

**ROLLING BACK AND LOSING GROUND:
EPA REGULATION AND ENFORCEMENT IN THE TRUMP
ERA**

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INTRODUCTION

The Presidency of Donald J. Trump has been a time of retrenchment, disappointment, and decline for the United States Environmental Protection Agency (EPA). Due to illegitimate and sometimes illegal public policies, mismanagement, willful blindness to science, and poor leadership, the Agency has fallen well behind in implementing its longstanding mission of protecting the nation’s air, water, and land. As a result, the health of Americans and the quality of our air, water, and climate have suffered.

This Article examines some of the key trends, developments, and events at EPA over the past four years, both with respect to the Agency’s regulatory policies and its enforcement efforts. It begins, in Part I, with an overview of the regulatory rollbacks that have occurred at EPA since January 2017. In Part II, I will focus on three exemplary Trump Administration regulatory changes and their broader implications: loosening of vehicle mileage standards intended to

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improve the nation’s “carbon footprint,” redefining *Waters of the United States* to narrow the Clean Water Act’s regulatory reach, and the Trump Administration’s overall policy requiring federal agencies to eliminate two existing regulations each time they promulgated a new one. In Part III, I will summarize some critical developments and trends in EPA’s enforcement work over the past four years. After a comparison of the Trump and Obama administrations’ enforcement approaches, I will critique the EPA enforcement policies adopted during the Trump Administration and the substance and ultimate results of EPA’s 2020 “COVID-19 Enforcement Policy.” Finally, in Part IV, I will suggest ways in which the damaging administrative failings of the 45th President’s EPA can be ameliorated in a new administration by the adoption and prudent implementation of a discrete set of reforms.

I. AN OVERVIEW OF TRUMP-ERA REGULATORY ROLLBACKS

The Trump Administration has systematically undone an extraordinary number of environmental regulations. An extensive analysis published in the *New York Times* on July 15, 2020, reported that, to that point, the Trump Administration reversed, revoked, or otherwise rolled back nearly 70 environmental rules and regulations.¹ Moreover, more than 30 additional rollbacks were in progress when the *New York Times* published that comprehensive analysis—based on research conducted at Harvard and Columbia law schools.² These regulatory reversals have affected a number of critical areas, including air quality, water pollution, toxic substances, infrastructure, and protecting animal species. States and environmental NGOs have challenged many of the rollbacks in court.³ Most of those lawsuits are currently pending. Thus, at the time of this writing, the extent to which those regulatory reversals will ultimately become effective is unclear. Nonetheless, the Trump Administration’s regulatory rollbacks,

¹ Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here’s the Full List*, N.Y. TIMES, www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html (last updated Jan. 20, 2020).

² *Id.* (providing 14 additional rollbacks in progress as of October 2020).

³ *Id.*

without a doubt have—at minimum—significantly delayed the nation’s efforts to improve its air and water quality, have set back needed national and global progress on tackling climate change, and have harmed the health of a great many Americans.

With regard to air pollution—in addition to weakening Obama-era fuel-economy and greenhouse-gas standards for passenger cars and light trucks, which I will consider further in Part II.A—the Trump EPA limited some 26 pre-existing EPA regulations.⁴ The most prominent of these air-quality-related regulatory cutbacks included a proposed rule seeking to replace the Obama Administration’s Clean Power Plan limitations on carbon emissions from power plants that burn fossil fuels.⁵ The proposed rule would withdraw the legal justification for a rule limiting mercury emissions from coal-fired power plants;⁶ would revoke California’s authority to set stricter automobile tailpipe emission standards than the federal government;⁷ would cancel a requirement for reporting methane emissions from oil and gas companies;⁸ and would revise and repeal a rule limiting methane emissions on public lands from venting and flaring at fracking operations.⁹

Very significant de-regulation also occurred with respect to water-quality protections. Beyond scaling back pollution protections for numerous tributaries and wetlands¹⁰—a topic to be explored further

⁴ The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (proposed Aug. 24, 2018) (to be codified at 40 C.F.R. pts. 85, 86).

⁵ Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, 83 Fed. Reg. 44,746 (proposed Aug. 31, 2018) (to be codified at 40 C.F.R. pts. 51, 52, 60).

