

Trumping the Environment: The First Four Months - A Lump of Coal

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Introduction

During his first 100 days, President Donald Trump issued thirty-three executive orders,¹ twenty-eight Memoranda² and thirty Proclamations.³ President Trump signed more executive orders in the first 100 days than any president since Harry Truman, and Trump has signed twenty-nine congressional bills or resolutions, fourteen of which have overturned Obama era regulations⁴ through the use of the Congressional Review Act (CRA).⁵ Six of the Trump executive orders, two of his memoranda and four of the CRA enacted bills⁶ have a direct impact on environment, energy or conservation policy, reversing Obama orders and policies. Executive orders and memoranda afford an opportunity for higher profile declaration of policy, as well as provide directions to heads of agencies to review or expedite matters within their jurisdiction, consistent with the declared policy. The Trump administration actions are aimed at fostering energy sector growth, while denying climate change as a justification for energy and

¹ See Donald J. Trump Exec. Orders, <https://www.federalregister.gov/executive-orders/donald-trump/2017> (last visited May 5, 2017), (listing orders to date).

² See Presidential Memoranda, WHITE HOUSE, <https://www.whitehouse.gov/briefing-room/presidential-actions/presidential-memoranda> (last visited May 5, 2017).

³ See Presidential Proclamations, THE WHITE HOUSE, <https://www.whitehouse.gov/briefing-room/presidential-actions/proclamations> (last visited May 5, 2017).

⁴ CRA Tracking, SENATE REPUBLICAN POLICY COMMITTEE (May 15, 2017), www.rpc.senate.gov/cra-tracking; see also First 100 Days, CNN (Apr. 29, 2017), <http://www.cnn.com/2017/04/29/politics/donald-trump-100-days-data/>.

⁵ Congressional Review Act, 5 U.S.C. § 801 - 808 (1996). The CRA allows Congress to review major regulations published in the Federal Register and received by Congress in the past 60 legislative days. When this overlaps a new session of Congress, regulations in the carryover period are treated as if they were received by Congress on the 15th day of the new legislative session (15th legislative day of the House or 15th session day of the Senate). From the date the regulation was deemed to be received by Congress, Congress has 60 days to consider and adopt a joint resolution of disapproval of the rule (going back to June 13, 2016 for this session). Presidential signature is then required.

⁶ Stream Protection Rule Disapproval, H.J.Res. 38, 115 Cong (2017) (enacted Feb. 16, 2017), to be codified as Public Law No. 115-6, <http://www.congress.gov/bill/115th-congress/house-joint-resolution/38text>; Providing for Congressional Disapproval under chapter 8 of title 5, United States Code, of a Rule submitted by the Securities and Exchange Commission relating to "Disclosure of Payments by Resource Extraction Issuers," H.J.Res. 41, Pub. L. No. 115-4 (enacted Feb 24, 2017); Disapproving the Rule Submitted by the Department of the Interior relating to Bureau of Land Management Regulations that Establish the Procedures used to Prepare, Revise, or Amend Land Use Plans Pursuant to the Federal Land Policy and Management Act of 1976, H.J.Res. 44, Pub. L. No. 115-12 (enacted March 27, 2017), <https://www.congress.gov/bill/115th-congress/house-joint-resolution/44>; Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska, H.J.Res 69, Pub. L. No. 115-20 (2017), (enacted Apr. 3, 2017).

environmental policy. Such executive orders and memoranda⁷ set in motion substantial policy changes and review of existing regulations that can lead to significant changes in the role of government in fostering environmental integrity and protecting natural resources.

This article focuses on major presidential actions and congressional oversight that have a direct impact on environmental policy in the first 120 days of the Trump administration. It provides background and analysis of issues related to climate change, minimization of environmental compliance restrictions, and regulatory reform. It includes an overview of climate change issues, after which the article examines President Trump's Executive Orders on Energy Independence and Expediting Environmental Review of Infrastructure Projects, especially as they relate to encouragement of coal mining, oil pipeline approval, and offshore oil drilling. President Trump's orders deconstructing the Clean Power Plan and the Waters of the United States (WOTUS) rule. Finally his Executive Order on Reducing Regulation and Controlling Regulatory Costs will be examined.

I. Climate Change – Reality and Denial

A. Reality

For the third year in a row, global surface temperatures are the warmest since 1880, when official record keeping commenced. The National Aeronautics and Space Administration (NASA) reports that sixteen of the seventeen warmest years on record occurred since 2001, with 2016 being the warmest.⁸ Due to weather and climate events, the United States experienced \$1 billion in losses in 2016.⁹ Seven in ten Americans believe that climate change is occurring and ninety-seven percent of the scientists believe that human activities are causing the climate change,¹⁰ in accord with the findings of the National Research Council of the National Academy of Sciences.¹¹

The Intergovernmental Panel on Climate Change (IPCC), formed by the United Nations and World Meteorological Organization, concluded that “[w]arming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea level.”¹² The IPCC reported that the period of 1995-2006 included eleven of the twelve warmest years since 1850-when instrumental records of the global surface temperatures began being recorded.¹³ The IPCC forecasted a rise in global temperatures of two to 11.5 degrees Fahrenheit by the end of the century.¹⁴ Even a study financed substantially by the Charles Koch Foundation, prominent

⁷ The American Presidency Project, http://www.presidency.ucsb.edu/executive_orders.php (listing presidential orders) (last visited May 8, 2017); see <http://www.presidency.ucsb.edu/data/orders.php> (listing memoranda).

⁸ NASA, Global Climate Change Vital Sign of the Planet, <https://climate.nasa.gov/vital-signs/global-temperature/> (last visited May 31, 2017).

⁹ NOAA, <http://www.noaa.gov/climate> (last visited Apr. 28, 2017) (indicating that the average surface temperature of the earth has risen 1.68° from 1880 to 2016).

¹⁰ CNN Politics, <http://www.cnn.com/2017/04/29/politics/epa-climate-change-website/> (Apr. 29, 2017).

¹¹ National Research Council, *Advancing the Science of Climate Change*, NATIONAL ACADEMY PRESS at 286 (2010).

¹² Climate Change 2007: Synthesis Report - An Assessment of the Intergovernmental Panel on Climate Change, at 2, http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf. (last visited March 24, 2012) (examining 577 studies, with particular focus on 75 studies to reach its conclusions).

¹³ *Id.*

¹⁴ Future Temperature Changes, EPA, <http://www.epa.gov/climatechange/science/futuretc.html> (last visited March 24, 2012).

backer of global warming skeptics, concluded that temperature rises have definitely occurred since the 1950s and were not based on biased results, according to University of California-Berkeley physicist (and former climate change skeptic) Richard Muller.¹⁵

Gases that trap heat in the Earth's atmosphere are called "greenhouse gases"(GHGs).¹⁶ GHGs include carbon dioxide (CO₂),¹⁷ methane (CH₄),¹⁸ Nitrogen Oxide (N₂O)¹⁹ and fluorinated gasses.²⁰ Global GHG emissions increased by seventy percent from 1970 to 2004 according to the IPCC, with carbon dioxide annual emissions growing by eighty percent.²¹ In 2010, worldwide emissions of carbon dioxide increased by 6% (564 million more tons of carbon in the air than in 2009), producing the highest annual net increase ever in carbon pollution.²² Carbon dioxide reached 400 parts per million by 2016; before 1950 it never exceeded 300 parts per million.²³ Although gases may be generated by both stationary and mobile sources, they mix with other gases and wind patterns disperse the combined gases to remote locations, so the negative effects of GHGs are not limited to the region that produces them. Under the Endangerment Rule in 2009, the Environmental Protection Agency (EPA) issued a finding that CO₂ and other GHGs are linked to climate change and are harmful to human health and the environment.²⁴ The EPA found an "unambiguous warming trend over the past 100 years," and especially "over the past 30 years."²⁵

More extreme weather patterns are emerging. Climatologists also predict that there will be significant disruption of the marine life, crop failure and potential collapse of the food chain

¹⁵ Seth Borenstein, AP science writer, *Skeptics Fund Study that Supports Global Warming*, SPRINGFIELD NEWS-LEADER, Oct. 31, 2011, at 3A.

¹⁶ Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,495 at 66,499 (Dec. 15, 2009), <https://www.gpo.gov/fdsys/pkg/FR-2009-12-15/pdf/E9-29537.pdf>.

¹⁷ EPA, <http://www.epa.gov/climatechange/emissions/index.html> (last visited Jan. 2, 2012) (recognizing that carbon dioxide enters the atmosphere through the burning of fossil fuels (oil, natural gas, and coal), solid waste, trees and wood products, and also as a result of other chemical reactions (e.g., manufacture of cement). Largely because of increased fossil fuel combustion, CO₂ emissions increased 21 percent from 1990-2007. Some CO₂ is also removed from the atmosphere (or "sequestered") when it is absorbed by plants as part of the biological carbon cycle)).

¹⁸ EPA, <http://www.epa.gov/climatechange/emissions/index.html> (last visited Jan. 2, 2012), (recognizing that methane is emitted during the production and transport of coal, natural gas, and oil. Methane emissions also result from livestock and other agricultural practices and by the decay of organic waste in municipal solid waste landfills).

¹⁹ EPA, <http://www.epa.gov/climatechange/emissions/index.html> (last visited Jan. 2, 2012) (recognizing that nitrous oxide is emitted during agricultural and industrial activities, as well as during combustion of fossil fuels and solid waste).

²⁰ EPA, <http://www.epa.gov/climatechange/emissions/index.html> (last visited Jan. 2, 2012) (recognizing that Fluorinated Gases include Hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆) are synthetic, powerful greenhouse gases that are emitted from a variety of industrial processes [and are not naturally occurring substances]. Fluorinated gases are sometimes used as substitutes for **ozone-depleting substances** (i.e., CFCs, HCFCs, and halons). These gases are typically emitted in smaller quantities, but because they are potent greenhouse gases, they are sometimes referred to as High Global Warming Potential gases ("High GWP gases"))).

²¹ *Climate Change 2007: Synthesis Report - An Assessment of the Intergovernmental Panel on Climate Change*, IPCC at 5, http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf (last visited March 24, 2012).

²² *Carbon Emissions Soar*, SPRINGFIELD NEWS-LEADER, Nov. 4, 2011, at 3A (referencing the U.S. Dept. of Energy's Oak Ridge National Lab and IPCC).

²³ CNN Politics, <http://www.cnn.com/2017/04/29/politics/epa-climate-change-website/> (Apr. 29, 2017).

²⁴ EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act (hereinafter Endangerment Rule), 74 Fed. Reg. 66,496, 66,535 (Dec. 15, 2009), http://epa.gov/climatechange/endangerment/downloads/Federal_Register-EPA-HQ-OAR-2009-0171-Dec.15-09.pdf.

²⁵ Endangerment Rule, 74 Fed. Reg. at 66,517.

as a consequence of the impact of climate change.²⁶ This fits the pattern that climate scientists like Jim Hurrell of the National Center for Atmospheric Research have been predicting – more extreme weather patterns with more frequent and more severe tornados, floods, hurricanes and droughts - as people pump increased greenhouse gases into the atmosphere.²⁷ For example, in May of 2011, Joplin, Missouri experienced an E5 tornado.²⁸ Missouri and the Missouri River basin experienced record flooding in the Spring of 2011,²⁹ with January to May of that year being the wettest on record since at least 1895, according to the National Oceanic and Atmospheric Administration (NOAA).³⁰ Missouri and Arkansas again experienced record rainfall and flooding in the Spring of 2017.³¹

More than half of registered voters, including 545 of Republicans do not believe that environmental regulations cost American jobs, according to a Harvard University poll. Over 60% do not want the President to withdraw from the Paris Climate Accord. In a Yale University poll, over 60% of Trump supporters approve of either taxing or regulating pollution that causes global warming.³²

B. Denial

Climate change? “We’re not spending money on that anymore,” is the Trump mantra.³³ By nominating a climate change denier to head the EPA, Donald Trump left no doubt on where he stands on environmental issues. President Trump’s EPA Secretary Pruitt does not see human activity or carbon dioxide as significant contributors to climate change and is implementing

²⁶ CNN Politics (Apr. 29, 2017), <http://www.cnn.com/2017/04/29/politics/epa-climate-change-website/>.

²⁷ Endangerment Rule, 74 Fed. Reg. at 66524-66535; *see also* ABC Evening News, (March 7, 2012, 5:30 PM), <http://abcnews.go.com/WNT/vidExec. Order No. /warmest-winter-decade-15872613>.

²⁸ NOAA, 2011 Tornado Information, http://www.noaanews.noaa.gov/2011_tornado_information.html (last visited May 6, 2017) (also reporting that a record number of tornados (1817) occurred in 2004).

²⁹ NATIONAL WEATHER SERVICE, *Flooding on the Missouri River 2011* (last visited May, 13, 2013) (reporting that in the second half of May 2011, a year’s worth of rain fell in the upper Missouri River basin. With record snowfalls in the Rocky Mountains, six major dams along the Missouri River released record amounts of water in 20110; *see also*, *Missouri River Flood Closes 100 Miles of Bridges*, YAHOO! NEWS.COM. (archived from the original on June 23, 2011) (reporting that bridge closings precluded crossing the river for 100 miles, with every bridge between Kansas City and Omaha impacted. and I29 in the Northwest Missouri-Iowa-Nebraska corridor closed most of the summer); *see also* *Flooding Grows in Holt, Atchison Counties*, KansasCity.com (June 24, 2011) (archived from the original on June 21, 2011); *The Latest on Flooding*, Omaha.com (achieved from the original on Sept. 19, 2012).

³⁰ NOAA, *Understanding and Explaining Climate Extremes in the Missouri River Basin Associated with the 2011 Flooding*, at 22 <https://www.esrl.noaa.gov/psd/csi/factsheets/pdf/noaa-mrb-climate-assessment-report.pdf> (concluding, however, that the Missouri River Basin had been experiencing a reduced frequency of very wet Springs prior to 2011).

³¹ *Record Flooding in April/May 2017 Swamps Parts of Missouri, Arkansas, Illinois*, THE WEATHER CHANNEL (May 6, 2017), <https://weather.com/storms/severe/news/flood-threat-forecast-south-mississippi-valley-April-2017> (reporting that twelve Southwest Missouri communities experienced record flooding and water closed sections of I44 for days and impacting the Merrimac Basin south of St. Louis (which had also experienced ten inches of rain in three days in 2015)); *see also*, Diana Lutz, *Record Missouri Flooding was Manmade Calamity*, SCIENTIST SAYS, <https://phys.org/news/2016-02-missouri-manmade-calamity-scientist.html> (last visited May 5, 2017).

³² Lenzy Krehbiel-Burton, *Polls: Attitudes on Energy, Environmental Policy Not so Disparate*, MO LAWYER’S WEEKLY, June 19, 2017 at 11.

