the revocation of California's waiver and NHTSA's preemption rule, this action would prevent any state from advancing more aggressive vehicle greenhouse gas goals by regulation. Unless and until the California waiver is restored and approved, the new federal standard sets the ceiling for all states. Twenty-three states, five cities, industry, and nongovernmental organizations have filed petitions for review in the D.C. Circuit challenging the final SAFE rule.

Clean Water Act Section 401 Rulemaking

Some federal environmental laws expressly defer to state governmental decisions with respect to issues in which Congress determined that states have expertise or direct interest. One such provision is §401 of the Clean Water Act, enacted in 1970, two years before the first modern Clean Water Act. Section 401 empowers states to examine applications for proposed federal licenses and permits and to determine whether the permitted activities will impair achievement of state water quality standards. It allows states to deny certification that standards will be met, which forecloses issuance of the federal permit; and it allows states to impose appropriate conditions on such federal permits.

Section 401 of the Act provides that:

- Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State . . . that any such discharge will comply with the applicable provisions of [CWA §§301, 302, 303, 316 and 317].
- Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements, necessary to assure that any applicant for a Federal license or permit will comply with [various CWA standards and limitations] and with any other appropriate requirement of State law set forth in such certification and shall become a condition on any Federal license or permit subject to the provisions of this section.

On June 1, 2020, EPA finalized changes to the rules governing state certification of federal licenses and permits under §401. The new §401 rule limits the scope of state review and conditions. Certifications will be limited to "water quality requirements," defined as regulations addressed to point source discharges rather than to entire activities; the rule also reinforces a hard one-year deadline for waiver of state certification, and

relies on the *Chevron/Brand X* form of judicial deference to justify EPA's adoption of a narrow construction of §401.

EPA announced that its rule substitutes the dissent's view of §401 for the Supreme Court's majority decision in *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology*, 511 U.S. 700 (1994), a ruling that had allowed states to require conditions other than discharge limitations. The rule also codifies and interprets the D.C. Circuit's decision in *Hoopa Valley Tribe v. FERC,* 913 F.3d 1099, 1104 (D.C. Cir. 2019). In *Hoopa*, the court held that §401 certification had been waived in a case where a dam relicense applicant and the state agreed that the applicant would withdraw and refile the same application year-after-year in order to avoid the one-year "not to exceed" review period provided for in §401. EPA's rule would start the clock upon filing of an application, and would not provide for any re-fliing or tolling of the certification period.

2021 Outlook

Both of the rules described above can be seen as connected to the Trump Administration's efforts to create a more favorable regulatory setting for fossil fuel development, in that the oil and gas industry stands to benefit both from vehicle regulation that is less ambitious and that constrains states, and from the curtailment of state' use of Clean Water Act §401—which has been used by a number of states to deny certifications to oil and gas pipelines and liquefied natural gas storage facilities. These developments stand in contrast to the Administration's general reliance on states in justifying a diminished federal role in the environmental arena. If the Trump Administration continues into 2021, these policy preferences can likewise be expected to continue.

Litigation is likely to play a major role in the outcome of both of these issue areas described above. It can also be expected that if there is a change in administration, these actions may be reversed via notice-and-comment rulemakings in coordination with settlement of litigation.

In the motor vehicle context, it remains to be seen whether California's approach of negotiating standards will catch on with other automobile companies, other states, and with consumers, or whether in the absence of an enforceable California regulatory requirement, the new federal requirement will effectively dictate the U.S. market. In the meantime, there is likely to be litigation and regulatory chaos in these model years if California or other states attempt to insist on standards the federal government has declared "preempted" pursuant to a waiver the federal government has declared "revoked."

If the §401 rule falls within the CRA reach-back period, it is possible that a new Congress might seek to repeal it (if politically feasible).

Chapter 8: Moving the Federal Floor

In some areas of environmental law, federal regulators leave the task of standard-setting and enforcement to the states. There may be a minimum federal floor of requirements, but the content of regulation is left to state law. Such is the prohibition of "open dumps" for solid waste under Subtitle D of the Resource Conservation and Recovery Act (RCRA), currently at issue in the context of coal ash disposal facilities. While there is federal regulation relating to management of these facilities, the regulations leave nearly all decisions to state law. There is substantial controversy concerning how prescriptive the base federal requirements should be.

Background

Coal ash, also referred to as coal combustion residuals, is the product of burning coal in power plants. According to the American Coal Ash Association, nearly 130 million tons of coal ash were generated in 2014. This ash is frequently disposed of by mixing it with water and pumping it into retention ponds. The primary concern about these ponds, which can cover more than 100 acres, is that they can leak and contaminate groundwater. This risk is most pronounced when the ponds are unlined, meaning there is nothing physically separating the ponds from groundwater aquifers. Coal ash ponds can contain arsenic, mercury, and other toxic substances. EPA data suggests that up to 95% of coal ash ponds have leaked across at least 22 different states.

In response to these concerns, made more pressing by high-profile spills in Tennessee and North Carolina, the Obama Administration in 2015 promulgated rules under RCRA that set national minimum requirements for coal ash disposal. These rules regulated operating criteria, location, and recordkeeping, and barred groundwater-contaminating (leaking) unlined ponds from receiving waste. Under this rule, new ponds would require a compound lining, and existing unlined ponds could continue to exist under stricter observation. Unlined ponds must comply with more stringent monitoring, and those that have contaminated groundwater above a regulated constituent's protection standard must retrofit acceptable liners or close. If lined ponds contaminated groundwater, they were allowed to remain open while the source of the leak was addressed. The rule also included a cap (of 12,400 tons per site) on the quantity of coal ash that could be disposed of without an "environmental demonstration" showing there would be no added environmental or health risk from excess disposal.

Significantly, the Obama Administration opted to regulate coal ash ponds under Subtitle D of RCRA, which puts states at the center of nonhazardous waste management instead of EPA, as would have been the case with regulation under Subtitle C governing hazardous waste.

A subsequent law, the Water Infrastructure for Improvements to the Nation (WIIN) Act enacted in 2016, specifically allows states to assume regulatory control of coal ash disposal so long as they meet minimum federal requirements. In 2018, EPA approved Oklahoma's application to regulate coal ash disposal, and in early 2020 Georgia became the second state to get EPA's approval.