⁶ National Emission Standards for Hazardous Air Pollutants for Source Categories, 85 Fed. Reg. 31,286 (May 22, 2020) (to be codified at 40 C.F.R. pt. 63).

⁷ The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85, 86; 49 C.F.R. pts. 531, 533).

⁸ Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration, 85 Fed. Reg. 57,398, 57,418 (Sept. 15, 2020) (to be codified at 40 C.F.R. pt. 60).

⁹ Emission Standards for New, Reconstructed, and Modified Sources Review, 84 Fed. Reg. 50,244, 50,246 (proposed Sept. 24, 2019) (codified at 40 C.F.R. pt. 60).

¹⁰ The Navigable Waters Protection Rule: Definition of “Waters of the United

below—EPA withdrew a proposed rule that was intended to reduce pollutant discharges at sewage treatment plants.¹¹ EPA also withdrew a proposed rule that would have required groundwater protection for uranium mines.¹² The Agency encouraged Congress to revoke a rule that prevented coal companies from discharging mining waste into local streams.¹³ EPA also proposed to extend the useful life of unlined coal-ash holding areas that can spill their contents because they lack a protective overlay,¹⁴ and it proposed doubling the time given local governments to remove lead pipes from local water systems—like those in Flint, Michigan—that contain high levels of toxic lead.¹⁵

Regarding toxic substances and safety measures at industrial facilities, EPA’s regulatory record was similarly dismal in the Trump era. The Agency rejected a proposal to ban chlorpyrifos, a pesticide linked to developmental disabilities in children.¹⁶ EPA ignored legislation mandating safety assessments for dry-cleaning solvents and other potentially toxic compounds.¹⁷ The Agency also reversed a rule requiring upgrades of braking systems for trains that haul flammable

States,” 85 Fed. Reg. 22,250, 22,259 (Apr. 21, 2020) (33 C.F.R. pt. 328).

¹¹ Clean Water Act Methods Update Rule for the Analysis of Effluent, 84 Fed. Reg. 56,590, 56,599 (proposed Dec. 23, 2019) (codified at 40 C.F.R. pt. 136).

¹² Ground Water Protection at Uranium In Situ Recovery Facilities, 84 Fed. Reg. 574, 577 (proposed Jan. 31, 2019) (codified at 10 C.F.R. pt. 40).

¹³ Coral Davenport, *Trump Removes Pollution Controls on Streams and Wetlands*, N.Y. TIMES (Jan. 22, 2020), <https://www.nytimes.com/2020/01/22/climate/trump-environment-water.html?smid=url-share>.

¹⁴ Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Enhancing Public Access to Information; Reconsidering of Beneficial Use Criteria and Piles, 84 Fed. Reg. 40,353, 40,362 (proposed Oct. 15, 2019) (codified at 40 C.F.R. pt. 257).

¹⁵ *See* Use of Lead Free Pipes, Fittings, Fixtures, Solder, and Flux for Drinking Water, 85 Fed. Reg. 54,235, (Sept. 1, 2020) (to be codified at 40 C.F.R. pts. 141, 143) (delaying the full replacement of water systems lead service lines until September 1, 2023, 32 years after the EPA published the Lead and Copper rule of 1991).

¹⁶ Chlorpyrifos; Final Order Denying Objections to March 2017 Petition Denial Order, 84 Fed. Reg. 35,555 (July 24, 2019) (codified at 40 C.F.R. pt. 180).

¹⁷ Approval of Section 112(1) Authority for Hazardous Air Pollutants; Perchloroethylene Air Emission Standards for Dry Cleaning Facilities; State of Vermont, 83 Fed. Reg. 9254 (proposed Mar. 5, 2018) (to be codified at 40 C.F.R. pt. 63).

liquids,¹⁸ removed heavy-metal-laden copper filter cakes from the government's hazardous waste list,¹⁹ and rolled back requirements for improving safety at industrial plants that use hazardous chemicals.²⁰

EPA also proposed limiting studies used for the purposes of rulemaking to only those that make data publicly available.²¹ This proposal, which produced an outcry from numerous scientists, would eliminate the use of many health studies that gather data while promising to protect the identity of study participants. Furthermore, the Trump Administration proposed changes in the way cost-benefit analyses are conducted that benefit industrial polluters by unreasonably exaggerating the cost of effective regulations while minimizing their potential benefits to the public.²²