³³ Patrick Goodenough, *WH on Global Climate Change: “We’re Not Spending Money on That Anymore,”* CNN (March 16, 2017), <http://www.cnsnews.com/news/article/patrick-goodenough/>, quoting Mick Mulvaney, the head of Trump’s Office of Management and Budget (last visited Apr. 29, 2017).

policies that support such denial. On the eve of the Peoples' Climate March on Washington (April 29, 2017), Pruitt ordered the removal of climate change information from the EPA website, although some information remains on the government sites.³⁴ In a related press release, Pruitt said that the website was being updated to “reflect the approach of new leadership” to focus more on partnering with the states,³⁵ which is somewhat problematic since President Trump's budget proposals do not fund environmental grants to the states.³⁶

Donald Trump has abdicated the leadership role of the United States with his announcement that the U.S. is withdrawing³⁷ from the 2015 Paris Agreement Framework Convention on Climate Change.³⁸ Even though such withdrawal cannot be finalized until the day after the 2020 election,³⁹ global efforts to combat climate change will see decreased participation by the United States, as his administration fails to implement its priorities. Secretary of State Rex Tillerson, the Pope, G7 leaders, and Presidential daughter Ivanka Trump were among those who tried to convince Trump of the importance of keeping a seat at the table and remaining in the international climate change agreement.⁴⁰ A Center for Climate and Energy Solutions (C2ES) open letter from twenty-four major CEOs to President Trump (appearing multiple times in the *Wall Street Journal* and *New York Times*) emphasized that the exiting the Paris Accord threatens American competitiveness, raises the risk of negative trade implications, and could actually hurt their ability to create jobs.⁴¹ Nevertheless, he listened to EPA's Scott Pruitt, Steve Bannon and his promise to his base in announcing that the United States would pull out of the accord.⁴²

“Climate change is real. Industry must now lead and not depend on government,” tweeted General Electric CEO Jeff Immelt. CEOs such as Apple's Tim Cook and Microsoft

³⁴ See EPA, Air Pollution: Current and Future Challenges, https://www.epa.gov/clean-air-act-overview/air-pollution-current-and-future-challenges#_edn8 (last visited May 8, 2017).

³⁵ EPA Climate Change Website, CNN Politics (Apr. 29, 2017), <http://www.cnn.com/2017/04/29/politics/epa-climate-change-website/>.

³⁶ *America First A Budget Blueprint to Make America Great Again*, WHITE HOUSE at 41 (March 13, 2017), www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf.

³⁷ President Trump Announces U.S. Withdrawal from Paris Climate Accord (June 1, 2017), <https://www.whitehouse.gov/blog/2017/06/01/president-donald-j-trump-announces-us-withdrawal-paris-climate-accord>.

³⁸ United National Framework Convention on Climate Change (Nov. 18, 2016), http://unfccc.int/paris_agreement/items/9485.php (indicating that 144 of 197 participating parties (countries) have ratified the convention) (last visited Apr. 29, 2017).

³⁹ Brad Plumer, *What to Expect as the U.S. Leaves Paris Climate Accord*, NY TIMES (June 1, 2017), https://www.nytimes.com/2017/06/01/climate/us-paris-accord-what-happens-next.html?_r=0.

⁴⁰ Jena McGregor, ‘Climate Change is Real’: CEOs Share their Disappointment Over Trump's Paris Accord Exit, WASHINGTON POST (June 1, 2017), https://www.washingtonpost.com/news/on-leadership/wp/2017/06/01/ceos-make-final-pleas-to-trump-to-stay-in-paris-climate-agreement/?utm_term=.31c35f6c6af4.

⁴¹ Dear President Trump, CENTER FOR CLIMATE CHANGE SOLUTIONS (C2ES WITH CERES) <https://www.c2es.org/international/business-support-paris-agreement>, C2ES open letter to President Trump urging him to stay in the Paris Climate Accord, signed by CEOs of Adobe, Apple, Blue Cross Blue Shield of Massachusetts, Danfoss, Facebook, Gap, Inc., Google, The Hartford, Hewlett Packard Enterprise, Ingersoll Rand, Intel Corporation, Johnson Controls, Levi Strauss & Co., Mars Incorporated, Microsoft, Morgan Stanley, National Grid, PG&E Corporation, Royal DM, Salesforce, Schneider Electric, Tiffany & Co., Unilever, and VF Corporation, published in the NEW YORK TIMES (May 8, 9, 16, 18 and June 1, 2017), published in WALL STREET JOURNAL (May 9, 17 and June 1, 2017) and published in NEW YORK POST (May 9, 2017).

⁴² Michael Shear & Diane Cardwell, *Trump Advisers Wage Tug of War Before Decision on Climate Deal*, NY TIMES, (May 30, 2017), https://www.nytimes.com/2017/05/30/us/politics/paris-climate-agreement-trump.html?_r=0.

president Brad Smith tried to convince Trump that it leaving the Paris Accord was bad for business. In protest, Elon Musk (Tesla and Space X CEO) and Robert Iger (Disney CEO) resigned from the president's advisory council as a matter of principle following Trump's decision to withdraw the United States from the Paris Accord.⁴³ Even companies not normally viewed as environmental advocates, such as Monsanto, PG&E, Dow Chemical CEO Andrew Liveris, and Exxon Mobil's chief executive Darren Woods⁴⁴ tried to convince Trump not to exist the Paris Accord. On the same day as Trump announced his decision, the 62.3% of the shareholders of ExxonMobil voted to require climate change reporting by the company, with major investors BlackRock, State Street Global Advisors and even Vanguard Group all voting for the climate report.⁴⁵

Each country set its own goals in the Paris accord, contrary to the impression given by President Trump that other countries were trying to take advantage of the United States. Trump's assumption that 195 countries are going to renegotiate the accord to make it less burdensome to the United States is naïve. These countries will just go forward with implementing solar, wind and renewable alternatives to coal and other efficiency measures and they will become the innovative leaders in these areas, harming the opportunity for green-sector jobs in America. China and India are already ahead of schedule in implementing practices to achieve their self-declared goals.⁴⁶ The effort to foster more unhealthy, unsafe coal industry jobs will potentially cost the United States more jobs in the alternative energy sector. In response, the Governors of California, New York, Washington, Massachusetts, Vermont, Connecticut and Rhode Island reassert their states' commitment to meeting the United States climate accord targets.⁴⁷ Trump's announcement and posture generally will effectively relinquish the leadership role of the United States, not only in the area of countering climate change, but in the world generally.

President Trump announced that he is cancelling payments to the United Nation programs related to climate change and withdrawing funds from the Green Climate Change Fund⁴⁸ that helps provide survival funding for developing nations that are struggling with the impact of droughts, crop failure, floods, increasing strong storms, heating, insect infestation, and rising oceans. Acidification of the oceans also impacts survival of marine life, a food source for

⁴³ McGregor, *supra* note 40.

⁴⁴ Bradley Olson, *Exxon Shareholders Pressure Company on Climate Risks*, WALL ST. J. (May 31, 2017), <https://www.wsj.com/articles/exxon-shareholders-pressure-company-on-climate-risks-1496250039>, indicating that 62% of shareholders at 2017 annual shareholders meeting voted to compel more information on how climate change and regulation are impacting operations, as probe alleges Exxon mislead investors.

⁴⁵ Eric Rosenbaum, *A Big Climate Change Vote Against Exxon Mobil, with some Heavyweight Investors Behind It*, CNBC (May 31, 2017), <http://www.cnbc.com/2017/05/31/index-giant-vanguard-does-about-face-on-big-investing-position-report.html>.

⁴⁶ Jon Greenberg, *Fact-checking Donald Trump's Statement Withdrawing from the Paris Climate Agreement*, POLITIFACT (June 1, 2017), <http://www.politifact.com/truth-o-meter/article/2017/jun/01/fact-checking-donald-trumps-statement-withdrawing-/>.

⁴⁷ James Conca, *The Paris Agreement: As Trump Pulls Out, Governors Jump In*, FORBES (June 4, 2017), <https://www.forbes.com/sites/jamesconca/2017/06/04/the-paris-agreement-as-trump-pulls-out-governors-jump-in/#4d41ef635c57>.

⁴⁸ Nell Greenfield Boyce, *Trump's Budget Slashes Climate Change Funding*, NPR MORNING EDITION (March 16, 2017), <http://www.npr.org/sections/thetwo-way/2017/03/16/520399205/trumpw-budget-slashes-climate-change-funding>, a point Trump reinforced in his withdrawal from the Paris Accord speech June 1, 2017, <https://www.whitehouse.gov/blog/2017/06/01/president-donald-j-trump-announces-us-withdrawal-paris-climate-accord..>

many people. Such problems also are deemed to be a security threat to the United States.⁴⁹ A country with great wealth (such as the United States) has a moral obligation to help other countries that face the climatic effect of the past practices of the United States in conspicuous consumption and coal/oil-generated harm to the global climate. People who face inadequate water resources, crops, or food supplies, through little fault of their own, need and deserve aid from wealthy countries, aid which Trump announced that the U.S. would no longer provide.⁵⁰

President Trump's response, instead, is to defund, stay enforcement, order prompt review of infrastructure projects, and direct agencies to review and repeal environmental regulations, especially those that could be linked to climate change. Such policies ignore overwhelming evidence of climate change and its impact on humans and the planet.

II. Energy Independence with Diminished Environmental Protection

A. President Trump's Executive Order on Promotion of Energy Independence

President Trump's Executive Order on Promoting Energy Independence and Economic Growth (Energy Independence Order) was motivated by Trump's desire to avoid "regulatory burdens that unnecessarily encumber energy production, constrain economic growth and prevent job creation" and to reverse environmental rules that cost such industries millions of dollars in compliance.⁵¹ Trump's Energy Independence Order (1) revokes, rescinds or suspends several prior climate change and GHG directives and documents,⁵² while disbanding the Interagency Working Group on Social Cost of Greenhouse Gasses (IWG),⁵³ (2) lifts the moratorium on coal leases on federal lands,⁵⁴ (3) authorizes immediate review, suspension, revision or rescission of the Clean Power Plan,⁵⁵ and (4) instructs the head of each agency to make immediate review of all agency actions that potentially "burden" development of domestic energy resources.⁵⁶ The obstructive "burden" could include significant costs in "siting, permitting, production, utilization, transmission, or delivery of energy resources."⁵⁷

Trump's Energy Independence Order rescinds prior presidential actions centered on climate change agenda, including Obama administration Executive Order 13653 on Preparing the

⁴⁹ See CAN Military Advisory Board, National Security and the Accelerating Risk of Climate Change (2014), https://www.cna.org/cna_files/pdf/MAB_5-8-14.pdf; see also, EPA, Air Pollution: Current and Future Challenges, https://www.epa.gov/clean-air-act-overview/air-pollution-current-and-future-challenges#_edn8 (last visited May 8, 2017).

⁵⁰ See Andrew Taylor, *GOP-controlled House Subcommittees Reject Trump Budget Cuts*, WASHINGTON POST (June 28, 2017), https://www.washingtonpost.com/politics/congress/gop-controlled-house-subcommittees-reject-trump-budget-cuts/2017/06/28/f60d1a76-5c1c-11e7-aa69-3964a7d55207_story.html?utm_term=.c81e42d25449, discussing that **congressional committees are looking at budget proposals. The Food for Peace program funding was restored by an Appropriation subcommittee, retaining the \$1.6 billion which Trump's budget proposal would delete.**

⁵¹ Exec. Order No. 13783, Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16093 (March 31, 2017).

⁵² *Id.* at Sec. 3 and 5.

⁵³ *Id.* at Sec. 5(b).

⁵⁴ *Id.* at Sec.6.

⁵⁵ *Id.* at Sec. 4.

⁵⁶ *Id.* at Sec. 2

⁵⁷ *Id.* at Sec. 2(b).

United States for Impacts of Climate Change, the President's Climate Action Plan (2013) and Climate Action Plan Strategy to Reduce Methane Emissions Report (2014), as well as three other Presidential Memoranda on climate change from the Obama administration.⁵⁸

The one environmental measure that has survived congressional scrutiny is the Methane Waste Rule,⁵⁹ after Senators McCain, Graham and Collins sided with Democrats in voting against⁶⁰ House Joint Resolution 36 under the CRA.⁶¹ The Methane Rule requires certain natural gas producers to reduce natural gas wastes from venting, flaring and leaks during the production process, as a measure aimed at reducing this GHG. Methane has a global warming potential of twenty-three times that of carbon dioxide.⁶² Trump's Energy Independence Order, however, includes a section ordering review of the regulatory impact of social costs of methane, carbon and nitrous oxide.⁶³

President Trump has also threatened to halt NASA's research on climate change and terminate funding of certain science missions,⁶⁴ even though to do so would be logistically difficult with orbiting satellites that are collecting information related to weather prediction. There has long been difficulty in coordinating climate research within the federal government, with NOAA also being a key agency.⁶⁵

The Board of Scientific Counselors (BOSC) advises the EPA on the strength of the scientific methods that the EPA uses for its various studies and judgments. Scott Pruitt has dismissed over half of the members of the EPA's BOSC, rather than renewing their three-year terms. Replacements have not been added to the board. It lacks sufficient members for the

⁵⁸ Exec. Order No. 13,783, § 3 (revoking Exec. Order No. 13,653 on Preparing the United States for the Impacts of Climate Change (Nov. 1, 2013); Presidential Memorandum on Power Sector Carbon Pollution Standards (June 25, 2013); Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (Nov. 3, 2015); Presidential Memorandum on Climate Change and National Security (Sept. 21, 2016); President's Climate Action Plan, Report of the Executive Office of the President (June 2013); and Climate Action Plan Strategy to Reduce Methane Emissions, The Report of the Executive Office of the President (March 2014)).

⁵⁹ EPA, Oil & Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources (Methane Rule), 81 Fed. Reg. 35823 EPA (June 3, 2016) (codified at 40 C.F.R. § 60).

⁶⁰ Juliet Eilperin and Chelsea Harvey, *Senate Unexpectedly Rejects Bid to Repeal Obama-era Environmental Regulation*, WASHINGTON POST (May 10, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/05/10/senates-poised-to-repeal-a-final-obama-era-rule-as-soon-as-wednesday/?utm_term=.a126715ed7d8.

⁶¹ H.J. Res. 36, 115th Cong., <https://www.congress.gov/bill/115th-congress/house-joint-resolution/36>. (passed House, but not Senate)

⁶² Center for Climate and Energy Solutions, Quick Facts, <https://www.c2es.org/energy/source/coal> (last visited Apr. 28, 2017).

⁶³ Exec. Order No. 13,783, Presidential Executive Order on Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093 (March 31, 2017).

⁶⁴ America First A Budget Blueprint to Make America Great Again, at 43 (March 13, 2017), www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf.