Environmental organizations challenged EPA's decision to regulate coal ash ponds under Subtitle D's less-stringent requirements. The resulting August 2018 decision in *Utility Solid Waste Activities Group v. EPA* struck down certain provisions from the 2015 rules for not going far enough in protecting the environment. Specifically, the court held that unlined coal ash ponds posed "a substantial present or potential hazard to human health and the environment," and that the regulation should not have provided for the continued

operation of unlined coal ash ponds. Furthermore, the court rejected EPA's determination that clay-lined ponds would be deemed to be lined.

In the meantime, the Trump Administration pursued changes to the 2015 rules. Just prior to the *USWAG* decision, on July 30, 2018, the Trump Administration promulgated its "Phase One" final rule amending the 2015 national standards. This rule set a closure deadline of October 31, 2020, for leaking unlined ponds. It also allowed most existing ponds to continue to accept new coal ash, something previously barred under the 2015 rules. A number of environmental groups challenged EPA's Phase One rule in light of the *USWAG* decision. In March 2019, the D.C. Circuit in a brief order remanded the rule to EPA; in seeking remand, EPA agreed to reconsider the rule in light of the D.C. Circuit's decision in the *USWAG* case.

In November 2019, EPA issued another proposed rule, the "Holistic Approach to Closure: Part A." The proposal would advance the date by which unlined coal ash ponds must stop receiving new waste to August 31, 2020; but it also provided for an extension until November 30, 2020, for operators who self-certify that they need more time to complete arrangements for alternative management of these wastes. It also included some notable exceptions that can substantially extend closure dates, proposing that operators who can demonstrate "a lack of capacity" for finding an alternative for their coal ash waste would have until October 2023. Moreover, operators of large coal ash ponds, defined as over 40 acres, would have until October 2028 if they can demonstrate they are permanently shutting down a coal-fired boiler generating these wastes. These extensions mean that many unlined coal ash ponds across the country may stay in operation for an additional three to eight years.

(In July 2019, the Administration had also proposed further amendments to the 2015 rules. This proposal would do away with a 12,400-ton threshold that triggers a required showing of no environmental harm to support beneficial use of coal ash applied to land. That proposed rule would replace the numeric criteria with a location-based requirement.)

In February 2020, EPA published a proposed rule that would establish a *permit program* under Subtitle D for the impoundments. The permit would be issued either by states that have WIIN Act authorization, or by EPA. Initially only "high hazard" impoundments would need permits with applications due 18 months after the effective date of the final rule. Permit dates for future tiers of impoundments would be determined later.

On March 3, 2020, the Administration published its "Holistic Approach to Closure: Part B," a proposed rule that would further amend the closure requirements of the 2015 coal ash disposal rules. This proposal would further expand the number of surface impoundments that can remain open. It would allow disposal sites to remain operational as long as they demonstrate to EPA that their "alternative" liner does not increase the "reasonable probability of adverse effects to human health or the environment."

2021 Outlook

Given the shifting and delayed federal requirements on coal ash pond regulation, states will in many instances be taking the lead in protecting public health and reducing the risk of major spills. Already, North Carolina, Virginia, and Tennessee have begun the process of requiring excavation of coal ash ponds. For example, in 2019, Virginia passed a measure requiring Dominion Energy to excavate 27 million cubic yards of coal ash from unlined ponds and move it into landfills with liners.

WIIN Act approvals will also have some effect, where states choose to take on the program. However, the federal rules will have a profound influence in other states, such as Kentucky, where state law forbids regulation any tougher than the federal standards. At the same time, states taking delegation under EPA's rules run the risk of disapproval of their programs. In April 2020, a federal court vacated a portion of EPA's

2018 approval of Oklahoma's program as it allowed unlined impoundments to continue to operate in violation of *USWAG*, but the remainder of the program continues to operate. *Waterkeeper Alliance v. Wheeler,* Civ. No. 18-2230 (D.D.C. Apr. 15, 2020).

In addition to states, environmental nonprofits have made progress challenging some owners of unlined coal ash ponds. In 2019, for example, Talen Energy entered into a consent decree with three Pennsylvania groups to settle claims of leakage from a coal ash disposal site. The consent decree included a payment of $1 million and a supplemental $100,000 for projects addressing water pollution in the region. However, if the pending federal permitting rules go final, they will provide permit holders a litigation "shield" to claims of Subtitle D violations.

In the meantime, federal litigation will continue over the array of rules, closure dates, lining requirements, and other provisions of the federal coal ash rules. This area will likely remain in substantial flux for a long time. States that do not have their own legislation and regulation of coal ash disposal sites will be left to the vagaries of federal rules and court remands affecting the operators within their borders.

Chapter 9: Foreign Policy—Paris Agreement on Climate Change

In the field of foreign policy, the treaty power is shared between the president and the Senate, which must provide its advice and consent for any treaty to enter into force. But the president also retains substantial authority to enter into agreements and undertakings with foreign governments and to manage the foreign policy of the United States within parameters set forth by Congress. In the international context, the most prominent recent activity has been on climate change.

Paris Agreement

In June 2017, President Trump announced his intention to withdraw the United States from the 2015 Paris Agreement on Climate Change. The Paris Agreement was entered into among 196 countries and the European Union to reduce emissions of greenhouse gases; the parties undertook to hold the global average temperature increase to "well below" 2° Celsius above pre-industrial levels and to pursue efforts to limit the increase to 1.5 °C. The agreement calls upon each signatory nation to establish and implement ambitious nationally-determined commitments to greenhouse gas reductions.

The United States signed the agreement on April 22, 2016 (Earth Day) and submitted its formal acceptance on September 3; the agreement entered into force on November 4, 2016. The Paris Agreement is treated in the United States as an executive agreement within the U.N. Framework Convention on Climate Change (Framework Convention). The Framework Convention was signed by President George H.W. Bush and ratified by the Senate in 1992.

The United States's national intention under the Paris Agreement was to implement a target commitment of 26%-28% reduction in U.S. greenhouse gas emissions. This was to have been implemented through various measures under domestic U.S. law, including the Obama Adminisration's Clean Power Plan regulating greenhouse gas emission from the power sector (since revoked by the Trump Administration).