II. SOME ILLUSTRATIVE POLICY REVERSALS IN THE TRUMP YEARS

A. Vehicle Mileage Standards

One of EPA's most damaging regulatory retreats was its rollback of the vehicle mileage standards that the Obama Administration established to reduce the emission of greenhouse gases.²³ There is a clear consensus among qualified scientists that global climate change is a cause of flooding, droughts, wildfires, sea-level rise, disease, and other severe and growing

¹⁸ Hazardous Materials: Liquefied Natural Gas by Rail, 85 Fed. Reg. 44,994, 45,017 (July 24, 2020) (to be codified at 49 C.F.R. pts. 172–174, 179–180).

¹⁹ Hazardous Waste Management System; Identification and Listing of Hazardous Waste, 82 Fed. Reg. 45,736 (Oct. 2, 2017) (codified at 40 C.F.R. pt. 261).

²⁰ National Emission Standards for Hazardous Air Pollutants: Petroleum Refinery Sector, 85 Fed. Reg. 6,064, 6,066 (Feb. 4, 2020) (to be codified at 40 C.F.R. pt. 63).

²¹ Strengthening Transparency in Regulatory Science, 83 Fed. Reg. 18,768 (proposed Apr. 30, 2018) (to be codified at 40 C.F.R. pt. 30); *see also* Strengthening Transparency in Regulatory Science, 85 Fed. Reg. 15,396, 15,402 (proposed Mar. 18, 2020) (to be codified at 40 C.F.R. pt. 30).

²² Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process, 83 Fed. Reg. 27524 (proposed June 13, 2018) (to be codified at 40 C.F.R. ch. 1).

²³ The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174, 24,182 (Apr. 30, 2020) (to be codified at 40 C.F.R. pts. 86, 600; 49 C.F.R. pts. 523, 531, 533, 536–537).

problems. Motor vehicles are a significant source of greenhouse gases that cause climate change, and the vehicle mileage standards established in the Obama years would have meaningfully reduced those emissions.

The Trump Administration's rollback of vehicle mileage standards has been challenged in the federal courts. There is a strong argument that this far-reaching regulatory change contradicts a landmark U.S. Supreme Court decision, *Massachusetts v. EPA*, which established greenhouse gases as a pollutant subject to EPA regulation.²⁴ The rollback also conflicts with an EPA finding that greenhouse gases endanger public health and welfare.²⁵ Moreover, the Trump Administration's primary rationale for freezing vehicle emission standards—an assertion that stricter standards will make vehicles less safe—is shaky at best.

The Trump regime's reasoning relies on two highly questionable assumptions: that automobile manufacturers will inevitably spend less money on research, development, and safety if they are compelled to meet more stringent vehicle mileage standards and that most consumers will spend most or all of the money they may save if emission standards are rolled back on improving the safety of their own cars and trucks.²⁶ There is scant evidence for these predictions. The proposed regulatory rollback further assumes that to comply with stricter vehicle mileage requirements, auto-makers will attempt to reduce the mass and weight of larger cars and trucks by constructing them from reinforced aluminum.²⁷ That is a highly unlikely prediction. The auto industry never indicated it planned to make such a manufacturing change.

The Obama Administration conducted extensive scientific

²⁴ *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

²⁵ Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,516 (Dec. 15, 2009) (codified at 40 C.F.R. pt. 1).

²⁶ The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174, 24,176, 24,737, 24,742, 25,132, 25,136 (Apr. 30, 2020) (to be codified at 40 C.F.R. pts. 86, 600; 49 C.F.R. pts. 523, 531, 533, 536–537).

²⁷ *Id.*, 24,525.

research before promulgating its vehicle mileage standards.²⁸ In watering down its standards, the Trump Administration blithely ignored the careful research that Obama Administration officials previously conducted. The Trump Administration's regulatory actions regarding vehicle emissions is of a piece with Trump's abrupt withdrawal from the promising (if still limited) Paris Agreement on Climate Change²⁹ and with his administration's reassignment of federal government scientists doing legitimate and needed research on the climate crisis.³⁰ Taken together, these regrettable policies have brought our nation (and the world) considerably closer to a profound and lasting climate catastrophe.