⁶⁵ Proposed NOAA FY2012 Reorganization, http://www.corporaateservices.noaafo/nbo/fy12budget_highlights/NOAA_FY_12_Reorganization_One_Paper.pdf (last visited March 24, 2012, 2:05 PM) (noting attempts "to bring together NOAA's existing widely dispersed climate capabilities under a single line office management structure to more efficiently and effectively respond to the rapidly increasing demand for *climate services* – easily accessible and timely scientific data and information about climate that helps people make informed decisions in their lives, businesses, and communities" and provide better climate forecasts have been caught in a political quagmire and *see* NOAA Pushes Back Against Reorganization Plan (Jan. 17, 2012)), <http://ireport.cnn.com/docs/DOC-732467>.

subcommittees to perform need oversight, so six scheduled meetings are cancelled. Similarly, Zinke Department has suspended the Department of Interior's 200 advisory scientific panels, ranging from advisory panels on BLM, invasive species, and Alaska North Slope.⁶⁶

B. Regulation of the Environmental Impact of Coal Mining

Emissions from coal-fired power plants have been linked to global warming, with carbon dioxide emissions from coal combustion representing 24.5% of 2012 greenhouse gas emissions in the United States. Coal mine methane constitutes eight to ten percent of human-generated methane emissions worldwide. In addition, disposal methods associated with coal mining and acid mine drainage run-off have been linked to water contamination of creeks and rivers.⁶⁷ Under a process called mountaintop removal mining, coal companies in Central Appalachia (especially West Virginia, Virginia and Kentucky) dump mountaintop “excess spoil” rock debris into the valleys, leading to contamination of streams and waterways with toxic heavy metals. These “valley fills” in turn jeopardize drinking water safety,⁶⁸ and impact surface-water chemistry, and jeopardize macroinvertebrate species. In addition to the pollution of waterways, mining beneath streams can cause “subsidence,” cracking the stream back and drying up streams.⁶⁹ The EPA issued water quality standards under the Clean Water Act (CWA) for surface mining in the Appalachian region in 2011.⁷⁰

1. Stream Protection Rule (2016) – History and Demise

The Surface Mining Control and Reclamation Act of 1977 (SMCRA)⁷¹ prohibits mining companies from causing material damage to the environment to the extent that it is technologically and economically feasible to prevent it. The law covers regulation of active surface mines and the reclamation of abandoned mines. One of the purposes of the act is to “assure that the rights of surface landowners and other persons with a legal interest in the land or

⁶⁶ Juliet Eilperin & Brady Dennis, *EPA Dismisses Half of Key Board's Scientific Advisors; Interior Suspends More than 200 Advisory Panels*, WASHINGTON POST, https://www.washingtonpost.com/news/energy-environment/wp/2017/05/07/epa-dismisses-half-of-its-scientific-advisers-on-key-board-citing-clean-break-with-obama-administration/?utm_term=.ecde24541f37.

⁶⁷ Center for Climate and Energy Solutions, Quick Facts, <https://www.c2es.org/energy/source/coal> (last visited Apr. 28, 2017).

⁶⁸ Brad Plumer, *Why Trump Just Killed a Rule Restricting Coal Companies from Dumping Waste in Streams*, <http://www.vox.com/2017/2/2/14488448/stream-protection-rule> (last visited Apr. 28, 2017).

⁶⁹ Reid Frazier, THE ALLEGHENY FRONT (Feb. 19, 2017), <https://stateimpact.npr.org/pennsylvania/2017/02/14/congress-axed-a-rule-to-protect-streams-from-coal-pollution-heres-what-that-means-for-pennsylvania/> (also noting at 2 that Pennsylvania state records indicate that from 2008-2013, 39 miles of streams and 855 wells, springs and ponds were adversely affected; the executive director of the Pennsylvania Coal Alliance (Rachel Gleason) feared that the rule might be applied to “longwall” mining, typically used in Pennsylvania).

⁷⁰ Final Guidance to Protect Water Quality in Appalachian Communities from Impacts of Mountaintop Mining / Agency (July 21, 2011), Memorandum at <http://www.uky.edu/CommInfoStudies/IRJCI/MTRguidance.pdf>, (last visited Apr. 29, 2017) and EPA news release, <https://yosemite.epa.gov/opa/advpress.nsf/3881d73f4d4aaa0b85257359003f5348/1dabfc17944974d4852578d400561a13!OpenDocument> and <https://www.epa.gov/cwa-404/cwa-policy-and-guidance> for current policies (last visited Apr. 29, 2017).

⁷¹ Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201 – 1328 (1977), as amended in 1990, 1992, and 2006.

appurtenances thereto are fully protected from such operations.”⁷² In 1979, the Department of Interior issued its initial “stream buffer zone rule” to create buffer zones of 100 feet to “protect streams from the adverse effects of sedimentation and gross disturbance of stream channel.”⁷³ In 1983, it amended the rule, deleting the requirement to restore the original stream channel.”⁷⁴ The Bush Administration amended the rule to provide for a permitting process under the CWA, even where avoiding disturbance of the stream is not reasonably possible.⁷⁵ The District of Columbia District Court vacated the 2008 Bush rule because of the failure of the Office of Surface Mining Reclamation and Enforcement (OSM) to consider recent impacts of coal mining and its failure consult with the Fish and Wildlife Service (FWS), as required pursuant to Endangered Species Act (ESA) section 7(a), regarding the impact of the change in criteria on endangered species and critical habitat.⁷⁶

In response, an Executive Order of George W. Bush changed the interpretation of “any discretionary action,” so that agencies without express discretionary authority to consider and protect wildlife would not have to comply with ESA section 7(a) consultation, removing the environmental review of the FWS on federal projects involving mining, logging, and road building.⁷⁷ President Obama’s early memorandum (entitled “Science Integrity”) compelled agencies to resume the long-standing practice of consultation with FWS (or the National Marine Fisheries Service (NMFS)), while working to reverse this December 16, 2008 Bush rule⁷⁸ Of course, the key reason for the ESA section 7(a) consultation requirement with the FWA or NMFS is that the other agencies may lack seasoned scientists to evaluate the impact of projects on endangered species and habitat. A subsequent Obama executive order emphasized that regulatory decisions should be based on the best available science.⁷⁹ One would expect the Trump administration to be more in line with the Bush philosophy regarding species protection and consultation.

The Stream Protection Rule was promulgated under 1977 SMCRA.⁸⁰ In issuing the Stream Protection Rule in 2016, the Office of Surface Mining Reclamation and Enforcement (OSM) stated that the new rule was aimed at improving the balance between environmental protection and the nation’s need for coal as an energy source, while providing better protection for water supplies, groundwater quality, and protection of fish and wildlife from adverse impacts

⁷² 30 U.S.C. § 1202(b).

⁷³ See 30 C.F.R. 816.57 and 817.57 (regarding what additional performance standards apply to mining activities conducted in or through a perennial or intermittent stream on the surface of land within 100 feet of a perennial or intermittent stream).

⁷⁴ Stream Buffer Zone Rule, 48 Fed. Reg. 30,312 (June 30, 1983).

⁷⁵ Excess Spoil, Coal Mine Waste, and Buffers for Perennial and Intermittent Streams, Part II, 73 Fed. Reg. 75,814 (Dec. 12, 2008), to amend 30 C.F.R. Parts 780, 784, 816, and 817. (vacated)

⁷⁶ *Nat’l Parks Conservation Ass’n v. Jewell*, 62 F. Supp. 3d 7, 2014 U.S. Dist. LEXIS 152383, at *13-*14 (D.D.C. 2014).

⁷⁷ Interagency Cooperation Under the ESA, 76 Fed. Reg. 76,272-76,287 (Dec. 16, 2008); the G.W. Bush administration also gave economic activity equal priority with preserving the forests’ ecological health and required forest management plan to focus on the overall health of the forest rather than on counting and preserving the population of endangered species; an EIS was no longer required to accompany the management plan (Dec. 28, 2004).

⁷⁸ Obama Presidential Memorandum on Scientific Integrity for Heads of Executive Departments, and Agencies (March 3, 2009), <https://www.gpo.gov/fdsys/pkg/CFR-2010-title3-vol1/pdf/CFR-2010-title3-vol1-other-id210.pdf>.

⁷⁹ President’s Exec. Order No. 13,563, Improving Regulations and Regulatory Review, 76 Fed. Reg. 3821-3823 (Jan. 21, 2009), <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>.

⁸⁰ 30 U.S.C. §§ 1201 – 1328.

of coal mining.⁸¹ The rule had restricted coal companies from dumping mining wastes into streams and waterways, and required that they assist in the monitoring and clean up.

Over a seven-year period during the Obama administration, the OSM examined thousands of documents, studying the interrelationship of coal mining and ecosystems. After following the Administrative Procedures Act (APA) notice and comment requirements and seeking industry and community input, it issued its Stream Protection Rule on December 19, 2016. The rule went into effect 30 days later, on the last day of the Obama presidency. This rule required a baseline assessment of ecosystems and required coal companies to monitor affected streams and develop a plan to restore damaged waterways. This was a prerequisite to receiving a permit for new surface or underground mining activities; the company was required to demonstrate that it would avoid causing damage to the “hydrological balance” of waterways (a controversial term that was defined in detail). Although environmentalists believed that the rule did not go far enough, it was deemed to provide more protection than prior rules and the implementation of the rule was estimated to improve protection of 6000 miles of streams and 50,000 acres of forest.⁸²

2. Coal Proponents use CRA and Executive Order to Promote Coal Interests

In contrast, the coal industry viewed the Stream Protection Rule as an overly broad attempt to make coal mining economically infeasible. According to a White House press release, over 600 coal mines closed from 2009 to 2015.⁸³ Correlated with a decline in coal production nationwide, coal mining jobs declined from 850,000 in the 1920s to 50,000 by the end of 2015⁸⁴ (with a loss of 36,000 jobs since 2009). Fearing that the Stream Protection Rule would “regulate the coal mining industry right out of business,” Southeast Ohio GOP Congressman Bill Johnson introduced House Joint Resolution 38,⁸⁵ using the CRA to “disapprove” the Obama era Stream Protection Rule.⁸⁶ Responding to such concerns, President Trump signed House Joint Resolution 38 to “end the war on coal” and bring back coal jobs.⁸⁷ In addition, President Trump’s Energy Independence Order ends the moratorium on coal leases on federal land.⁸⁸

The Bureau of Land Management (BLM) in the Department of Interior administers 306 coal leases in eleven states, producing over 4.3 billion tons of coal in the past ten years,

⁸¹ Stream Protection Rule, Final Rule Summary, 81 Fed. Reg. 93,066 at 93,066.

⁸² Brad Plumer, *Why Trump Just Killed a Rule Restricting Coal Companies from Dumping Waste in Streams*, <http://www.vox.com/2017/2/2/14488448/stream-protection-rule> (last visited Apr. 28, 2017).

⁸³ Press Release, The White House, President Trump: Putting Coal Country Back to Work (Feb. 16, 2017), <http://www.whitehouse.gov/the-press-office/2017/02/16/president-trump-putting-coal-country-back-work>.

⁸⁴ *Mine Wars: The Struggle for Coal Miners’ Health Care and Pension Benefits Comes to a Head*, THE CONVERSATION (Apr. 27, 2017), <https://www.rawstory.com/2017/04/mine-wars-the-struggle-for-coal-miners-health-care-and-pension-benefits-comes-to-a-head/>.

⁸⁵ H.J.Res. 38, 115 Cong (2017) (enacted Feb. 16, 2017), to be codified as Public Law No. 115-6, <http://www.congress.gov/bill/115th-congress/house-joint-resolution/38text>.

⁸⁶ Stream Protection Rule: A Rule by Surface Mining Reclamation and Enforcement Office, 81 Fed. Reg. 93,066 (Dec. 21, 2016) (was to be codified at 30 C.F.R. Parts 700-827).

⁸⁷ The White House Press Release, President Trump: Putting Coal Country Back to Work (Feb. 16, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/16/president-trump-putting-coal-country-back-work>.

⁸⁸ Exec. Order No. 13,783, Promoting Energy Independence and Economic Growth, Sec. 2, 82 Fed. Reg. 16093 (March 31, 2017).

especially in the Powder River Basin in Wyoming and Montana.⁸⁹ In 2016, the Obama administration halted new coal leases on federal lands, ordering a three-year Programmatic Environmental Impact Statement (EIS) review to be completed as a prerequisite to lifting the moratorium.⁹⁰ It also ordered a review of royalties for coal extraction paid by mining companies to the United States government, with the implication that that the royalties paid should be higher. Pursuant to the congressional resolution and President Trump's executive order,⁹¹ Secretary of the Interior Ryan Zinke issued two secretarial orders. He issued Secretarial Order 3349 to reexamine climate change policies guidance,⁹² despite the finding by the Wilderness Society and Center for American Progress that combustion of coal from federal lands in the Powder River Basin contributes eleven percent of GHG emissions in 2014.⁹³ Secretarial Order 3348⁹⁴ lifted the moratorium on new coal leases on federal lands and "paused" work on the Programmatic EIS.

There is no doubt that the coal industry is at a crisis point. The demand for coal has been reduced by cheaper natural gas, state renewable energy standards and federal environmental regulations, such as the anticipated implementation of the Clean Power Plan.⁹⁵ In light of the growing trend toward using natural gas in power plants and biofuels, and solar and wind power, there is no guarantee that the coal jobs will come back. In addition, the repeal of rules such as the Stream Protection Rule actually diminishes higher paying jobs associated with environmental compliance, some of which had been employment for former mine workers.⁹⁶

3. Court Challenges to Reviving Coal Leases on Public Lands

In response to the opening of coal leases on federal land, four attorneys general⁹⁷ have filed a suit in Great Falls, Montana,⁹⁸ arguing that the policy reversal was "arbitrary and capricious," being made without considering the environmental effects or ensuring that the program provides fair market value for the publically owned coal.⁹⁹ They also argue that it will have negative effects on climate change. Similar arguments have been made in a citizen suit by

⁸⁹ Bureau of Land Management, Notice of Intent to Prepare a Programmatic Environmental Impact Statement to Review the Federal Coal Program and To Conduct Public Scoping Meeting, 81 Fed. Reg. 17,720 (March 30, 2017), <https://www.federalregister.gov/documents/2016/03/30/2016-07138/notice-of-intent-to-prepare-a-programmatic-environmental-impact-statement-to-review-the-federal-coal>.

⁹⁰ *Id.*

⁹¹ Exec. Order No. 13,783, Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16093 (March 31, 2017).

⁹² Secretarial Order 3346, Secretary of Interior Zinke (March 29, 2017), https://www.doi.gov/sites/doi.gov/files/uploads/so_3349_-_american_energy_independence.pdf.

⁹³ See *U.S. Halts Leasing of Federal Land for Coal Mining*, BLOOMBURG, Jan. 15, 2016 at 10:22 AM, <https://www.bloomberg.com/news/articles/2016-01-15/u-s-halts-new-leases-of-public-land-for-coal-exploration>; *Coal Lease*, NY TIMES, May 9, 2017.

⁹⁴ Secretarial Order 3348, Secretary of Interior Zinke, Concerning the Federal Coal Moratorium (March 29, 2017), https://www.doi.gov/sites/doi.gov/files/uploads/so_3348_coal_moratorium.pdf.

⁹⁵ Center for Climate and Energy Solutions, *Quick Facts*, <https://www.c2es.org/energy/source/coal> (last visited Apr. 28, 2017).

⁹⁶ In Coal Country, Environmental Regulations Are Creating Jobs, Ohio Valley Resource, NATIONAL PUBLIC RADIO (Apr. 13, 2017).

⁹⁷ California, New Mexico, New York and Washington.

⁹⁸ *California v. Zinke*, Case No. cv-17-42-GF-BBM (D. Mont. filed May 9, 2017).