The U.S. State Department on November 4, 2019, notified the United Nations of its withdrawal from the Paris Agreement. Under the terms of the Agreement, this will effectuate the withdrawal on November 4, 2020.

2021 Outlook

U.S. efforts to implement Paris have continued in various ways despite the notice of withdrawal.

Numerous U.S. states and cities have mobilized to form the "We Are Still In" Coalition, to pursue the aims of the Paris Agreement even absent federal commitment and in the face of the pending withdrawal. In addition, various states have enacted climate change legislation, and promoted rapid transitions to renewable energy and other measures to slow the climate crisis.

These efforts included not only comprehensive laws like California's AB 32, originally enacted in 2006, but also recently enacted laws like New York's 2019 Climate Leadership and Community Protection Act, which set statewide greenhouse gas limits and requires development of regulations and plans, including renewable energy programs to achieve zero emissions from electric power by 2040, setting a social cost of carbon, and creating programs for "just transition" and environmental justice. Even more recent state efforts include Virginia's 2020 Clean Economy Act, which commits the Commonwealth to reduce carbon emissions from electric power generation to zero by 2050 (2045 for most of the state), and set goals for energy efficiency, solar and onshore wind and energy storage, and a commitment to offshore wind energy. The Virginia Legislature in the same session enacted the Clean Energy and Community Flood Preparedness Act to establish a CO_2 cap-and-trade program and provide climate resilience funding.

A number of state-international partnerships have also occurred. California reached agreement with the Canadian province of Quebec to mutually participate in a greenhouse gas cap-and-trade market (Ontario had been a member, but its conservative government withdrew in 2018). The U.S. government attacked the agreement in federal court, but in March 2020, a district judge rejected federal claims that the agreement violated the Treaty Clause or the Compact Clause of the U.S. Constitution. *United States v. California*, No. 2:19-CV-02142 WBS EFB (E.D. Cal. Mar. 12, 2020).

Apart from legislation, litigation strategies have been pursued by various parties including state and local governments. Various states and localities have sued fossil fuel companies for their GHG emissions using theories of public nuisance, common-law duties to abate hazards, failures to warn, strict liability, and other state legal concepts. In nearly every case, the defendants have removed these actions to federal court, contending that these claims really involve federal common law, federal statutory law, international obligations, and other concepts making removal necessary. However, U.S. courts of appeal have recently sustained the remand of many of these cases to state courts for trial under state law. *See, e.g., City of Oakland v. BP PLC* (9th Cir. May 26, 2020) (vacating district court's denial of remand); *County of San Mateo v. Chevron* (9th Cir. May 26, 2020) (affirming district court's order of remand); *Baltimore v. BP PLC* (4th Cir. Mar. 6, 2020) (affirming remand). Cases are pending in the First Circuit, Second Circuit, and Tenth Circuit, presenting the same issues. These cases may lead to substantial results even in the absence of U.S. participation in Paris or federal regulatory leadership.

If there is no change in administration and the United States remains outside of the Paris Agreement, at the federal level, the climate change agenda will likely be driven by continuing administration preferences. U.S. national responses will also be affected by litigation outcomes with respect to the ACE rules, SAFE vehicle rules, methane rule rollbacks, and other contested actions, some of which are described in this report. For a fuller list of pending and ongoing litigation and regulatory activity affecting federal climate action, see the Sabin Center's Climate Change Litigation Database and its Climate Deregulation Tracker.

If there is a change in administration, a new president could give notice to the parties to the Paris Agreement and rejoin the Agreement. Article 21 of the Agreement provides that a country may join (or rejoin) the agreement with 30 days' notice. Thus, if a new president gave notice to the parties on inauguration day, the United States could be back in as early as February 20, 2021, after having been out since November 4, 2020. Because of the worldwide COVID-19 pandemic, the next conference of the parties has been postponed until November 2021, which could give a new administration a substantial opportunity for preparation and participation.

Chapter 10: Chemical Regulation and Legislation

Emerging environmental regulatory issues often attract legislative as well as regulatory attention. The connection between the legislative agenda and administrative agenda presents opportunities as well as complexities for advancing environmental protection—especially where federal legislation is difficult to get through both houses of Congress and signature by the president.

PFAS Regulation

One key example of this interaction has been rising interest in the regulation, disclosure, and cleanup of classes of substances known generally as per- and polyfluoroalkyl substances (PFAS). These comprise more than 7,000 chemicals used in a vast variety of applications, from nonstick coatings to firefighting foams. They have also been found in numerous studies to persist in the environment, and to present risks to public health.

Federal attention to the possible regulation and establishment of cleanup requirements for PFAS has been slow and complex, which has led to numerous legislative efforts to drive regulatory activity. EPA has been the focus of much of this congressional interest, because of the many programs it administers that potentially affect the use, management, monitoring, and remediation of PFAS in the environment.

In early 2019, responding to congressional interest and to available research, EPA adopted a "PFAS Action Plan" mapping out a proposed portfolio of intended actions and determinations related to these chemicals—and especially to two of the most-studied: perfluooctanesulfonic acid (PFOS) and pefluorooctanoic acid (PFOA). Among the contemplated actions in the plan was the intention to set drinking water contaminant standards for PFOS and PFOA in 2019. Additional proposals included adding PFAS to the Toxics Release Inventory (TRI), setting cleanup levels for hazard substance sites, and actions on monitoring.

EPA issued an advance notice of proposed rulemaking in September 2019 (published in the *Federal Register* in December) to collect information about adding PFAs to the TRI. The TRI provides for mandatory disclosure of discharges to the environment, tracked and reported to EPA by numerous companies across the nation. However, concerned with the pace of action and seeking greater accountability on PFAS, Congress enacted provisions in the National Defense Authorization Act for Fiscal 2020 (NDAA) that directed EPA to take certain actions immediately.

The NDAA required EPA to add 14 *named* PFAS substances to the TRI for the year beginning January 1, 2020, and to add additional PFAS that meet statutory criteria of (1) being subject to "significant new use rules" under TSCA on or before December 20, 2109, and (2) active in commerce per the TSCA Inventory published February 2019. In January 2020, EPA added 160 PFAs substances to the TRI (expanded to 172 on February 20, 2020); TRI reporters will need to track these, and the information must be provided to EPA by July 2021 for the 2020 TRI.