B. Interpreting "Waters of the United States"

The Trump Administration's attempt to narrowly define the Clean Water Act's jurisdictional scope was the latest development in a long-standing legal and political dispute.³¹ The Clean Water Act

²⁸ Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324, 25,326–27 (May 7, 2010) (codified at 40 C.F.R. pts. 85, 86, 600); 49 C.F.R. pts. 531, 533, 536, 537, 538) (referencing EPA findings that light duty vehicle fuel economy standards are necessary to address challenges of climate change, energy security, air quality, and cost savings).

²⁹ See Lisa Friedman, *U.S. Quits Paris Agreement: Questions and Answers*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2020/11/04/climate/paris-climate-agreement-trump.html> (documenting President Trump's decision to leave the Paris Agreement and potential implications for the incoming Biden Administration regarding greenhouse gas emissions).

³⁰ See Christopher Flavelle, Lisa Friedman, & Coral Davenport, *Trump Administration Removes Scientist in Charge of Assessing Climate Change*, N.Y. TIMES (Nov. 9, 2020), <https://www.nytimes.com/2020/11/09/climate/michael-kuperberg-climate-assessment.html> (discussing the removal of Dr. Michael Kuperberg, executive director of the U.S. Global Change Research Program); Brad Plumer & Coral Davenport, *Science Under Attack: How Trump is Sidelining Researchers and Their Work*, N.Y. TIMES (Dec. 28, 2019), <https://www.nytimes.com/2019/12/28/climate/trump-administration-war-on-science.html> (discussing the Trump Administration's reduction in scientific involvement in federal policymaking, including halting studies, diminishing research influence, and challenging climate change research).

³¹ For a useful overview of legal and administrative developments that are components of this dispute, see Richard M. Glick & Oliver F. Jamin, *Waters of the*

(CWA) regulates discharges into *navigable waters*, a term it defines as “Waters of the United States, including the territorial seas.”³² The statute does not define the latter term. Nonetheless, the legislative history of the Act makes clear that Congress intended the CWA’s jurisdiction to extend beyond waterways that are navigable-in-fact. Congress intended the term be given “the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.”³³

Most of the disputes regarding the application of the term *Waters of the United States* have concerned wetland areas and intermittent streams that flow only during some times of the year. Regrettably, the Supreme Court’s treatment of the CWA’s jurisdiction with regard to those waters has been inconsistent and confusing. In *United States v. Riverside Bayview Homes*, the Court deferred to an Army Corps of Engineers’ policy that the Act covers wetlands adjacent to a traditionally navigable waterway regardless of whether flooding by the navigable waterway creates or affects the wet conditions that support plants requiring such conditions in the abutting wetlands.³⁴

A divided Supreme Court refused to defer to the Army Corps and EPA interpretation of *Waters of the United States* in the next pertinent case it considered; however, in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, the Court rejected the agencies’ rule applying the CWA to wetlands and waters that migratory birds used in crossing state lines.³⁵ Reasoning that this administrative interpretation would raise serious constitutional questions and infringe upon state police powers, the Court opined that Congress had only intended for the Act to cover “waters that were or had been navigable-in-fact or which could reasonably be made so.”³⁶

U.S.: Nearly 50 Years of Jurisdictional Uncertainty, and More to Come, 26 WATER L. 147, 148 (2019) (delineating the historical debate over the definition of *Waters of the United States* as exemplified by judicial challenges and changes between presidential administrations).

³² Clean Water Act § 502, 33 U.S.C. § 1362(7) (2018).

³³ 118 CONG. REC. 33,699 (1972).

³⁴ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985).

³⁵ *Solid Waste Agency N. Cook Cnty. v. U.S. Army Corps of Eng’g*, 531 U.S. 159, 171–72 (2001).

³⁶ *Id.* at 172.