⁹⁹ See *States Sue over Trump Decision to Restart Coal Lease Program*, NY TIMES, May 9, 2017 at 6:58, https://www.nytimes.com/aponline/2017/05/09/us/ap-us-interior-coal-lawsuit.html?_r=0.

several nongovernmental organizations (NGOs), including Citizens for Clean Energy, Defenders of Wildlife and the Sierra Club,¹⁰⁰ but the State of Wyoming is seeking to intervene to prevent disruption of leases¹⁰¹ and a bill has been introduced in the Wyoming state legislature to ban the state utilities from using solar and wind as sources.¹⁰²

4. Mine Safety and Worker Benefit Concerns

The asserted reason for policy changes favoring coal is to bring back “good” coal jobs. Coal jobs have always exposed workers to serious health impacts, such as black lung disease, and coal unions have long fought uphill battles to acquire and maintain health and pension benefits. How to improve mine safety and provide health care benefits for miners has itself been controversial. The proposed Robert C. Byrd Mine Safety Protection Act of 2017 (Senate bill 854 and House Resolution 1903)¹⁰³ sought to improve mine safety and miner’s health, but the Trump administration may see this as an impediment to “job creation” and contrary to deregulated support of mine owners. Complicating the issues is fact that the Affordable Care Act provides black lung disease benefits to coal workers, which may be in jeopardy if the act is replaced.¹⁰⁴ Miners face imminent danger of losing health care and pension benefits. As part of the April 30 larger fiscal spending agreement, the federal government and mining companies (even those in bankruptcy) will continue to fund health care benefits, but did not address the pension fund crisis. United Mineworkers for America President Cecil Roberts urges passage of the Mine Safety Protection Act as a more permanent solution.¹⁰⁵

Part of the debate is over the appropriate response and the scope of a 1946 commitment. After President Truman temporarily imposed wage and price controls on the nation’s coal mine industry, the conflict was settled with the Krug-Lewis Agreement with the United Mine Workers Union, establishing health and pension benefits for coal industry workers.¹⁰⁶ Was this a temporary or long-term commitment? Health benefits of coal miners are set to expire this Spring, as United Mine Worker health and pension trust funds have reached a structural deficit and many of largest coal companies declared bankruptcy, discarding their obligations to former

¹⁰⁰ *Citizens for Clean Energy v. U.S. Dept. of Interior*, Case 4:17-cv-00030-BMM26 (D. Montana filed March 29, 2017).

¹⁰¹ *Id.*, Motion to Intervene filed April 27, 2017.

¹⁰² Wyoming Tries to Prop up Coal by Banning Clean Energy, <http://www.sierraclub.org/sierra/green-life/wyoming-tries-prop-coal-banning-clean-energy> (last visited May 19, 2017).

¹⁰³ Robert C. Byrd Mine Safety Protection Act, S. 854, 115th Congress, <https://www.congress.gov/bill/115th-congress/senate-bill/854> (04/05/2017 read twice and referred to the Committee on Health, Education, Labor, and Pensions) and H. 1903 <https://www.congress.gov/bill/115th-congress/house-bill/1903> (04/05/2017 Referred to the House Committee on Education and the Workforce) (last visited Apr. 29, 2017).

¹⁰⁴ Obamacare Repeal Threatens A Health Benefit Popular in Coal Country, Morning Edition, NPR, <http://www.npr.org/sections/health-shots/2017/01/24/510668899/obamacare-repeal-threatens-a-health-benefit-popular-in-coal-country> (Jan. 24, 2017); *see also*,

Small Business Regulatory Enforcement Fairness Act (SBREFA), Title II, Subtitle E. P.L. 104-121, 5 U.S.C. § 601 (1996).

¹⁰⁵ *See* Valerie Volcovici, *Coal Miners Health Benefit Deal Reached*, REUTERS, May 1, 2017, <https://www.usnews.com/news/us/articles/2017-05-01/us-congress-secures-health-benefits-for-coal-miners>.

¹⁰⁶ Harry S. Truman, Statement by the President Endorsing a Plan for Negotiations Between Coal Miners and Operators (Nov. 15, 1946), (as reported in Gerhard Peters and John T. Woolley, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=12548>).

workers. The Miners Protection Act of 2017,¹⁰⁷ introduced by Democratic Senator Joe Manchin of West Virginia, would make up the deficit in both the health care and pension funds by using money from a fund that was supposed to be dedicated to cleaning up abandoned mines. The Congressional Budget Office previously estimated that funding would require \$2.2 billion for health care and \$1.7 billion for the pension trust fund over a ten-year period. Senate Majority Leader Mitch McConnell of Kentucky opposes bailing out the pension fund.¹⁰⁸ Environmentalists oppose diversion of funds dedicated to cleaning up abandoned mines, cognizant of the water quality problems that persist with inadequate funding for cleanup.

C. Environmental Review Expedited of Energy Infrastructure Projects

In the first week of his presidency, Trump issued an Executive Order on Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects.¹⁰⁹ The stated purpose is to strengthen our economic platform and create millions of jobs. It is specifically aimed at streamlining and expediting environmental reviews to facilitate projects associated with “the U.S. electric grid and telecommunications systems and repairing and upgrading critical port facilities, airports, pipelines, bridges, and highways.”¹¹⁰ Pursuant to this order, the Chairman of the White House Council on Environmental Quality (CEQ) has 30 days to determine whether a request qualifies as a “high priority” infrastructure project.¹¹¹ When that determination is made, it triggers “expedited procedures and deadlines for completion of environmental reviews and approvals for such projects.”¹¹² The promotion of such energy sector projects (arguably linked to job creation) now has a higher weight than environmental protection of water and air quality. The thirty day deadlines is arbitrary and does not facilitate genuine consideration of environmental impacts.

1. Keystone XL Pipeline

Projects specifically encouraged by President Trump’s executive memoranda include expediting approval for the Keystone XL Pipeline¹¹³ and the Dakota Access Pipeline.¹¹⁴ The Keystone XL Pipeline project involves the construction of an 875-mile pipeline from Morgan, Montana to Steele City, Nebraska that would deliver up to 830,000 barrels per day of crude oil

¹⁰⁷ The Miners Protection Act of 2017, S. 175, 115th Cong., <https://www.congress.gov/bill/115thcongress/housebill/179?q=%7B%22search%22%3A%5B%22miners+protection+act%22%5D%7D&r=1> (02/10/2017 referred to the Subcommittee on Energy and Mineral Resources).

¹⁰⁸ Mine Wars: The Struggle for Coal Miners’ Health Care and Pension Benefits Comes to a Head, THE CONVERSATION, <https://www.rawstory.com/2017/04/mine-wars-the-struggle-for-coal-miners-health-care-and-pension-benefits-comes-to-a-head/> (last visited Apr. 27, 2017).

¹⁰⁹ Exec. Order No. 13,766. Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, 82 Fed. Reg. 8657 (Jan. 30, 2017).

¹¹⁰ Exec. Order No. 13,766, § 1.

¹¹¹ Exec. Order No. 13,766, § 2.

¹¹² Exec. Order No. 13,766, § 3.

¹¹³ Presidential Memorandum Regarding Construction of the Keystone XL Pipeline (Jan. 24, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-keystone-xl-pipeline>.

¹¹⁴ Presidential Memorandum Regarding Construction of the Dakota Access Pipeline Memorandum for the Secretary of the Army, 82 Fed. Reg. 8661 (Jan. 30, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-dakota-access-pipeline>.

from the western Canadian Sedimentary Basin. Keystone XL was granted a permit in 2008, after which it applied for a permit to expand the route. After the 2011 EIS was issued, changes to the route were made to minimize perceived environmental concerns, including avoidance of the Sand Hills region and villages of Clarks and Western, Nebraska, moving further away from water wellhead protection areas.¹¹⁵ Tribal consultation included sixty-seven of eight-four tribes,¹¹⁶ however, there was a major protest against the project in Washington, D.C. on November 6, 2011.¹¹⁷ In the preparation of the Supplemental EIS, the Department of State considered climate change analysis, impact on wildlife, endangered species, wetlands, water and air quality, and the impact on the lifestyle of people in the area. A comparison of risks with transportation of oil by rail was analyzed, with the conclusion being that the risk of an oil spill from rail transport was greater than with the type of pipeline being installed.¹¹⁸ The Final Supplemental EIS was issued in January of 2014.¹¹⁹ The concerns it raised regarding spills and other environmental issues associated with the pipeline, however, resulted in the rejection of the permit in 2015 by John Kerry, the Secretary of State in the Obama administration.¹²⁰

The Trump Presidential Memorandum Regarding Construction of the Keystone XL Pipeline¹²¹ invited TransCanada Keystone Pipeline, L.P. to re-submit its application for expeditious review and directed the Secretary of State to make a final decision on issuance of the permit within 60 days. Because this is a cross-border international pipeline, it is the Secretary of State who makes the decision on whether the permit can be issued, rather than the EPA. President Trump ordered reanalysis of the existing Supplemental EIS to satisfy National Environmental Policy Act (NEPA) and the ESA consultation requirements “to the maximum extent permitted by law.”¹²² In addition, the Army Corps of Engineers and the Assistant Secretary of the Army for Civil Works were instructed to utilize Nationwide Permit 12 under the CWA section 404(e) to allow the pipeline to cross water bodies.¹²³ The Secretary of the Interior, BLM and the FWS are to (a) expedite steps to review Migratory Bird Treaty Act considerations,¹²⁴ and (b) acquire grants of right-of-way and temporary use permits.¹²⁵ The

¹¹⁵ Final Supplemental Environmental Impact Statement for the Keystone XL Project (Keystone Supp. EIS), Executive Summary, ES-1 (Jan. 4, 2014).

¹¹⁶ Keystone Supp. EIS, ES 4.14.1.

¹¹⁷ *Thousands in D.C. Protest Pipeline*, CBS NEWS (Nov. 6, 2011), <http://www.cbsnews.com/news/thousands-in-dc-protest-pipeline/>.

¹¹⁸ Keystone SEIS, ES 5.4.3.

¹¹⁹ Keystone SEIS.

¹²⁰ Keystone Pipeline Permit Determination, Secretary of State John Kerry (Nov. 6, 2015), <https://2009-2017.state.gov/secretary/remarks/2015/11/249249.htm>, Notice of a Decision to Deny a Presidential permit to TransCanada Keystone Pipeline LP for the Proposed Keystone XL Pipeline, 80 Fed. Reg. 76,611 (Dec. 9, 2015), <https://www.federalregister.gov/documents/2015/12/09/2015-31038/notice-of-a-decision-to-deny-a-presidential-permit-to-transcanada-keystone-pipeline-lp-for-the-proposed-keystone-l-pipeline>.

¹²¹ Presidential Memorandum Regarding Construction of the Keystone XL Pipeline (Jan. 24, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-keystone-xl-pipeline>.

¹²² Keystone XL Memorandum, § 3(a).

¹²³ Keystone XL Memorandum, § 3(b).

¹²⁴ Migratory Bird Treaty Act, 16 U.S.C. § 703.

¹²⁵ Keystone XL Memorandum, § 3(c).

Under Secretary of State for Political Affairs, Thomas Shannon, Jr., issued the permit for the Keystone XL pipeline on March 23, 2017.¹²⁶

While agency decision-makers are not required to prioritize environmental concerns over all other factors, they are to balance those considerations with a serious review of the EIS content. President Trump's Memorandum presumptively concluded that other priorities would prevail before any "re-review" of the Supplemental EIS had occurred. Environmental NGOs and Native American groups filed two lawsuits challenging the decision in federal district court in Montana¹²⁷. Six environmental NGOs argued that the three-year-old Supplemental EIS is out of date and that the APA was violated when the Obama administration decision against granting the Keystone XL Pipeline permit was "arbitrarily" reversed. The Keystone pipeline (and its related pipeline segments) will carry carbon-heavy crude oil from the tar sands of Canada to the Gulf of Mexico; the tar sands oil is one of the "planet's most environmentally destructive energy sources."¹²⁸

The 2017 permit recognizes that the permittee is responsible for obtaining any necessary right-of-way grants of easements.¹²⁹ An additional roadblock to the completion of the pipeline is its unpopularity with landowners in Nebraska, who do not want to grant easement rights for the pipeline to cross their lands, fearing contamination of agricultural land and water resources. Nearly one hundred landowners in Nebraska challenged actions by TransCanada to obtain pipeline easements. Despite a 2016 court ruling requiring TransCanada to pay legal fees and costs of nineteen landowners who have fought eminent domain proceedings, the company is resisting such payments.¹³⁰

Climate advocates and members of the Indian native rights movement have voiced strong opposition to fossil fuel infrastructure projects, such as the Dakota Access pipeline, and the Keystone XL pipeline. Pipeline proponents argue that they transport oil and gas more safely than trains or trucks can, but environmentalists say pipelines threaten the contamination of drinking water.¹³¹ The Director of the Indigenous Environmental Network (IGN), Tom Goldtooth, admonished that

For too long, the U.S. government has pushed around Indigenous peoples and undervalued our inherent rights, sovereignty, culture and our responsibilities as guardians of Mother Earth and all life, while fueling catastrophic extreme weather and climate change with an addiction to fossil fuels. The time has come to keep fossil fuels in the

¹²⁶ Issuance of Presidential Permit to TransCanada for Keystone XL Pipeline, L.P., Secretary of State's Office (March 24, 2017), <https://www.state.gov/r/pa/prs/ps/2017/03/269074.htm>, 82 Fed. Reg. 16467 (Apr. 4, 2017) <https://www.federalregister.gov/documents/2017/04/04/2017-06646/notice-of-issuance-of-a-presidential-permit-to-transcanada-keystone-pipeline-lp>.

¹²⁷ *Northern Plains Resource Council et al. v. Shannon, Jr., et al.*, Case 4:17-cv-00031-BMM Document 1 (D. Mont. Filed March 30, 2017).

¹²⁸ Mike Ludwig, Indigenous and Environmental Groups Sue to Block Rump's Keystone XL Permit, TRUTHOUT (March 31, 2017), <http://www.truth-out.org/news/item/40056-indigenous-and-environmental-groups-sue-to-block-trump-s-keystone-xl-permit>.

¹²⁹ Art. 8 § 1, Permit for Keystone Pipeline.

¹³⁰ *Judge Orders TransCanada to Pay Landowners' Legal Fees*, HOLT COUNTY INDEPENDENT (July 6, 2016), http://www.holtindependent.com/news/judge-orders-transcanada-to-pay-landowners-legal-fees/article_9e5bf4c4-43a3-11e6-8999-8789378ca78a.html.

¹³¹ Trump Executive Orders, Memorandum, Proclamations and Presidential Action Guide, BUSINESS INSIDER (2017), <http://www.businessinsider.com/trump-executive-orders-memorandum-proclamations-presidential-action-guide-2017-1/#3-presidential-memoranda-january-24-approving-pipelines-54>.

ground and shut down risky extreme energy projects like the tar sands that are poisoning our families, wildlife, water sources and destroying our climate.

The IGN and the North Coast Rivers Alliance also filed a lawsuit challenging the Keystone XL permit, and claiming the Department of State, Department of Interior and the FWS violated the ESA, the Migratory Bird Treaty Act, the Bald Eagle and Golden Eagle Protection Act, as well as the NEPA and the APA.¹³²

2. Dakota Access Pipeline

Native American groups also have led the fight against the Dakota Access pipeline, a 1,200-mile pipeline from Bakken oil fields to Illinois which is slated to cross the Missouri River and the Standing Rock Sioux reservation. Native Americans camped out in freezing cold weather to protest the potential damage to their water supply after a route change brought the pipeline's crossing under Lake Oahe (primary water source for the reservation), as well as a nearby crossing of the Missouri River.¹³³ Although water contamination has not yet occurred, there have already been two leaks on the Dakota Access Pipeline in March of 2017. Due to a leaky flange at the pipeline terminal in Watford City, North Dakota, eighty-four gallons were leaked. Twenty gallons were leaked in Mercer County due to an aboveground valve with a manufacturing defect. While both leaks were quickly contained, they foreshadow the fears of environmentalists.¹³⁴

After President Trump's Presidential Memorandum Regarding Construction of the Dakota Access Pipeline,¹³⁵ the U.S. Army Corp of Engineers conducted an expedited approval of a 30-year easement for the Dakota Access pipeline.¹³⁶ The Standing Rock Sioux Tribe has asserted three lines of attack in challenging the pipeline in its lawsuit against the Corps. In *Standing Rock I*, the District of Columbia District Court rejected the argument that clearing and grading of the land violated cultural and historical rights.¹³⁷ In response to President Trump's Memorandum, the Army Corps of Engineers filed notice on February 7, 2017 that it was granting the easement and terminating its intent to conduct a new EIS (recommended by the EPA in 2016).¹³⁸ In *Standing Rock II*, the same court rejected a challenge based on their Religious Freedom

¹³² *Indigenous Environmental Network et. al. v. Dept. of State*, Case 4:17-cv-00029-BMM Document 1 (Dist. Mont. Filed March 27, 2017).