Safe Drinking Water Act (SDWA) regulation is also relevant to PFAS. Periodically, EPA must make determinations about setting drinking water standards for unregulated contaminants that may present risk to public health and that are known or anticipated to occur in public water systems. As EPA had not publicly moved forward on these actions as quickly as anticipated in the PFAS Action Plan, in January 2020, the House passed H.R. 535 (the PFAS Action Act) to require EPA to set drinking water standards for PFOS and PFOA; the bill also would require listing of these as hazardous substances under CERCLA. On February 20, 2020, EPA proposed to regulate PFOS and PFOA under the SDWA, issuing a preliminary determination as required by

the SDWA. After a 60-day comment period, if EPA finalizes the determination, it will commence a process to set a national primary drinking water standard for these contaminants in public water supplies.

Drinking water standards are often used in determining appropriate cleanup standards for hazardous waste sites under RCRA and hazardous substances under CERCLA. Absent such standards, it is still important for EPA to set standards and goals for cleanup activities to meet. In December 2019, EPA issued Interim Recommendations for Addressing Groundwater Contaminated With PFOA and PFOS to guide federal and state cleanup programs. EPA also initiated a process to list PFOS and PFOA as hazardous substances under CERCLA.

In September 2019 and January 2020, different citizen groups filed petitions with EPA seeking to have the Agency list entire classes of PFAS substances as hazardous waste under RCRA—with the intended effect that a hazardous waste listing would affect both management of discarded PFAS substances and cleanup of sites where these are present. EPA has not acted on these petitions.

Other Chemical Regulation

Apart from PFAS, there are other activities involving chemical safety and regulation that have attracted attention. In a regulation affecting state and local response, EPA in December 2019 rolled back chemical disaster rules finalized by the Obama Administration in January 2017 in response to the 2013 fertilizer plant explosion in West, Texas. The final rule changed the "risk management program" to remove requirements that facilities consider safer alternative technologies, requirements for third-party safety audits, and requirements related to analyses after incidents. It delays compliance dates for coordination and consultation with local officials. (EPA had initially attempted to suspend the Obama rules, but after the D.C. Circuit rejected that approach in 2018, it undertook the rulemaking to amend the rules.) States and labor unions separately filed cases challenging the new rules in court.

There is substantial interest in the implementation of the requirements of the Lautenberg Chemical Safety Act amendments to the Toxic Substances Control Act. However, EPA has fallen behind in meeting its commitments to evaluate chemical risks, and did not meet the June 2020 deadline for completion of the first 10 risk assessments as required by law, indicating that it hopes to complete these assessments by the end of 2020. In addition, the administration is excluding consideration of risks from indirect exposure and risks presented by legacy uses of chemicals that are no longer being manufactured for such purposes. The Ninth Circuit in November 2019 dismissed certain related environmentalist claims as premature or on the merits, but also upheld environmentalists' claims that legacy uses must be considered.

2021 Outlook

There is a large potential set of regulatory activities with many moving parts for ubiquitous PFAS materials. These will affect numerous manufacturers, users, water suppliers, potentially responsible parties and remediation managers, and others. It is very likely that congressional action will continue in 2021. Legislation, hearings, appropriations, and other activities will maintain pressure and momentum on EPA and U.S. Department of Defense actions. At the same time, EPA is likely to pursue action on the multiple tracks outlined in its 2019 plan. A change in administration might change the timetables and priorities, as well.

States have their own efforts. For example, in December 2019, New York enacted legislation banning PFAS in firefighting foam; California adopted a proposal to phase them out. In June 2020, New Jersey issued primary drinking water standards for PFOA and PFOS that are stricter than any others in the nation, and far stricter than EPA's nonbinding "advisory" standard. The interplay of federal laws and numerous regulatory processes make this an important area to watch.

On chemical safety, litigation will be the chief determinant of activities, as federal law substantially preempts state regulation. Thus, both the litigation posture in 2021 and whether or not there is a new administration will largely affect these actions.

Chapter 11: Public Lands & Outer Continental Shelf Management

Management of the federally owned domain (approximately 1/3 of the nation's lands, as well as the submerged lands of the Outer Continental Shelf), is primarily an executive branch function, bounded by authorities enacted by Congress to guide management objectives.

Most management decisions require preparation of resource management plans (or other plans), and NEPA applies to both planning and to actions undertaken by agencies on those lands and waters—such as approval of mining plans of operation, mineral leases, logging, grazing, wildlife management, and recreation. In a few instances, such as the Antiquities Act and §12 of the Outer Continental Shelf Lands Act (OCSLA), the president has direct authority to undertake conservation measures.

National Monuments

Certain actions affecting the public domain are committed to the discretion of the president under federal legislation. Sixteen presidents have used their authority under the Antiquities Act of 1906 to create national monuments on the public lands by "public proclamation." 54 U.S.C. §32031. As presidential actions, these are not subject to NEPA requirements for preparation of EISs or EAs for the proclamations themselves, although NEPA will apply to management decisions made by federal agencies thereafter.

Under the Act, a president has authority to set aside federally-owned lands and waters that contain "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest," and to protect these resources from incompatible activities such as mining, leasing, logging, grazing, collecting, commercial fisheries, and other uses. Under the Act, monuments are to be the "smallest area compatible with the proper care and management of the objects to be protected," which courts have recognized can include large acreages (such as the Grand Canyon, initially protected as a monument). Many of the monument lands have later been added by Congress to legislatively protected classes of conservation lands, such as national parks and wildlife refuges.

The Antiquities Act authorizes the president to designate monuments by proclamation but contains no express authority for the president to remove the designation. 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 authority to abolish a national monument, finding that the establishment of a monument in accordance with the Act is the one-way creation of a trust over the protected resources ("the president thereafter is 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 national monument, although this authority is in dispute. Unlike certain other public lands statutes, the Antiquities Act does not expressly include a power to modify. And until President Trump's substantial reduction of the size of the Grand Staircase-Escalante National Monument and the Bears Ears National Monument by proclamations issued on December 4, 2017, the last diminution of a monument had occurred in 1963.