¹³³ Phil McKenna, 2016: How Dakota Pipeline Protest Became a Native American Cry for Justice, INSIDER CLIMATE NEWS, <https://insideclimatenews.org/news/22122016/standing-rock-dakota-access-pipeline-native-american-protest-environmental-justice> (last visited May 7, 2017).

¹³⁴ *Leaks Found on Dakota Access Pipeline System*, (Minneapolis) STAR TRIBUNE (May 22, 2017), <http://www.startribune.com/apnewsbreak-2-more-leaks-found-along-dakota-access-pipeline/423678613/>.

¹³⁵ Presidential Memorandum Regarding Construction of the Dakota Access Pipeline Memorandum for the Secretary of the Army, 82 Fed. Reg. 8661 (Jan. 30, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-dakota-access-pipeline>.

¹³⁶ Juliet Eilperin & Brady Dennis, *Trump Administration to Approve Final Permit for Dakota Access Pipeline*, WASHINGTON POST (Feb. 7, 2017), www.washingtonpost.com/news/energy-environment/wp/2017/02/07/trump-administration-to-approve-final-permit-for-dakota-access-pipeline/?utm_term=.1089c2953085.

¹³⁷ *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (Standing Rock I)*, 205 F. Supp. 3d 4, 7 (D.D.C. 2016).

¹³⁸ *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (Standing Rock III)*, Case No 1:16-cv-1534-JEB (D.C. Dist. filed Feb. 9, 2017).

Restoration Act.¹³⁹ In *Standing Rock III* the tribe asserts negative environmental impact. Native American tribes have asserted that they have treaty rights to the land and water that the pipeline will cross and that the tribe's fishing and hunting rights are necessary to the subsistence living of some of its tribe members. On June 14, 2017 the District of Columbia court issued a memorandum opinion that agreed that the Corps "did not adequately consider the impacts of an oil spill on fishing rights, hunting rights, or environmental justice, or the degree to which the pipeline's effects are likely to be highly controversial," but reserved the question of whether to issue an injunction for a future hearing.¹⁴⁰

D. Offshore Drilling for Oil Exploration

The Outer Continental Shelf Lands Act (OCSLA)¹⁴¹ establishes policy for the management and exploration of oil and natural gas in the Outer Continental Shelf, including protection of the marine and coastal environment, promotion of shore protection, and restoration of coastal beach and wetlands, as well as the creation of an oil spill liability fund.¹⁴² Oil reserves along the continental shelf of the United States include 73.69 billion barrels off the Gulf of Mexico, 50 billion off Alaska's coast, in addition to 13.07 billion off the Pacific coast and 11.39 billion off the Atlantic coasts.¹⁴³

President Obama used his presidential authority under the OCSLA¹⁴⁴ to place land in a protective zone, under section 12(a) authority to "withdraw from disposition any of the unleased lands of the outer Continental Shelf." In issuing the December 20, 2016 order, President Obama recognized the ecological sensitivity of the Beaufort Sea Planning Area and Chukchi Sea Planning Area described in the report of the Arctic Executive Steering Committee Task Force on Oil Spill Response, chaired by the United States Coast Guard, stating that he was issuing the order

Consistent with principles of responsible public stewardship entrusted to this office, with due consideration of (1) the important, irreplaceable values of the Chukchi Sea and portions of the Beaufort Sea for marine mammals, other wildlife, wildlife habitat, scientific research, and Alaska Native subsistence use; (2) the vulnerability of these ecosystems to an oil spill; and (3) the unique logistical, operational, safety, and scientific challenges and risks of oil extraction and spill response in these Arctic waters.¹⁴⁵

¹³⁹ *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (Standing Rock II)*, 2017 W. L. 908538 at *1 (D.D.C. March 7, 2017).

¹⁴⁰ *Id.* Memorandum Opinion at 2 (D.D.C. June 14, 2017).

¹⁴¹ Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331 (1953).

¹⁴² OCSLA summary, [http://www.thecre.com/fedlaw/legal14coast/outer continental shelf lands act legal matters.htm](http://www.thecre.com/fedlaw/legal14coast/outer%20continental%20shelf%20lands%20act%20legal%20matters.htm).

¹⁴³ Tom DiChristopher, Obama Invokes 1953 Law to Indefinitely Block Drilling in Arctic and Atlantic Oceans (Dec 20, 2016), <http://www.cnn.com/2016/12/20/obama-expected-to-invoke-1953-law-to-block-offshore-drilling.html?view=story&%24DEVICE%24=native-android-mobile>.

¹⁴⁴ Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1341(a) (1953).

¹⁴⁵ Obama Presidential Memorandum — Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf from Mineral Leasing (Dec. 20, 2016), <http://www.the-president.us/16670.html> and *see also* Presidential Memorandum – Withdrawal of Certain Areas Off Atlantic Coast on the Outer Continental Shelf from Mineral Leasing (Dec. 20, 2016), <http://www.the-president.us/16668.html>.

This Obama Presidential Order was preceded by a rule change limiting oil exploration in the Arctic issued by the Safety and Environmental Enforcement Bureau and Ocean Energy Management Bureau in July of 2016.¹⁴⁶

In the Executive Order Implementing an America-First Offshore Energy Strategy,¹⁴⁷ President Trump directed his Secretary of Interior, Ryan Zinke, to review offshore oil drilling policies for the outer-continental shelf. He capped off his first 100 day on April 28, 2017 by reversing President Obama's Arctic Presidential Memorandum that had established a ban on leasing certain offshore lands for exploration development or production of mineral rights.¹⁴⁸ While President Trump's order primarily focuses on oil drilling, it also includes offshore energy activities such as "wind, oil, natural gas, methane hydrates, and any other sources that the Secretary of Commerce deems appropriate." The first U.S. offshore wind farm began off the Rhode Island coast in December of 2016.¹⁴⁹

Since no president has ever attempted to use the authority to remove land protected under the OCSLA, court challenges are expected.¹⁵⁰ Plans are subject to a five-year review, so a new 5-year plan could open areas along the coasts of Virginia, Georgia, North and South Carolina for oil and gas exploration, a measure which several coastal cities have opposed with resolutions. While the current governor of Alaska supports the order,¹⁵¹ there are grave concerns by environmentalists who remember the consequences of the 1989 Exxon Valdez oil spill and 2010 BP Deepwater Horizon oil spill.

The 1989 Exxon Valdez oil spill off the coast of Prince William Sound, Alaska resulted in devastating loss of wildlife. It is estimated that 250,000 seabirds, 2,800 sea otters, 300 harbor seals, 250 bald eagles, up to 22 killer whales died, and billions of salmon and herring eggs were destroyed as a result of this oil spill.¹⁵² Financial ramifications included \$2.1 billion in cleanup costs, in addition to \$900 million in fines and over \$303 million in private actions. Punitive damages were reduced by the Supreme Court's interpretation of maritime common law as late as 2008.¹⁵³

The BP Deepwater Horizon oil spill in 2010 resulted in over five million barrels of oil in the Gulf of Mexico. Exposure to oil has resulted in abnormal developments in many species of fish, significantly impacting the coastal shrimp and Atlantic Bluefin tuna industries. An estimated 32 percent of laughing gulls died as a result of the spill and at least 27,000 Kemp's

¹⁴⁶ Oil and Gas and Sulfur Operations on the Outer Continental Shelf-Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf, 81 Fed. Reg. 46,477 (July 15, 2016).

¹⁴⁷ Exec. Order No. 13,795, Implementing an America-First Offshore Energy Strategy, 82 Fed. Reg. 20815 (May 3, 2017).

¹⁴⁸ Presidential Memorandum—Withdrawal of Certain Portions of the United State Arctic Outer Continental Shelf from Mineral Leasing (Dec. 20, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/12/20/presidential-memorandum-withdrawal-certain-portions-united-states-arctic>.

¹⁴⁹ Tatiana Schlossberg, America's First Offshore Wind Farm Spins to Life, NY Times, Dec. 14, 2017, https://www.nytimes.com/2016/12/14/science/wind-power-block-island.html?_r=0.

¹⁵⁰ Tom DiChristopher, Environmental Groups Sue Trump in a Bid to Defend Obama's Arctic Drilling Ban, CNN (May 3, 2017), <http://www.cnn.com/2017/05/03/conservation-groups-sue-trump-to-defend-obamas-arctic-drilling-ban.html?view=story&%24DEVICE%24=native-android-mobile>.

¹⁵¹ Jason Dearen and Jill Colvin, Experts: Long Road Ahead for Trump Offshore Drilling Order, WASHINGTON POST (April 28, 2017), https://www.washingtonpost.com/politics/trump-to-sign-order-aimed-at-expanding-offshore-drilling/2017/04/27/984c9af4-2bae-11e7-9081-f5405f56d3e4_story.html?utm_term=.f9349de8dd79.

¹⁵² Questions and Answers about the Spill, EXXON VALDEZ OIL SPILL TRUSTEES COUNCIL, <http://www.evostc.state.ak.us/%3FFA=facts.QA> (last visited May 21, 2017).

¹⁵³ *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

ridley sea turtles (an endangered species) were killed. The devastating effects on marine animals and birds continues years after our nation's worst oil spill. Bottlenose dolphins were dying at four times historic rates four years after the oil spills and long-term impact on the wetlands and fisheries is still being studied.¹⁵⁴ Health problems for humans and marine life were compounded by the use of BP's Corexit dispersants used to break up oil slicks. The resulting smaller oil molecules have been ingested by marine life, with shrimp in the area being found with oil pouches and dolphins have hemorrhaged to death. Serious illness of people working with the dispersant has been reported.¹⁵⁵

There was a \$4.525 billion settlement between BP and the United States Justice Department. Of that amount, there was a \$1.256 billion criminal fine, the largest in United States' history and a \$525 million settlement with the Securities and Exchange Commission. In addition, \$2.4 billion went to the National Fish and Wildlife Foundation and \$1 billion to the United States Coast Guard to help reimburse cleanup efforts. While President Trump's offshore energy strategy is aimed at encouraging new exploration of oil reserves, Royal Dutch Shell stopped drilling in the Chukchi Sea in 2015, after spending \$7 billion in unsuccessful oil exploration. ConocoPhillips, Statoil, Chevron, BP and Exxon have all generally suspended offshore drilling in the Arctic area, deeming it not to be profitable currently. In 2008 the Interior Department withdrew several sales in Alaskan waters due to low demand.¹⁵⁶

E. Fracking Rule Stayed

Interior's BLM issued the 2015 "Fracking Rule"¹⁵⁷ to minimize the risk of water contamination through the hydraulic fracturing practice which involves injecting a mixture of chemicals and water at high pressure into underground rock formations to force out oil and gas. Wyoming District Judge Scott Skavdahl stayed of the implementation of the rule in June 2016, holding that the BLM "lacked Congressional authority to promulgate the regulations."¹⁵⁸

Secretary of Interior Ryan Zinke directed the BLM to rewrite the 2015 rule on hydraulic fracturing on public land,¹⁵⁹ as the Department of Justice is withdrawing from the appeal of the stay.¹⁶⁰ Since then Attorney General in Oklahoma, Scott Pruitt was heavily supported by the hydraulic fracturing (fracking) industry,¹⁶¹ policies of both EPA and Interior are apt to reflect a

¹⁵⁴ Five Years and Counting Gulf Wildlife in Aftermath of Deep Water Horizon Disaster, http://www.nwf.org/~media/PDFs/water/2015/Gulf-Wildlife-In-the-Aftermath-of-the-Deepwater-Horizon-Disaster_Five-Years-and-Counting.pdf (last visited May 20, 2017).

¹⁵⁵ Dahr Jamail, *Gulf Health Problems Blamed on Dispersed Oil*, TRUTHOUT (Aug. 12, 2010), <http://www.truth-out.org/gulf-health-problems-blamed-dispersed-oil62277>.

¹⁵⁶ No author, *Will Obama's Offshore Drilling Plan be Trumped?*, THE CONVERSATION (Jan. 2, 2017), <http://theconversation.com/will-obamas-offshore-drilling-ban-be-trumped-70125>.

¹⁵⁷ Land Management Bureau's Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands (Fracking Rule), 80 Fed. Reg. 16,127 (March 26, 2015), <https://www.federalregister.gov/documents/2015/03/26/2015-06658/oil-and-gas-hydraulic-fracturing-on-federal-and-indian-lands>.

¹⁵⁸ *State of Wyoming v. U.S. Dept. of Interior*, Case No. 2:15-CV-043-SWS, Order (Dist. Wyo. June 21, 2016), <http://www.wyd.uscourts.gov/pdf/forms/orders/15-cv-043-S%20Order.pdf>.

¹⁵⁹ Lorraine Crow, Trump Administration to Kill Fracking Rule on Public Lands <http://www.ecowatch.com/trump-fracking-public-lands-2316672382.html> (last visited May 14, 2017).

¹⁶⁰ Juliet Eilperin, Interior Dept. to Withdraw Obama-era Fracking Rule, Filings Reveal (March 15, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/03/15/interior-department-to-withdraw-obama-era-fracking-rule-filings-reveal/?utm_term=.0a1047b1e1c1.

¹⁶¹ Robinson Meyer, *Could Scott Pruitt Have Fixed Oklahoma's Earthquake Epidemics?*, (Jan. 18, 2017), <https://www.theatlantic.com/science/archive/2016/12/trumps-epa-pick-is-skeptical-of-more-than-just-climate-change/509960/>.

denial of the impact of fracking on earth movement, water use and water pollution, as the Trump policies focus on reducing restraints on the oil and gas industries.

Even though Texas greatly expanded its wind and solar production when Rick Perry (now Secretary of Energy) was its Governor, he has been tasked with the Trump administration's refocus on coal, oil and nuclear energy, instead of promoting renewable energy or a balance.¹⁶² In addition, Trump is considering Daniel Simmons to lead the Department of Energy's Office of Energy Efficiency and Renewable Energy (EERE) to oversee wind and solar energy, despite the fact that he has spent his career with the Koch Institute for Energy Research, denouncing renewable energy alternatives.¹⁶³

F. Air Quality and Climate Impact Regulation of GHGs

1. EPA Authority to Regulated GHGs

The EPA is empowered to list categories of air pollution and establish emission standards through the Clean Air Act (CAA), 42 U.S.C.S § 7411.¹⁶⁴ Since its inception in 1970, the EPA has developed regulations for six "traditional criteria pollutants" (fine particulate matter (PM), sulfur dioxide, nitrogen dioxide and nitrogen oxide, carbon monoxide, ozone and lead).¹⁶⁵ The Supreme Court decided that the EPA has delegated authority to establish National Ambient Air Quality Standards (NAAQS) for such pollutants.¹⁶⁶

A recent Harvard University study of the long-term effect of the current particulate matter standard of PM 2.5 on Americans over sixty-five concluded that 12,000 lives could be saved annually by reducing the standard by one microgram per cubic meter (ug/m3) nationwide. Another 19,000 lives could be saved if the level of ozone was lowered one part per billion (ppb)¹⁶⁷

In the 2007 decision of *Massachusetts v. Environmental Protection Agency*,¹⁶⁸ the United States Supreme Court recognized the rulemaking authority of the EPA to regulate GHGs pursuant to CAA section 7411. The Supreme Court concluded that greenhouse gases qualify as

¹⁶² See Rmuse, Opinion: After Leading the Nation in Renewable Energy, Rick Perry Targets Solar and Wind Power (Apr. 23, 2017), <http://www.politicususa.com/2017/04/23/leading-nation-renewable-energy-rick-perry-targets-solar-wind-power.html>.

<http://www.kochvs-clean.com/trump-picks-renewable-energy-hater-run-renewable-energy-office/>

¹⁶³ Trump Picks Renewable Energy Hater to Run Renewable Energy Office (May 5, 2017),

<http://www.kochvs-clean.com/trump-picks-renewable-energy-hater-run-renewable-energy-office/>.

¹⁶⁴ See 42 U.S.C. §§7411(c)(2), (d)(2), 7413,7414 (authorizing the EPA to delegate implementation and enforcement authority to the States, while retaining power to inspect, monitor and impose administrative penalties and commence civil actions against polluters).

¹⁶⁵ EPA, <https://www.epa.gov/criteria-air-pollutants> (last visited May 14, 2017).

¹⁶⁶ *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001) (unanimously holding that delegation of authority to the EPA under the CAA does not permit the EPA to consider implementation costs in setting NAAQSs. States, however, can consider the most cost effective way of implementing the NAAQS standards when developing State Implementation Plans (SIPs) for compliance with the CAA).

¹⁶⁷ Harvard T.H. Chan School of Public Health, *Study of U.S. Seniors Strengthens Link Between Air Pollution and Premature Death*, SCIENCE DAILY (June 28, 2017), <https://www.sciencedaily.com/releases/2017/06/170628183211.htm>.

¹⁶⁸ 549 U.S. 497 (2007); *c.f. American Electric Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011) (deciding that the CAA authority to regulate GHGs displaced federal common law nuisance).

“air pollutant[s]” under the CAA.¹⁶⁹ Under the Endangerment Rule in 2009, the EPA issued a finding that CO₂ and other GHGs were linked to climate change and were harmful to human health and the environment.¹⁷⁰ The EPA listed the principal GHGs on the EPA website until Trump’s EPA Director Scott Pruitt ordered the removal of most climate change sources.

In its attempt to comply with the *Massachusetts* court directive, the EPA has developed numerous rules addressing GHG issues, including standards for power plants, the oil and gas industry, and motor vehicles (trucks and light-duty vehicles) under the Tailpipe Rule¹⁷¹ and Triggering Rule.¹⁷²

2. Clean Power Plan – Construction and Deconstruction

The EPA finalized GHG standards for power plants under the Clean Power Plan¹⁷³ in August 2015 and for oil and gas industry sources in June 2016.¹⁷⁴ Under the Clean Power Plan,¹⁷⁵ the EPA directed the states to impose CO₂ limits on existing power plants. The existing source rule would not require the installation of carbon capture controls, but would reduce emissions through energy efficiencies, renewable power, and similar measures “outside the fence line” of the plant (and often outside the control of the plant operators). The final rule established a performance rate target (in units of pounds of CO₂ per net Megawatt-hour produced) for power plants in each state. It then provided the states with an option to establish market-based trading systems to achieve those standards. States were allowed to set mass-based limits on CO₂ emissions (cap-and-trade) to directly address the numerator of the standard. But states could also decide to establish a trading system for low-to-zero emitting renewable energy credits (rate-and-trade) to address the denominator of the standard.¹⁷⁶

The Clean Power Plan was finalized in 2015 on the same day as the EPA issued its New Source Performance Standards (NSPS)¹⁷⁷ for major source GHGs that would automatically set minimum control requirements. Under the final version of the later rule (August 2015), new coal-fired power plants constructed after February 2012 were required to install back-end control devices to capture and dispose of CO₂ emissions.¹⁷⁸

¹⁶⁹ *Massachusetts*, 549 U.S. at 528-529, quoting 42 U.S.C. §7602(g).

¹⁷⁰ EPA Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act” Endangerment Finding (Endangerment Rule), 74 Fed. Reg. 66,496, 66,535 (Dec. 15, 2009). http://epa.gov/climatechange/endangerment/downloads/Federal_Register-EPA-HQ-OAR-2009-0171-Dec.15-09.pdf.

¹⁷¹ CNN Politics (Apr. 29, 2017), <http://www.cnn.com/2017/04/29/politics/epa-climate-change-website/> (last visited May 5, 2017).

¹⁷² EPA Triggering Rule, 75 Fed. Reg. 17,004 (2010).

¹⁷³ EPA Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (Clean Power Plan), 80 Fed. Reg. 64,661 (Oct. 23, 2015), <https://www.federalregister.gov/documents/2015/10/23/2015-22842/carbon-pollution-emission-guidelines-for-existing-stationary-sources-electric-utility-generating>.

¹⁷⁴ EPA Oil & Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources (Methane Rule), 81 Fed. Reg. 35823 EPA (June 3, 2016) (codified at 40 C.F.R. § 60).

¹⁷⁵ Carbon Pollution Emission Guidelines, 80 Fed. Reg. 64661.

¹⁷⁶ Interview with Dr. David Fraley, Director of Environmental Affairs for City Utilities of Springfield, Mo. 1981-2015 in Springfield, Mo. (May16, 2017).

¹⁷⁷ EPA Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64509 (Oct. 23, 2015) (codified at 40 C.F.R. §§ 60, 70, 71, and 98).

¹⁷⁸ Fraley Interview, *supra* note 176.

Under the “Tailoring Rule,”¹⁷⁹ the EPA’s regulation of greenhouse gases initially targeted the largest emitters, requiring power plants, refineries and large industrial plants to obtain New Source Review permits, with a phase-in period for smaller facilities emitting as low as 100 tons per year. These standards attached when Clean Air Act permits are required for new and existing industrial facilities under the New Source Review Prevention of Significant Deterioration (PSD) in attainment areas and under Title V Operating Permit programs.¹⁸⁰

The Supreme Court considered the four rules (Endangerment Finding, Tailpipe Rule, Tailoring Rule, and Triggering Rule), which the District of Columbia Circuit Court had upheld *Utility Air Regulatory Group*.¹⁸¹ In deciding this consolidation of cases in 2014, the Supreme Court reiterated its position that EPA had CAA authority to regulate GHGs, however, it concluded that the EPA Administrator had exceeded that authority in substituting specific GHG emissions thresholds for stationary sources. The EPA did not have discretion to require permits for only sources emitting 100,000 tons per year of CO₂, instead of the 100 tons specified by Congress. Stationary source emissions of GHGs alone could not trigger Title V permitting requirements or the CAA’s PSD requirements. The justices ruled that EPA could require PSD permits that included GHG provisions, but only for those sources that would have been subject to PSD review anyway because of their NAAQS emission levels (based on the six criteria pollutants). Those “anyway” sources could only be required to comply with greenhouse-gas Best Available Control Technology (BACT)¹⁸² if they emitted more than a *de minimis* amount of greenhouse gases. In short, this meant that a newly constructed facility (whether a factory, office building, or restaurant) could not be dragged into the PSD permitting system on the basis of its GHG emissions alone. The result was seen as a victory for industry, as the ruling restricted the EPA’s permitting authority to only 83% of projected GHG emissions, rather than the 86% that would have been covered under the Tailoring Rule.¹⁸³

President Trump’s Energy Independence Order instructed the EPA administrator to deconstruct the Clean Power Plan, suspending, revising and rescinding it “as soon as practicable.”¹⁸⁴ Although the executive order was signed at EPA headquarters, in the presence of oil and coal executives on March 28, 2017, there was an “accidental” press release from the EPA asserting that “[w]alking away from the Clean Power Plan and other climate initiatives, including critical resiliency projects is not just irresponsible - it's irrational.”¹⁸⁵ The Clean Power Plan has been subject to protracted court review. While it is true that the coal and electric industries

¹⁷⁹ EPA, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg 31513 (June 3, 2010) (codified at 40 C.F.R. §§ 51, 52, 70, 71, (revised by 90 Fed. Reg 26183 (May 7, 2015), changing 40 C.F.R. § 52).

¹⁸⁰ Fraley Interview, *supra* note 176.

¹⁸¹ *Utility Air Regulatory Gp. v. EPA.*, 134 S.Ct. 2427, 573 U.S. ____ (2014). (U.S. cite not available)

¹⁸² CAA § 169(3), 42 U.S.C. § 7411(a)(1) (defining the BACT “standard of performance” achievable for the maximum degree of reduction of each pollutant as “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements)” through the application of production processes and available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of each such pollutant, applied to major sources under Title I, Part C).

¹⁸³ Fraley Interview, *supra* note 176.

¹⁸⁴ Exec. Order No. 13,783, Promoting Energy Independence and Economic Growth, Sec. 4, 82 Fed. Reg. 16093 (March 31, 2017).

¹⁸⁵ See E.P.A. Accidental Issues Press Release Slamming Trump’s Climate Policy, VANITY FAIR (March 30, 2017), <http://www.vanityfair.com/news/2017/03/epa-accidentally-issues-press-release-slamming-trumps-climate-policy>.

would likely experience job losses with the implementation of the Plan, the Plan also provided for transition training and benefits for displaced workers. In addition, the Clean Power Plan would generate far more jobs than it would displace and it gave states flexibility in meeting the goals and minimizing costs of compliance and.¹⁸⁶

Four major actions related to the Clean Power Plan are to be suspended while the administration seeks appropriate relief from the courts. Implementation of the Clean Power Plan is now stayed with the District of Columbia Circuit Court granting the state petitioners' motion to hold the consolidated cases in abeyance for 60 days from the April 28, 2017 date of its order.¹⁸⁷

3. Mobile Sources GHG and CAFÉ Standards Challenged

Title II of the Clean Air Act¹⁸⁸ is the basis for the EPA's authority to regulate greenhouse gas emissions from new motor vehicles if the EPA forms a judgment that such emissions contribute to climate change. The 2009 Endangerment Rule¹⁸⁹ and the corresponding Tailpipe Rule¹⁹⁰ found that such emissions contribute to climate change and endanger human health and the environment. The Triggering (or Timing Rule),¹⁹¹ which was actually a policy memo rather than a rule, reaffirmed the Johnson Memo finding that sources would not have to include GHGs in their PSD permits until the effective date of the Tailpipe Rule (the first day that model year 2012 autos could be marketed). That would be the "trigger" after which GHGs would be regulated under the CAA, thereby requiring their inclusion in BACT review.¹⁹² All of these rules were challenged by numerous parties and were argued as coordinated cases in February 2012, as discussed above.¹⁹³

The National Highway Traffic Safety Administration (NHTSA) within the Department of Transportation (DOT) has the primary responsibility for setting Corporate Average Fuel Economy (CAFE) standards, using fuel economy data derived from EPA testing. The 1975 Energy Policy Conservation Act (EPCA)¹⁹⁴ and 2007 Energy Independence and Security Act (EISA)¹⁹⁵ gave NHTSA authority to prescribe fuel economy standards.¹⁹⁶ The Secretary of Transportation is required to consult with the EPA Administrator before prescribing fuel

¹⁸⁶ See Labor Network for Sustainability, *The EPA's Clean Power Plan: How Unions and Allies Can Protect Affected Workers*, <http://www.labor4sustainability.org/articles/the-epas-clean-power-plan-how-unions-and-allies-can-protect-affected-workers/> (last visited June 14, 2017) and Analysis Group, *EPA's Clean Power Plan: States' Tools for Reducing Costs and Increasing Benefits to Consumers* (July 2014), http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/analysis_group_epa_clean_power_plan_report.pdf.

¹⁸⁷ *State of W. Va. v. EPA*, No. 15-1363 (D.C. Cir. Apr. 28, 2017).

¹⁸⁸ Clean Air Act, 42 U.S.C. § 7401.

¹⁸⁹ EPA Carbon Pollution Emission Guidelines, 80 Fed. Reg. 64661 (Oct. 23, 2015).

¹⁹⁰ EPA Light-Duty Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards (Tailpipe Rule), 75 Fed. Reg. 25,324 (May 7, 2010), codified as 40 C.F.R. §§ 85, 85, 600 and 49 C.F.R §§ 523, 531, 533, 536 and 537.

¹⁹¹ EPA Triggering Rule, 75 Fed. Reg. 17,004 (2010).

¹⁹² Fraley Interview, *supra* note 176.

¹⁹³ *Id.*

¹⁹⁴ Energy Policy Conservation Act (EPCA), 42 U.S.C. 620 (1975).

¹⁹⁵ Energy Independence and Security Act (EISA), 42 U.S.C. § 17001 (2007).

¹⁹⁶ 49 U.S.C. § 32,902(a).

economy standards,¹⁹⁷ and EPA is to calculate the fuel economy of vehicles and test automakers' compliance with fuel economy standards.¹⁹⁸

Since 1974, they have set standards on mobile source (car and truck) emissions,¹⁹⁹ adjusting the mileage standards downward periodically. Initially they were controlling for emissions of NOx, PM, and carbon monoxide (CO).²⁰⁰ In response to the *Massachusetts v. EPA* case, the EPA concluded that there is “compelling” evidence supporting the “attribution of observed climate change to anthropogenic” emissions of greenhouse gases (including carbon dioxide).²⁰¹ The EPA further concluded that GHGs from motor vehicles cause air pollution “which may reasonably be anticipated to endanger public health or welfare” under the Endangerment Rule²⁰²

There were significant changes to these CAFE standards affecting heavy duty diesel engines beginning with the 2004 model year and again in 2007. The 2007 standard was phased in over the period of 2007-10 with the aim of reducing diesel emissions by 95% compared to the previous 1998 standard. To meet the 2007 standards, diesel engines had to be equipped with exhaust pipe control equipment that was very sensitive to the presence of sulfur in the fuel under the clean diesel standard. The 2010 standards were even more stringent for nitrogen oxide emissions. Engine manufacturers experienced difficulty in meeting the new standards and were allowed to purchase a limited number of emission offsets.²⁰³

California passed AB 32, Global Warming Solutions Act of 2006,²⁰⁴ with the goal of reducing GHGs²⁰⁵ to 1990 levels by 2020. California was the only state that adopted its own vehicle emission standards prior to March 30, 2006, for which it was granted a waiver from federal preemption based on the EPA's January 21, 2009 reconsideration of the California Air Resources Board's (ARB) request.²⁰⁶

In the wake of *Massachusetts v. EPA*, the EPA decided to issue automotive emission standards under Title II of the CAA. The industry agreed to the national standards to avoid having to meet state-by-state standards during the bailout of the auto industry during the aftermath of the 2008 recession. The EPA and DOT created a joint rule for emission and fuel economy standard medium and heavy-duty vehicles in 2011,²⁰⁷ which generally was supported

¹⁹⁷ 49 U.S.C. § 32,902(b).

¹⁹⁸ 49 U.S.C. § 32,904.

¹⁹⁹ EPA, Clean Air Act 101 Module 2 Mobile Controls Sources (Aug. 26, 2010), https://archive.epa.gov/apti/vidExec_Order_No._/web/pdf/cleanair101module2mobilesourcesfinal_otaq_ogc_8-26-10.pdf.