The Trump Administration's reductions removed 862,000 acres from Grand Staircase-Escalante, shrinking it by 40 percent, and over 1.1 million acres from Bears Ears, shrinking it by 80 percent. This action opens these lands to mineral development and other uses. The president's proclamation followed a report by former Secretary of the Interior Ryan Zinke in response to E.O. No. 13792, in which the Secretary recommended

downsizing and changes to management of several other monuments. Litigation seeking to enjoin the monument reductions is still pending in the U.S. District Court for the District of Columbia.

In February 2020, the Bureau of Land Management (BLM) and the Forest Service released management plans for the released portions of the two monuments. These plans would allow mineral exploration and certain forms of development activities.

Onshore Fossil Fuel Development Activities

Development of oil and gas, oil shale, and coal resources on federal lands is governed by a number of laws, including the Mineral Leasing Act of 1920, which prescribe leasing of these minerals to private companies for development and extraction subject to payment of rents and royalties. Planning for lease sales includes consistency with resource management plans under the Federal Lands Policy Management Act, as well as compliance with NEPA, the Endangered Species Act, and other laws.

Federal laws require the government to conduct oil and gas lease sales four times each year. Coal leasing operates under a different regime, substantially driven by the interests of existing coal lessees. The Obama Administration had put a moratorium on all coal leasing, pending a programmatic review of the entire coal leasing planning process, which had not occurred for many decades. However, the Trump Administration dissolved the moratorium. A federal district court in Montana found that this move required preparation of an environmental review under NEPA, which has since been completed.

Federal fossil fuel resources constitute a meaningful percentage of fossil fuel extraction in the United States, and some have called for cessation of such leasing to combat climate change. But the royalty payments provide revenue to the federal government, and are also shared with the states within which the fossil fuel minerals are located. Leasing and energy development activities have been high priorities for the Trump DOI.

Operations on federal leaseholds are subject to regulations and lease terms. The Obama Administration's 2015 regulation of hydraulic fracturing techniques on oil and gas leases on federal lands was reversed by a Trump Administration rule in 2017 carrying out E.O. No. 13783; and the regulatory reversal was upheld by a federal district court in March 2020, ruling on challenges brought by several states and nongovernmental organizations.

In 2018, BLM also issued a final rule following E.O. No. 13783 that rescinded most of the Obama Administration's 2016 "venting and flaring rule," which had required certain controls and management practices on methane emissions from federal oil and gas leases. This final rulemaking followed several failed attempts by BLM to suspend the Obama rule. Litigation challenging the 2018 BLM rule remains in progress.

Offshore Activities

The OCSLA establishes a planning and leasing regime for management of mineral resources on the outer continental shelf (OCS). It requires that federal leases of oil and gas rights be offered and sold for development of resources following a series of five-year plans. The plans are generated through an intensive public notice-and-comment process. The existing plan, covering the years 2017-2022, was finalized in November 2016; it scheduled lease sales in the Gulf of Mexico and in Alaska's Cook Inlet, but no other areas in the Arctic, Pacific, or Atlantic OCS.

Apart from the planning process, which identifies OCS lands as candidates for leasing, OCSLA also provides for withdrawals of portions of the OCS from leasing. Section 12(a) of OCSLA 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. Section 12(a) does not provide explicit criteria for the exercise of this withdrawal power.

During his Administration, President Obama withdrew certain areas of the outer continental shelf, including large portions of the U.S. Arctic and the underwater canyon complexes off the Atlantic Coast, from leasing for exploration, development, or production. As with presidential designation of national monuments under the Antiquities Act, OCSLA provides no express language authorizing a president to terminate a withdrawal. Until now, no president has ever revoked an open-ended (rather than time-limited) withdrawal under §12(a); and it is legally untested whether a president can terminate a previous withdrawal. However, in 2008, President George W. Bush did end early some time-limited withdrawals issued by President William Clinton that were designed to end in 2012, but he left in place permanent marine sanctuary withdrawals without expiration dates.

On April 28, 2017, President Trump signed Executive Order No. 13795 "Implementing an America-First Offshore Energy Strategy." Section 5 of that Order specifically and immediately revoked President Obama's withdrawals of offshore Arctic and Atlantic areas. Section 3 further directed the Secretary of the Interior to consider revising the leasing schedule to include oil and gas lease sales in these and other areas, and the Department commenced the process of developing a new leasing plan covering the years 2019-2024. Other provisions of the Order directed the Secretary to review operating requirements on current lessees (§6); and to review, reconsider, and revise or rescind existing final rules on well control and on offshore Arctic drilling (§§7 and 11) and a proposed rule on offshore air quality (§8).

Section 4 of the Order directed the Secretary of Commerce to refrain from designating or expanding any National Marine Sanctuary absent an accounting of the area's energy or mineral resource potential, and to review all Marine Sanctuaries and Marine National Monuments designated or expanded in the past 10 years. That report was submitted to the president on October 25, 2017.

On January 8, 2018, pursuant to §3 of the Executive Order, the Bureau of Ocean Energy Management (BOEM) issued a draft proposed leasing program for 2019-2024, intended to supersede the existing plan for 2017-2022. The proposal would open more than 90% of all outer continental shelf resources to oil and gas drilling, including ending long-standing moratoria on drilling off the Atlantic and Pacific Coasts and large portions of Alaska. It also represents a direct reversal of the Obama-era plan, under which 94% of offshore acreage is off-limits to development. The proposed leasing program was open for public comment until March 9, 2018. (Leasing under the existing plan continues in the Gulf of Mexico Region, although one lease sale is scheduled in 2021 for Cook Inlet in Alaska.) The final leasing program has not yet been adopted.

In the meantime, a coalition of environmental and indigenous groups brought suit in the District of Alaska to enjoin §5 of the Order and reinstate the Obama §12(a) withdrawals, which had protected 98% of U.S. Arctic waters and a series of Atlantic canyons stretching from Massachusetts to Virginia. The plaintiffs argued OCSLA makes no provision for revoking a leasing withdrawal. On March 29, 2019, the district court rendered judgment for the plaintiffs, vacated §5 of E.O. No. 13795, and reinstated the §12(a) withdrawals in both the Arctic and Atlantic. *League of Conservation Voters v. Trump*, (D. Ala. 2019). The case has been appealed to the Ninth Circuit and has been fully briefed as of June 2020.