²⁰⁰ *Id.*, (CO is the poisonous gas, not to be confused with carbon dioxide, CO₂, the greenhouse gas).

²⁰¹ Endangerment Rule, 74 Fed. Reg. at 66,518 (Dec. 15, 2009).

²⁰² *Id.*

²⁰³ U.S.: Heavy-Duty Emissions, ICCT and Dieselnit, TRANSPORT POLICY http://transportpolicy.net/index.php?title=US:_Heavy-duty:_Emissions (last visited May 14, 2017).

²⁰⁴ Adding Division 25.5 to CA Health and Safety Code, Section 38,500, relating to air pollution.

²⁰⁵ EPA Rulemaking to Consider the Adoption of a Proposed California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation, Including Compliance Offset Protocols, Final Order (Dec. 22, 2011), adopting Cap-and-Trade program through which the California Air Resources Board (ARB) establishes caps on GHGs, allowing regulated entities to meet lower emissions through a combination of offsets and allowances.

²⁰⁶ EPA, Decision Granting a Waiver of Clean Air Act Preemption, 74 Fed. Reg. 32,744 (July 8, 2009) and *see* EPA, California Motor Vehicle Pollution Control Standards; Reconsideration of Previous Denial of Waiver of Preemption, 74 Fed. Reg. 7040 (Feb. 12, 2009), <http://www.epa.gov/fedrgstr/EPA-AIR/2009/February/Day-12/a2913.pdf>.

²⁰⁷ EPA and Dept. Transportation, Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles; Final Rules, 76 Fed. Reg. 57,106 (Sept. 15, 2011).

by the trucking industry.²⁰⁸ New standards to cover model year 2017-2027 were finalized in 2016 to cover semi-trucks, large pickup trucks, vans, work trucks, and busses.²⁰⁹

The 2009 agreement between DOT and the auto industry also led to 2010 Light-Duty CAFE standards. The EPA and NHTSA jointly issued the “Tailpipe Rule” to regulate light-duty vehicle (car and light truck) emissions in 2010,²¹⁰ which was revisited in October 2012.²¹¹ The 2012 GHG standards for cars and light trucks are scheduled to be phased in from model years 2017-2025.²¹² These standards would require the industry to deliver a fleet average of at least 54.5 mpg by 2025.²¹³ EPA estimated that the model years 2022-2025 standards will reduce GHG emissions by 540 million metric tons and reduce oil consumption by 1.2 billion barrels over the lifetime of the regulated vehicles.²¹⁴ The EPA committed to a “Mid-Term Evaluation” to assess whether to strengthen, weaken or retain those long-term standards. In the last days of the Obama presidency, his EPA Administrator made a final determination on January 12, 2017 to retain the model years 2022-2025 standards.²¹⁵

Mitch Bainwol, head of the Alliance of Automobile Manufacturers trade group cited Trump administration figures that reaching the goal of roughly doubling average vehicle fuel economy by 2025 will cost the industry \$200 billion over 13 years, in testimony to be delivered to the House Energy and Commerce Committee in 2016.²¹⁶ Ford CEO Mark Fields in January told President Trump that it could cost one million automotive jobs. In March, the Trump administration filed a Notice of Intent to reconsider the Mid-Term Evaluation of the mileage and timing targets of the already promulgated CAFE 2022-2025 GHG standards for light-duty vehicles.²¹⁷ According to the Federal Register summary, the reconsideration of the CAFE standards and assessment of what the maximum feasible standards should be is slated for

²⁰⁸ James McCarthy, *Clean Air Act Issues in the 115th Congress: In Brief*, CONGRESSIONAL RESEARCH SERVICE (Feb. 7, 2017).

²⁰⁹ EPA and Dept. of Transportation, *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium-and Heavy-Duty Engines and Vehicles-Phase: Final Rule*, 81 Fed. Reg. 73,478, 73,482 (Oct. 25, 2016).

²¹⁰ *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards*, Final Rule, 75 Fed. Reg. 25,324-25,728 (May 7, 2010).

²¹¹ EPA and NHTSA Joint Rule, *2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards (Light Duty Standards)*, 77 Fed. Reg. 62,623 (Oct. 15, 2012).

²¹² See EPA, National Highway Traffic Safety Administration & California Air Resources Board, *Interim Joint Technical Assessment Report: Light Duty Vehicle Greenhouse Gas Emission Standards and Fuel Economy Standards for Model Years 2017-2025*, <http://www.epa.gov/oms/climate/regulations/ldv-ghg-tar.pdf> and <http://www.epa.gov/regulations-emissions-vehicles-and-engines/final-rule-model-year-2017-and-later-light-duty-vehicle>.

²¹³ *Light-Duty Standards*, 77 Fed. Reg. 62,623 at 62,627 (Oct. 15, 2012).

²¹⁴ Christopher J. Carr, & Tyler G. Welti, *EPA Issues Final Determination That No Adjustments to GHG Standards for Model Years 2022-2025 Will Be Made, but Questions Remain*, MORRISON FOERSTER (Jan. 18, 2017), <https://www.mofo.com/resources/publications/170118-epa-determination-ghg-standards.pdf>.

²¹⁵ EPA Sec’y Gina McCarthy Cover Letter, *Final Determination of the Mid-Term Evaluation of Light-duty Vehicle GHG Emissions Standards for MYs 2022- 2025* (Jan. 12, 2017), <https://www.epa.gov/sites/production/files/2017-01/documents/mte-stakeholder-letter-2017-01-12.pdf> (adopting EPA Proposed Determination for the Mid-Term Evaluation, 81 Fed. Reg. 8,7927 (Dec. 6, 2016)).

²¹⁶ *GOP Lawmakers Challenge CAFE Standard*, AUTO NEWS (Sept. 21, 2016), <http://www.autonews.com/article/20160921/OEM11/160929935/gop-lawmakers-challenge-cafe-standard>.

²¹⁷ *Notice of Intention to Reconsider the Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light Duty Vehicles*, 82 Fed. Reg. 14,671 (March 22, 2017).

completion by April 1, 2018.²¹⁸ In addition, Representative Roger Williams has introduced the CAFE Standards Repeal Act of 2017 (H.B. 1593).²¹⁹

G. WOTUS Rule Review

Congress passed the CWA in 1972 “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”²²⁰ The CWA also recognized the “rights of States to prevent, reduce, and eliminate pollution.”²²¹ Wetlands serve a vital role in filtering pollutants, retaining water in dry seasons and providing habitat for many species. The issue is who should regulate these wetlands – the federal or state government. Pursuant to the CWA delegated authority, the EPA and the Army Corps of Engineers (Corps) broadly defined “waters of the United States” (and federal jurisdiction) to include “[a]ll interstate waters including interstate wetlands,”²²² as well as “[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce,”²²³ and “[t]ributaries of [such] waters.”²²⁴ In addition, the EPA and the Corps included wetlands “adjacent” to such waters and tributaries.²²⁵ The regulation defines “adjacent” wetlands as those “bordering, contiguous [to], or neighboring” waters of the United States.²²⁶

Recent United States Supreme Court decisions have compelled the EPA to clarify what is included in “waters of the U.S.” The 1984 *Riverside Bayview Homes* case²²⁷ extended the Army Corps of Engineers’ jurisdiction to include a marshy wetland that was not navigable, but was part of a larger drainage area abutting a navigable creek, broadening the concept of “adjacency” and finding a “sufficient nexus” between the wetland and “navigable waters.”²²⁸ By 2001 there were more justices with “narrow constructionist” views on the Supreme Court when the *Solid Waste Agency of Northern Cook County (SWANCC)*²²⁹ case was heard. In *SWANCC*, the Supreme Court refused to extend the Corps’ jurisdiction to abandoned sand and gravel pits that filled with water to become seasonal ponds for migratory birds, concluding that allowing such jurisdiction would “result in significant impingement on the States’ traditional and primary power over land and water use.”²³⁰ The Court held that the Corps cannot regulate “nonnavigable, isolated, interstate waters” that are not adjacent to traditional navigable waters.²³¹ Rather than overruling *Riverside* or ruling directly on the Commerce Clause constitutionality issue, the Court refused to

²¹⁸ 82 Fed. Reg. 14,671 at 14,672.

²¹⁹ H.R.1593, CAFE Standards Repeal Act of 2017, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/house-bill/1593/text> (proposed but not enacted).

²²⁰ Clean Water Act (CWA), 33 U.S.C. § 1251(a) (1972).

²²¹ 33 U.S.C. § 1251(b).

²²² 33 C.F.R. § 328.3(a)(2)(2004).

²²³ 33 C.F.R. § 328.3(a)(3).

²²⁴ 33 C.F.R. § 328.3(a)(5).

²²⁵ 33 C.F.R. § 328.3(a)(7).

²²⁶ 33 C.F.R. § 328.3(c).

²²⁷ *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

²²⁸ *Bayview Homes*, 474 U.S. at 131.

²²⁹ *Solid Waste Agency of Northern Cook Cty (SWANCC) v. S. Army Corps of Engineers*, 531 U.S. 159 (2001).

²³⁰ *SWANCC*, 531 U.S. 159 at 174.

²³¹ *SWANCC*, 531 U.S. 159 at 167, 171.

give deference to the Corps' Migratory Bird Rule of 1986²³² that was the basis for the Corps' jurisdiction, holding that it exceeded the delegated authority under CWA 404(a).²³³

John Rapanos did not obtain a CWA permit before backfilling three acres of wetlands lying near ditches that eventually emptied into navigable rivers eleven to twenty miles away. The Carabells were denied a permit to deposit fill material in a wetland parcel about one mile from Lake St. Clair. The wetland was separated from a man-made drainage ditch by a 4-foot berm that ran along one side of the wetland. The Court concluded that the Corps would not have jurisdiction over a nonnavigable wetland where the levee separated the marsh from the river. The cases were consolidated for review by the Supreme Court. The consolidated *Rapanos* decision (a four judge plurality decision), authored by Justice Scalia, held that the regulatory authority of the U.S. should extend only to "relatively permanent, standing or continuously flowing bodies of water" (streams, rivers, lakes and oceans)²³⁴ and to "wetlands with a continuous surface connection to" such relatively permanent waters.²³⁵ Although the Court deferred to the Corps' inclusion of wetlands actually abutting traditional navigable waters (because of the inherent ambiguity in defining where the water ends and the abutting ("adjacent") wetlands begin),²³⁶ Justice Scalia's plurality opinion also concluded that an "intermittent, physically remote hydrologic connection" alone is not sufficient.²³⁷

Justice Kennedy's concurring opinion, however, established the "sufficient nexus" standard, in which wetlands would be analyzed on a case-by-case basis. "[I]f the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable'" the wetlands have the requisite nexus to fall within the statutory phrase "navigable waters."²³⁸ According to Kennedy, "'hydrographic features' could just as well refer to intermittent streams carrying substantial flow to navigable waters."²³⁹ If the wetland's impact on water quality is insubstantial, however, it would fall outside the jurisdiction of "navigable waters".

Since there was no one true majority position, the Corps and EPA crafted the WOTUS rule in 2015²⁴⁰ by concluding that it had jurisdiction if either Justice Kennedy or Scalia's opinion was satisfied.²⁴¹ At the crux of objections to the WOTUS rule is breadth of the term "adjacent," which includes 'neighboring' waters that are reasonably close to jurisdictional water and have an ecological interconnection.²⁴²

²³² Migratory Bird Rule, 33 C.F.R. § 328.3(a)(3).

²³³ SWANCC 531 U.S. 159 at 174.

²³⁴ *Rapanos, et ux, v. United States and Carabell v. United States Army Corps of Engineers*, 547 U.S. 715, 739 (2006).

²³⁵ *Rapanos*, 547 U.S. at 742.

²³⁶ *Rapanos*, 547 U.S. 715 at 742.

²³⁷ *Rapanos*, 547 U.S. 715 at 742.

²³⁸ *Rapanos*, 547 U.S. 715 at 780.

²³⁹ *Rapanos*, 547 U.S. 715 at 771.

²⁴⁰ Waters of the U.S. Rule (WOTUS), 80 Fed. Reg 37054 (June 29, 2015).

²⁴¹ EPA and Army Corps of Engineers Joint Memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, at 3 (Dec. 2, 2008). (paper copy)

²⁴² *Id.*

President Trump's EPA Administrator Scott Pruitt denounced the WOTUS rule as "the greatest blow to private property rights the modern era has seen"²⁴³ in 2015, and led a multi-state lawsuit against it while he was Oklahoma's Attorney General.²⁴⁴ Therefore, it is not surprising that President Trump's February 28, 2017 Executive Order²⁴⁵ required a review of the WOTUS rule.²⁴⁶ President Trump instructed the EPA to draft a rule that narrows the definition of "navigable waters"²⁴⁷ under the CWA by directing the EPA administrator to interpret the term "navigable waters" so that it is consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*.²⁴⁸ The result and intent of this interpretation is to decrease federal jurisdiction and increase jurisdiction of state governments over wetlands that may be part of the ecology of a basin but not immediately connected to major bodies of water.

Wetlands serve as an essential habitat for many species, while serving as a filter of pollutants before they contaminate larger water bodies and as a buffer to protect the land from storms. They serve as a nursery for fish and fowl and are necessary for feeding and shelter for migratory birds. Wetlands are the habitat for many endangered species. Wetland also with help water retention during dry periods.²⁴⁹ Congress should amend the CWA and ESA to more clearly include wetlands and habitat protection within the scope of those acts and empower the EPA to define the scope of what is included within a hydrological and ecological perspective. The WOTUS rule, which the Trump administration wants to alter, is a problematic attempt to comply with a mixed-message Supreme Court plurality decision.²⁵⁰ Multiple EPA attempts have awkwardly stretched the concept of "adjacency." That term needs to be replaced and a watershed-hydrological "sufficient nexus" approach to regulation needs to be adopted, pursuant to clear delegated authority to address wetland and species habitat issues.

President Trump's budget proposal would eliminate \$1.6 for the Army Corps of Engineers to use in water and navigation projects. In response, an Agriculture subcommittee unanimously kept that amount in the proposed budget plan.²⁵¹

H. Reduction of Regulations and Expansion of Congressional Oversight of Administrative Rule-Making

Currently agencies follow the well-established notice and comment process pursuant to the APA since 1946.²⁵² Proposed regulations involve careful studies and agency actions often

²⁴³ Curtis Killman, *Oklahoma Attorney General Scott Pruitt Sues EPA = Again*, TULSA WORLD (July 9, 2015), http://www.tulsaworld.com/news/courts/oklahoma-attorney-general-scott-pruitt-sues-epa-again/article_c603ba08-dd62-5b0a-ad3e-e4b8d0e2d977.html (last visited May 4, 2017), but see *Ditch the Myth*, EPA, www.epa.gov/ditchthemyth. and Clean Water Rule Factsheet, www.epa.gov/cleanwaterrule (May 27, 2015) (last visited Jan. 4, 2016) (clarifying that the rule does not interfere with private property right and does not regulated most ditches or groundwater).

²⁴⁴ *2017 Outlook on Environment & Energy*, BLOOMBURG BNA (Jan, 9, 2017), <https://static1.squarespace.com/static/53a09c47e4b050b5ad5bf4f5/t/588a7fa1e6f2e122db51f055/1485471655294/2017+Outlook+-+Environment+and+Energy+Bloomberg+BNA.pdf>, listing cases that Pruitt brought against EPA.

²⁴⁵ Exec. Order No. 13,778, 82 Fed. Reg 12,497 (March 3, 2017) (regarding WOTUS).

²⁴⁶ WOTUS, 80 Fed. Reg 37,054.

²⁴⁷ 33 U.S.C. 1362(7).

²⁴⁸ *Rapanos*, 547 U.S. 715.

²⁴⁹ Mo. Dep't. Natural Resources (DNR), Wetlands, <https://dnr.mo.gov/geology/wrc/wetlands.htm> (last visited May 21, 2017).

²⁵⁰ *Rapanos*, 547 U.S. 715 (2006).

²⁵¹ Andrew Taylor, *GOP-controlled House Subcommittees Reject Trump Budget Cuts*, WASHINGTON POST (June 28, 2017), https://www.washingtonpost.com/politics/congress/gop-controlled-house-subcommittees-reject-trump-budget-cuts/2017/06/28/f60d1a76-5c1c-11e7-aa69-3964a7d55207_story.html?utm_term=.c81e42d25449.

necessitate an EIS. Alternatives will often be discussed with affected parties. The proposed rule undergoes the notice and comment process. It is published in the Federal Register, usually with 60 days or more for comments and sometimes hearings. After agency staffers look through the comments and include published responses, the final rule is again published in the Federal Register.

President Trump's January 30, 2017 Executive Order on Reducing Regulation and Controlling Regulatory Costs which requires agencies to offset the cost associated with a new regulation by eliminating the costs associated with two prior regulations and it also caps the spending on new regulations for 2017 at zero dollars.²⁵³ "For purposes of this order the term 'regulation' or 'rule' means an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe procedure or practice requirements of an agency."²⁵⁴ President Trump also has issued an Executive Order on Enforcing the Regulatory Reform Agenda.²⁵⁵ It directs the regulatory reform officers in each agency to focus on repealing, replacing or modifying regulations that inhibit job creation, are outdated, unnecessary, or impose costs that exceed benefits.

The Natural Resources Defense Council (NRDC), the Communications Workers of America and Public Citizen NGOs have filed a suit in the United States District Court of the District of Columbia²⁵⁶ to challenge the 1-in-2-out executive order.²⁵⁷ Chris Shelton, president of the union, said workers should not be required to "trade off one set of job, health and safety protections in order to get protection from another equally dangerous condition."²⁵⁸ NRDC President Rhea Suh insisted that "[n]ew efforts to stop pollution don't automatically make old ones unnecessary."²⁵⁹ Is it "arbitrary and capricious" to abolish or create regulations on a quota basis rather than considering the benefits and costs of individual regulations on their own merits? Making decisions based solely on cost and ignoring benefits is as problematic as the reverse.

The proposed Regulations from the Executive in Need of Scrutiny Act of 2017 (REINS Act) (House Resolution 26),²⁶⁰ introduced by Representative Doug Collins, echoes the goals of the Trump administration. It would become significantly more difficult to create and implement regulations. "Major rules" (defined similarly to the CRA) would require a congressional joint resolution to approve the new rule by majority vote and a two-thirds vote to override a presidential veto.²⁶¹ If the rule was not acted on by Congress within the strict timelines, the rule would not go into effect.²⁶² Under the REINS Act, an agency would be required to "identify a rule or rules that may be amended or repealed to completely offset any annual cost of the new rule to the United States economy."²⁶³ The repeal or amendment would have to precede the

²⁵² CRA, 5 U.S.C. § 801 – 808.

²⁵³ Exec. Order No. 13,771, Reducing Regulation and Controlling Regulatory Costs, 82 Fed. Reg. 9339 (Feb. 3, 2017).

²⁵⁴ *Id.*, at § 4.

²⁵⁵ Exec. Order No. 13,777, Enforcing the Regulatory Reform Agenda, 82 Fed. Reg. 12,285 (March 1, 2017).

²⁵⁶ *Public Citizen, Inc. v Trump*, Case 1:17-cv-00253 (D.C. Dist. filed Feb. 8, 2017).

²⁵⁷ Tom Devaney, *Trump Sued over '1-in-2-out' Regulations Order*, THE HILL (Feb. 18, 2017),

<http://thehill.com/regulation/318457-trump-sued-over-1-in-2-out-regulations-order>.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Regulations from the Executive in Need of Scrutiny Act of 2017 (H.B. 26) (REINS Act), 115th Cong., <https://www.congress.gov/bill/115th-congress/house-bill/26> (proposed but not adopted).

²⁶¹ REINS Act, § 801(b).

²⁶² REINS Act, § 802.

²⁶³ Regulations from the Executive in Need of Scrutiny Act of 2017 (REINS Act), § 803.

effective date of the new rule under this “cut-go” requirement.²⁶⁴ Although an executive order requiring such off-set rules can be rescinded by a subsequent President, enactment of the proposed REINS Act would have far more permanent changes to the way regulations are implemented and reviewed.

The bill even provides for a ten-year review of existing regulations, which would not continue in effect if they were not affirmatively acted on by Congress.²⁶⁵ The extent to which existing rules could be bundled for congressional consideration is ambiguous. The REINS Act has passed the House and hearings were held March 31, 2017 in the Senate Committee on Small Business and Entrepreneurship.²⁶⁶

Congress already has the right to narrow or expand enabling authority of an agency as it relates to a particular law, controls the purse strings on appropriations to the agency and can conduct oversight hearings, investigations and reviews. Regulations are already subject to a quite time-consuming scrutiny under the APA notice and comment process. It is a protracted process that already includes many checks on arbitrary rulemaking, such as the EIS that is to precede major agency actions or rules. Ultimately, regulations are subject to judicial review. If the regulation is not founded on solid scientific testing, it can be challenged as “arbitrary and capricious,” as occurred when the Department of Commerce failed to conduct scientific studies mandated by Congress prior to attempting to change the definition of “dolphin-safe” tuna label.²⁶⁷ As Washington University Law School Distinguished Professor Ronald Levin observed in his analysis of the REINS ACT,

much of the work of modern rulemaking (“major” and otherwise) is to engage in very detailed analysis of legal, factual, and policy issues, many of which are highly technical. This work is better suited to the subject matter specialists in the respective agencies than to the generalists who serve as our elected representatives. Roughly speaking, that is the very reason why Congress delegated responsibility for these issues in the first place.²⁶⁸

Would the REINS Act survive Constitutional scrutiny? In the 1983 case of *INS v. Chadha*,²⁶⁹ the Supreme Court ruled that a single house of Congress could not exercise “legislative veto” of a regulation because it violated the bicameral requirements for enacting laws.²⁷⁰ Suppose that only one house of Congress wants to strike down the regulation. If both houses of Congress have already enacted the legislation that delegates rule-making authority to an agency, should only one house of Congress be allowed to prevent the regulation that comes from that agency from being in force? Could such veto authority also be viewed as an impermissible usurpation of authority granted to the executive branch of government? Those

²⁶⁴ REINS Act, at § 808.

²⁶⁵ REINS Act, § 809.

²⁶⁶ Regulations from the Executive in Need of Scrutiny Act of 2017 (H.B. 26), <https://www.congress.gov/bill/115th-congress/house-bill/26>.

²⁶⁷ *Earth Island Inst. v. Hogarth*, 484 F.3d 1123, as modified in 494 F.3d 757 (9th Cir. 2001). *Brower v. Daley*, 93 F.Supp. 1071 (N.D. Cal. 2000), aff. 257 F.3d 1058 (9th Cir. 2001).

²⁶⁸ Ronald Levin, *The REINS ACT: Unbridled Impediment to Regulation*, 83 GEO. WASH. L. REV. 1446, 1455 (Sept. 2015).

²⁶⁹ *INS v. Chadha*, 462 U.S. 919, 959 (1983).

²⁷⁰ *Chadha*, (recognizing the Attorney General exercised his right to suspend a deportation of Chadha under authority delegated to him in the Immigration and Nationality Act, an act which allowed for either house of Congress to veto and action; the Court struck down the House’s nullification of the Attorney General’s action).

arguing to the contrary would assert that Congress did not have to delegate authority to the agency to begin with, so it is free to impose an additional step (congressional oversight) as a prerequisite to the regulation becoming law.²⁷¹

Proponents maintain that the REINS Act and Trump's corresponding executive policy will increase accountability for and transparency in the federal regulatory process. As Professor Levin concluded, however, the REINS Act "would create an unmanageable workload for Congress, as well as unacceptable risks of stalemating the development of important regulations."²⁷² When future Justice Scalia was a professor, he recognized, that when the Republicans become the "in" party, they needed to jettison their support for various "supposed regulatory reform devices" that they had considered attractive while they were the "out" party. Such measures would now interfere with their ability to pursue their political agenda.²⁷³

Conclusion and Recommendations

The ELI's March 2017 White Paper on Regulatory Reform in the Trump Era provides a broad overview of areas of concern for environmentalists regarding changes in the implementation of environmental protection requirements and revision or elimination of key rules that protect the natural resources, air and water quality, and the integrity of the regulatory process.²⁷⁴ In my article, I have provided additional detailed analysis of orders, laws and the regulatory process critically affecting environmental policy during the first four months of the Trump administration.

With a potential increase in the production of coal, oil and fracking, what measures can and should the EPA and other agencies take to regulate air quality, minimize the impact of increased production, and reduce the likelihood of oil spills and other environmental risks?

The CAA and CWA should be amended to recognize climate change as a serious air and water quality problem. The amendments should clearly delegate authority to the EPA to regulate both criteria pollutants and GHGs. In addition, climate change should be recognized and prioritized in other congressional laws, including those that deal with flood control and address the consequences of storms, droughts, acidification of the oceans, land erosion and habitat degradation. Other agencies, such as NOAA and FWS, also need sufficient delegated authority to deal with the consequences of climate change. The BLM should receive specific delegated authority to regulate fracking.

²⁷¹ See further discussion generally in Levin, *supra* note 268.

²⁷² *Id.* at 1446.

²⁷³ Antonin Scalia, Regulatory Reform - The Game Has Changed, *Reg.*, Jan/Feb. 1981, at 13, (discussed in Levin, *supra* note 268 at 1460).

²⁷⁴ White Paper, Regulatory Reform in the Trump Era, ENVIRONMENTAL LAW INSTITUTE (March 2017), recognizing under the heading of "Revising or Eliminating Existing Environmental Protection Requirements," concerns regarding (1) reversing or revising Executive Orders and actions, (2) undoing Presidential actions protecting public lands and resources, (3) fast-tracking projects that require federal approval, (4) "canceling" the Paris Agreement on Climate Change, (5) reversing or revising agency regulations, (6) invalidating recent agency regulations under the Congressional Review Act, (7) implementing the new "two-for-one" Executive Order on federal regulations, and (8) rolling back public lands plans and also outlining "Changing the Implementation of Environmental Protection" strategies that include (9) cutting back on federal enforcement of environmental law, (10) defunding federal environmental protection programs, (11) preempting state environmental protection requirements, (12) subjecting agency regulations to additional cost-benefit analysis, (13) enacting new procedures for federal regulation, and (14) enacting new constraints on citizen enforcement of environmental law. The ELI White Paper identifies areas of concern, rather than providing detailed analysis of each area.

Regarding the CAA, the EPA needs to be delegated specific authority to regulate sources of GHGs, including specific authority to develop tailoring and timing rules. The Clean Power Plan may be problematic, but it is essential that the larger emitters of GHGs be regulated with at least BACT standards, if not more stringent technology-forcing standards. Cap-and-trade is a way that costs can be apportioned, so that the firms who can control a particular pollutant or gas in a more cost-effective manner can sell credits to those firms for which the controls would be more costly. Congress needs to authorize cap-and-trade specifically as an alternative in the EPA toolbox. For smaller emitters of criteria pollutants or GHGs, a cost-benefit analysis might be more appropriate.

Congress and the Trump administration should be dissuaded from watering-down species protection under the ESA. Preservation of habitat, including wetlands is essential to the survival of species. Land designated for preservation under the Antiquities Act should remain as a protected area.

The CRA should be amended to delete the restriction on an agency's ability to create another "substantially the same" rule. The use of the CRA is so politically motivated that it negates the ability of agencies to address critical environmental issues based on scientific data. Since the Stream Protection Rule has been struck down by congressional use of the CRA, Congress has the responsibility of crafting a law that addresses the water pollution and land degradation issues posed by mining. The damage to streams does not automatically cease just because the rule is disapproved.

In the first months of the Trump administration, executive orders, cabinet selections, and congressional actions point to an active assault on environmental protection, under the guise of promoting job growth and diminishing costly regulatory compliance. President Trump proposes a \$2.6 billion (31%) cut to the EPA budget and elimination of funding for many environmental programs,²⁷⁵ while refocusing the agency's role away from climate change priorities. He has appointed men who question the causes of climate change and have a history of opposing environmental protection measures to head the EPA (Pruitt) and the Department of Interior (Zinke). He is authorizing leasing of more land and water for oil, gas and coal interests, with little accompanying guidance to assure that these activities are implemented in ways that minimize contamination of our air and water natural resources. Insufficient regard has been given to the short-term or long-term consequence of such policies on the health of our citizens, the endangerment of our environment.

Well-reasoned policies based on sound science need to have orderly adoption and implementation to facilitate adaptation by agencies, businesses and citizens. Representative and senators from passing regulatory oversight that is so onerous that it pragmatically prevents environmental regulations from been created, enforced or challenged. Congress should not adopt the REINS Act²⁷⁶ or other similar laws that prevent our nation from addressing serious issues in a timely manner, based on agency expertise with input from constituency groups.

Returning the United States to the practices of 1920's isolationism, wealth-concentration and dependence coal sets us on a path of self-destruction, not only from an environmental perspective, but from an economic and trade perspective as well. In the 1970s, America led the

²⁷⁵ America First A Budget Blueprint to Make America Great Again, at 41 (March 13, 2017), www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf.

²⁷⁶ Regulations from the Executive in Need of Scrutiny Act of 2017 (H.B. 26) (REINS Act), 115th Cong., <https://www.congress.gov/bill/115th-congress/house-bill/26> (proposed but not adopted).

world in the passage of environmental protection laws – NEPA,²⁷⁷ ESA, MMPA,²⁷⁸ FIFRA,²⁷⁹ TSCA,²⁸⁰ SMCRA,²⁸¹ RCRA²⁸² and amendments to the CWA²⁸³ and CAA,²⁸⁴ with bi-partisan support. The EPA and NOAA were created to implement most of them.²⁸⁵ What is needed is a revival of the spirit of bipartisan environmentalism.

²⁷⁷ National Environmental Policy Act, 42 U.S.C §. 4321 (1970).

²⁷⁸ Marine Mammal Protection Act, 16 U.S.C Ch. 31 (1972).

²⁷⁹ Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (1972)

²⁸⁰ Toxic Substances Control Act, 15 U.S.C. § 2601 (1972).

²⁸¹ Surface Mine Control and Reclamation Act, 42 U.S.C. Ch. 25 (1977).

²⁸² Resource Conservation Recovery Act, 41 U.S.C. § 6901 (1976).

²⁸³ Clean Water Act, 33 U.S.C. Ch. 23 (1972), amending the Federal Water Pollution Control Act.

²⁸⁴ Clean Air Act, 42 U.S.C. 7410 (1970).

²⁸⁵ President Richard Nixon, Special Message to the Congress About Reorganization Plans To Establish the Environmental Protection Agency and the National Oceanic and Atmospheric Administration (July 9, 1970), <http://www.presidency.ucsb.edu/ws/index.php?pid=2575&st=environmental+protection+agency&st1>.