Apart from the OCSLA §12(a) withdrawals, President Obama also declared several marine national monuments under the Antiquities Act, as had his predecessor, President George W. Bush. Ruling in 2019, the D.C. Circuit upheld a district court's dismissal of commercial fishing groups' challenges to the designation of the Northeast Canyons and Seamounts Marine National Monument off the Atlantic Coast. On June 5, 2020,

at a public event, President Trump signed a proclamation opening this marine monument to commercial fishing, and conservation groups filed suit immediately thereafter.

2021 Outlook

The national monuments and OCSLA litigation will likely continue into 2021. This will determine the fate of many onshore and offshore resources and will affect the likelihood of development. In the meantime, it is likely that DOI will finalize its OCS leasing plan for 2019-2024.

It should be noted that even if final judicial orders determine that President Trump could properly end a national monument designation or §12(a) withdrawal, a subsequent president could nonetheless issue a new national monument proclamation or OCSLA withdrawal for these lands. However, such new proclamations or withdrawals would be subject to any valid existing rights that might have been acquired in the interim by companies that have purchased leases or located mining claims. The creation of valid existing rights is more likely on the terrestrial national monument lands than on the OCS in the near term, because of the lengthy time period between completion of OCS planning and the actual sale and acquisition of offshore leases.

With respect to onshore and offshore fossil fuel leasing, since 2015, bills have been introduced in both the Senate and House to end such leasing for development of federal minerals, in order to reduce the rate of climate change. The prospects for these bills will likely depend heavily on economic conditions, the salience of climate policy legislation in 2021, and the determination of ways in which loss of future leasing revenues to the states and federal treasury might be offset.

Chapter 12: Endangered Species

The Trump Administration undertook a number of regulatory changes related to threatened and endangered species and their habitats under the 1973 Endangered Species Act. These actions generally loosen the level of protection these resources had previously received and revise the processes by which impacts to species are evaluated. Other actions change the approach to mitigation for impacts to habitats and cooperative management of species to avoid the need for listing.

ESA Rulemaking

The U.S. Fish and Wildlife Service and National Marine Fisheries Service amended the Regulations for Listing Species and Designating Critical Habitat 84 FR 45020 (Aug. 27, 2019). The regulations remove language requiring that listing decisions be made "without reference to possible economic or other impacts of such determination," and they include a revised "jeopardy" standard. Consultation under §7 will only be required where the federal action causes "appreciable" harm to a listed species or its critical habitat, a change from previous regulations that indicated for species already in jeopardy additional adverse impacts would be prohibited. The rule also explains that the same criteria used to list a species will be used to delist a species.

With respect to "threatened" species (i.e., "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range"), the rule defines the term "foreseeable future." Under the new rule, "[t]he term foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely."

The rule revises the definition of "destruction or adverse modification" of critical habitat by adding the phrase "as a whole" to the definition and deleting certain additional language. If a project affects a portion of critical habitat, the Services would "place those impacts in context of the designation to determine if the overall value of the critical habitat is likely to be reduced."

The rule requires that areas where threatened or endangered species are present at the time of listing must be evaluated before unoccupied areas are considered for designation as critical habitat. The regulations also impose a heightened standard for unoccupied areas to be designated as critical habitat, so that in addition to a finding that the designated unoccupied habitat is essential to the conservation of the species, it must also, "at the time of designation, contain one or more of the physical or biological features essential to the species' conservation." The rule also provides an illustrative list of conditions under which the Services may find designation of critical habitat is not prudent.

The rule regularizes "informal consultation" by requiring the services to provide a written concurrence or nonconcurrence determination to the lead agency within 60 days, with the option to extend to 120 days by agreement.

The Fish and Wildlife Service also amended its regulations, 84 FR 44753 (Aug. 27, 2019) to remove the prior regulations' automatic or "blanket" application of most prohibitions relating to endangered species to species newly listed or classified as *threatened*. Instead, the Service will determine what protective regulations are appropriate. However, "for species already listed as a threatened species, the revised regulations do not alter the applicable prohibitions."

See generally Congressional Research Service, Final Rules Changing Endangered Species Act Regulations (2019).

Seventeen states, led by California, filed suit in the U.S. District Court for the Northern District of California challenging the 2019 rules as violating the Endangered Species Act, NEPA, and the APA. Environmental groups filed separately.

Mitigation Policies

In 2018, the Fish & Wildlife Service withdrew the Mitigation Policy under the ESA that had been adopted by the previous administration. 83 Fed. Reg. 36472 (July 30, 2018). The Service specifically rejected the prior administration's principal of "net conservation gain'' as "inconsistent with current Executive branch policy." The Service reinstated the pre-Obama Administration policies, including the 1981 Fish and Wildlife Service Mitigation Policy, 46 Fed. Reg. 7644-7663.

On the same day, the Service also withdrew the prior administration's Compensatory Mitigation Policy. That policy had set out terms and conditions under which an agency or applicant might offset unavoidable harm to species and habitats. In withdrawing the policy, the Service stated that:

> . . . because by definition compensatory mitigation does not directly avoid or minimize the anticipated harm, its application is particularly ripe for abuse. At times the nexus between a proposed undertaking and compensatory mitigation requirements is far from clear. These concerns are particularly acute when coupled with a net conservation gain goal, which necessarily seeks to go beyond mitigating actual or anticipated harm to forcing participants to pay to address harms they, by definition, did not cause.

This withdrawal not only removes any guidance for compensatory mitigation, but also renders the concept itself suspect. One of the major consequences of the withdrawal is to revoke the detailed provisions for "conservation banking." These attempted to update and regularize the fairly common practice of offsetting unavoidable impacts to threatened and endangered species by allowing investment in habitat and species recovery efforts, often on a multi-species basis. Conservation banking will again be governed by the Service's 2003 Conservation Banking Guidance Document, which is fairly general and conceptual.

Sage-Grouse Plans

In 2015, DOI and the Forest Service, working with western states, developed a set of resource management plan amendments to conserve the sage-grouse. Collaborative adoption of these plans, with funding, management, and conservation commitments, allowed the Department to forgo listing of the sage-grouse as threatened or endangered.

Based on E.O. No. 13783 on energy independence and economic growth, issued in March 2017, the Trump Administration announced its intention to roll back the sage-grouse plans, pursuant to DOI Secretary's Order 3353, issued June 7, 2017. Ultimately, the Administration determined to amend the sage-grouse plans in seven states in order to accommodate more development of fossil fuel resources. The amended plans were adopted in March 2019, but were enjoined by the U.S. District Court for the District of Idaho in October as arbitrary and capricious and in violation of NEPA. In particular, the court found that DOI had not provided a sufficiently reasoned scientific basis for its change in position. The Department subsequently prepared draft supplemental EISs for Idaho, Utah, Colorado, Wyoming, Oregon, and Northeast California/Nevada in response to the court's order, and released them for public comment on February 14, 2020. Meanwhile, in a separate case, a federal district court rejected oil and gas leases in certain states because they were issued under a BLM "Instruction Memo" rather than in accordance with public participation under NEPA and the Federal Lands Policy Management Act (FLPMA). And in May 2020, a federal district court in Montana voided 440 oil and gas leases issued by BLM in Montana and Wyoming, finding that the agency's reliance on the

"Instruction Memo" conflicted with the 2015 sage-grouse plans that were still in effect when the leases were offered. The sage-grouse revisions have been complex and contested.

2021 Outlook

The Trump Administration can be expected to continue to pursue its existing ESA policies if reelected. These include limiting the coverage of ESA actions where possible, and a general aversion to requiring mitigation or offsetting actions, consistent with its general view that requiring offsets from private entities is a form of public extraction of benefits rather than a regulatory tool.

Another administration would likely take an opposing policy view and would likely undertake to reverse the actions undertaken in the last several years.

States do have a role to play, particularly in the management of species on private and state lands, and where management must be coordinated with federal decisions. This can require diplomacy and nimble management, as the various parties to the sage-grouse agreements have found in the case of shifting federal perspectives.

Chapter 13: Environmental Justice

Environmental justice (EJ), with roots in the civil rights movement, is often traced to public recognition of the role of race and poverty in a 1982 North Carolina organizing effort concerning the proposed expansion of a hazardous substance disposal facility in a minority community. In the later 1980s, EJ was highlighted by both influential research and community organizing actions. At the federal level in 1992, President George H.W. Bush established the EPA Office of Environmental Equity, the predecessor of the EPA Office of Environmental Justice (OEJ). The National Environmental Justice Advisory Committee (NEJAC) was established in 1993. It plays a significant advisory role in identifying EJ concerns for EPA, and particularly with respect to actions that may improve federal agency performance.

EJ gained more substantial federal recognition after President Bill Clinton's 1994 Executive Order No. 12898 ("Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations"). This Order directed all federal agencies to promote nondiscrimination in health and environment and established an Interagency Working Group (IWG) on environmental justice. It directed each federal agency to develop public policy approaches to identify and avoid in its actions and decisions "disproportionately high and adverse impacts" to human health and the environment affecting low-income and minority communities. The Council on Environmental Quality, working with the IWG, developed EJ Guidance in 1997 for the entire federal government to assist agencies in carrying out these duties.

While all federal agencies have EJ responsibilities under the Executive Order, EPA's OEJ has a substantial role in promotion of environmental justice. It has developed tools, including EJScreen, a mapping and information tool, to assist agency decisionmakers and permit applicants in identifying communities and factors where cumulative adverse impacts may occur. It has also identified EJ Legal Tools to show where, in federal law, environmental justice can be advanced and used proactively. The OEJ has not had a prominent role in the current Administration, but in FY2020 was appropriated a budget of $9.6 million, an increase from the prior year, which was $6.7 million. But President Trump has proposed to reduce funding for OEJ to just $2.7 million in FY2021.

Additional recent developments affecting EJ across the federal government include CEQ's July 16, 2020, major revision of the NEPA regulations. Specifically, CEQ did away with the 50-year old requirement that federal agencies consider the cumulative and indirect impacts of their actions on communities, replacing it with definition of environmental "effects" based on tort-law liability standards. (See Chapter 5, *supra*). For decades, environmental justice analysis under NEPA has been based on a required consideration of cumulative impacts, as agencies attempt to assess whether a proposed action will have a "disproportionately high and adverse impact" on a minority or low-income population.

EJ analysis under NEPA up until now has expressly required an understanding of both existing and foreseeable impacts that affect a community and its health. CEQ, Environmental Justice Guidance Under the National Environmental Policy Act (1997) (EJ Guidance) ("Agencies should consider relevant public health data and industry data concerning the potential for multiple or cumulative exposure to human health or environmental hazards in the affected population and historical patterns of exposure to environmental hazards . . . . Agencies should consider these multiple, or cumulative effects, even if certain effects are not within the control or subject to the discretion of the agency proposing the action."); see also EPA, Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses (1998) ("EPA NEPA analyses must consider the cumulative effects on a community by addressing the full range of consequences of a proposed action as well as other environmental stresses which may be affecting the

community."). But it is far from clear that the new regulations will provide a basis for a similar level of review. The current EJ Guidance document will be revoked, says CEQ, along with other guidance documents, because it is inconsistent with the new rule.

In adopting the new NEPA rule, CEQ stated that it acted in compliance with E.O. 12898 because the rule itself would not cause any environmental impacts, and thus no disproportionately high and adverse impacts: "It is in the agency implementation of NEPA when conducting reviews of proposed agency actions where agencies can consider, as needed, environmental justice issues." 85 Fed. Reg. 43356. CEQ, in its preamble discussion of the dropping of "cumulative impact" definitions and requirements, also provided no discussion of the effect of this change on the "disproportionately high and adverse impact" analysis. 85 Fed. Reg. 43351. And in its response to comments document, CEQ said that if it withdraws the EJ Guidance, this will "not create confusion" nor "reduce the quality of analysis." Response to Comments, at 571. In sum, CEQ has largely deferred any consideration of EJ to some future date when individual federal agencies attempt to apply the new regulations and communities attempt to discern their rights in the absence of a specific regulation and guidance document.

CEQ, in its final rule, slightly amended one section to require that in environmental impact statements (but not expressly for EAs) the description of the "affected environment" include "reasonably foreseeable environmental trends and planned actions in the area(s)." 40 CFR 1502.15. It explains this as ways of dealing with known and anticipated results of actions other than the action under review. 85 Fed. Reg. 43331. It may be a partial substitute for "cumulative impacts" analysis, which would have otherwise appeared in the environmental consequences analysis.

Despite these changes and the shifting fortunes of EJ at the federal level, the heightened recognition of racial injustice associated with policing and institutional behaviors, along with recognition of the heavy toll of COVID-19 on minority communities, has provided an opportunity to undertake a resurgence of EJ as an essential element of justice and accountability. It is not an add-on or a sidelight, but central to an understanding of ongoing injustice and needed reforms.

2021 Outlook

Environmental Justice has in recent years had little direct federal legislative support, and so has been largely dependent on the implementation of federal statutes and on the depth of agency commitments to carrying out E.O. No. 12898. However, in February 2020, Reps. Donald McEachin (D-Va.) and Raúl Grijalva (D-Ariz.) introduced in the House a comprehensive bill to provide a continuing and solid legislative basis for EJ.

H.R. 5986, "The Environmental Justice for All Act," would codify many of the institutions that currently rely on the Executive Order. It would, for example, legislative authorize both NEJAC and IWG. It would require federal agencies to consider cumulative health impacts under the Clean Air Act and Clean Water Act, and would provide that permits not be issued unless they can provide reasonable certainty of no harm to human health. The bill would amend the Civil Rights Act to authorize private rights of action to enforce Title VI based on disparate impacts (reversing *Alexander v. Sandoval*). It would create a grant program on health impacts in EJ communities, and provide funding for just energy transitions, among other features. If there is a change in the leadership of the Administration and the Senate, conditions may be right for enactment of EJ legislation.

If the Trump Administration's NEPA regulations survive judicial challenge and attempts at legislative repeal, the limitation on considering cumulative and indirect impacts of federal actions can be expected to greatly reduce opportunities for ensuring EJ in the context of federal actions across the entire government, including permitting and licensing actions affecting EJ communities. This is a critically important set of developments

presenting some stark choices. The uncertain footing of cumulative impact analysis places communities at greater risk.

In the meantime, and regardless of federal electoral results, state laws will be increasingly important in advancing EJ across the board. Key legal developments include new EJ and climate laws in New York and Virginia, continued development of EJ tools and implementation in California, and the continuing development of case law. For example, in 2020, the U.S. Court of Appeals for the Fourth Circuit applied EJ provisions implied in Virginia state law to reverse a state approval of the siting of a natural gas compressor station in a historic African American community.

These state developments may be increasingly informed by climate concerns, based on growing understanding of potential disparate impacts of energy development and climate policy on communities of color.

Finally, is a healthy environment a human right? The right to a clean and healthy environment is recognized internationally and in at least some state constitutions—but the mechanisms for making that right an enforceable reality in the United States are far from well-developed. As states and the federal government begin to confront, at least legislatively, their records of disparate treatment and perpetuation of unjust systems of legal protection and institutionalized racism, perhaps there is an opportune moment to place environmental justice in the foreground of legal reform.

Chapter 14: Environment 2021

Like all other areas of the American experience in 2020, the environment seems to be at a crossroads, or perhaps a tipping point. Mainstream science holds that greenhouse gas emissions have put the planet on an increasingly rapid course toward disaster, accelerating the already dire timetables in familiar climate models. At the same time, governmental institutions seem more remote and less trusted at all levels, and social change seems likely to run in very divergent directions—reflecting different lived realities, different assumptions about the economy, and different expectations about what government is even for.

It is interesting to contemplate that periods of rapid legal change often follow periods of such turmoil and conflict. In the United States, 1968 was a year of social breakdown, violence, assassination, police brutality shown live on national television, riots, and a hotly contested election. The following year, 1969, had its own massive demonstrations and crackdowns, and the economy began to sputter toward major systemic problems. But we owe practically all of our effective national environmental laws to the several years that followed—NEPA and the Clean Air Act in 1970, the Clean Water Act (enacted over President Richard Nixon's veto) in 1972, the Endangered Species Act in 1973, the Safe Drinking Water Act in 1974, and many more. And in the wake of impeachment hearings and President Nixon's resignation in 1974, a new Congress enacted the Freedom of Information Act amendments and Privacy Act, the Government in the Sunshine Act, and later the Equal Access to Justice Act, and many other procedural reforms.

As environmental lawyers and practitioners, many of us have spent the bulk of our careers operating around the margins of our environmental statutes—what regulatory interpretations can we adopt or reject, based on statutes that were seen as unchangeable and unchanging because of the political landscape and fear of "re-opening" legislation? We have become used to interpretive challenges under these laws—how to interpret "navigable waters" to reflect modern understanding of hydrology, air pollutants to include greenhouse gases—and we have become rather accepting of the clunky gaps in coverage of various laws.

But what if we should be thinking about an actual climate change law? Can we enact legislation that specifically takes on climate change goals, challenges, and responses head-on? Can we provide for safer and more protective uses of the oceans? Must environmental justice depend on a 26-year-old Executive Order and the hoped-for good will of administrators, or can we provide it with a solid legal foundation? Can we require mitigation of habitat damage, better management of nonrenewable resources, actual "resource recovery" in materials management—and do so in law? In 2019, ELI and the environmental law program at George Washington University School of Law convened two workshops (at Wingspread and Airlie House) to consider these questions as well as appropriate roles for federal, state, tribal, and local governments, technology, innovation, and private environmental governance in meeting the challenges environmental and natural resources law will face in the coming decades. ELI hopes to elaborate on some of the leading ideas from this "reimagining" initiative in a report to be issued soon.

And regardless of federal actions, we have again seen the power and innovation of states. "Our federalism" is an old concept, and sometimes it has served to slow progress. But it has also provided immense opportunities for change: climate legislation, social reform, remaking the energy economy, protection of community, and public resources. If states can find the funding and can overcome federal constraints on their powers, and if the innovation of major cities can likewise be liberated, this can be an era of rapid progress.

Environment 2021 need not simply be a re-run of the seesaw of making and unmaking rules. It can be, indeed it ought to be, a new day for all of us, where we set a course for durable and needed change.

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