A splintered Supreme Court also rejected the Army Corps' interpretation in *Rapanos v. United States*.³⁷ That case focused on whether CWA jurisdiction applies to non-navigable waters that neither abut a navigable water nor are hydrologically connected to one.³⁸ The Court issued no majority opinion in this case. Writing for a plurality, Justice Scalia expressed concern about the constitutionality of a broad interpretation of the Act's jurisdictional reach.³⁹ His opinion took an extraordinarily narrow view of the statute. It held that the phrase "'Waters of the United States' includes only those relatively permanent, standing, or continuously flowing bodies of water forming 'geographic features' that are described in ordinary parlance as 'streams, oceans, rivers [and] lakes.'"⁴⁰ The statutory phrase does not include "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."⁴¹

In an influential concurring opinion in *Rapanos*, Justice Kennedy expressed a strikingly different view as to what test applies to CWA jurisdictional determinations. As Justice Kennedy saw it, the Army Corps of Engineers and EPA should determine on a case-by-case basis whether a waterway has a "significant nexus" to waters that are navigable-in-fact.⁴² For Justice Kennedy, such a nexus exists where the waterways in question "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"⁴³

The Supreme Court's failure to reach a definitive position as to the extent of the CWA's jurisdictional coverage created confusion among lower courts and agencies. Moreover, administrative agency attempts to uniformly apply Justice Kennedy's significant nexus test on a case-by-case basis proved resource-consuming and difficult to implement for EPA and the Army Corps of Engineers due to the difficulty of compiling accurate data on relevant factors pertaining to

³⁷ *Rapanos v. United States*, 547 U.S. 715, 731–32 (2006).

³⁸ *Id.* at 729–30.

³⁹ *Id.* at 738.

⁴⁰ *Id.* at 739.

⁴¹ *Id.*

⁴² *Id.* at 782 (Kennedy, J., concurring).

⁴³ *Id.* at 780 (Kennedy, J., concurring).

the great number of waterways that flow in the United States.

In 2015, the Obama Administration promulgated a new rule (the so-called “Clean Water Rule”) that increased the number of categorical-jurisdictional determinations to be made in classifying waterways, while minimizing the need for case-by-case analyses.⁴⁴ Though controversial, this rule did at least provide greater clarity and stability with respect to the CWA’s jurisdictional reach.

The Trump Administration, however, wasted little time in undercutting and ultimately dismantling Obama’s Clean Water Rule. Not long after taking office, President Trump signed an Executive Order encouraging the Army Corps of Engineers and EPA to interpret the term *Waters of the United States* consistently with Justice Scalia’s plurality opinion in *Rapanos*.⁴⁵ Trump followed up by proposing and later adopting a new rule repealing the Obama interpretation of *Waters of the United States* and again adopting the narrow interpretation of that phrase that Justice Scalia favored in *Rapanos*.⁴⁶

The Trump Administration’s position regarding *Waters of the United States* was surely consistent with President Trump’s announced preference for minimizing environmental regulation, dismantling President Obama’s environmental legacy, and honoring the preferences of regulated manufacturers and developers. However, this position is deeply flawed in important respects. In casting aside the Clean Water Rule, the Trump Administration ignored the vital social benefits of wetlands as natural flood-control areas, filters of pollutants, and nurseries of many aquatic species. Trump’s replacement rule also took no account of the natural interconnectedness of water systems and the crucial importance of isolated pockets of wetlands in the survival of numerous endangered species of plants and animals. Trump’s administrative redefinition of *Waters of the United States* stands as still

⁴⁴ Clean Water Rule: Definition of “Waters in the United States,” 80 Fed. Reg. 37,054 (June 29, 2015) (codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 232, 300, 302, 401).

⁴⁵ Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule, Exec. Ord. No. 13,778, 82 Fed. Reg. 12,497 (Mar. 3, 2017).

⁴⁶ Definition of “Waters of the United States”-Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626, 56,630 (Oct. 22, 2019) (codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401).

another illustration of the Trump Administration's blithe willingness to cast aside important environmental and social considerations and to ignore the critical work of scientists in establishing regulatory policies.

C. Establishing the Two-For-One Regulation Policy

President Donald Trump's stubborn antipathy to federal regulation manifested from the earliest weeks of his tenure in office. Only ten days after Trump's inauguration, the new President issued Executive Order 13771, widely referred to as "The Two-For-One Order."⁴⁷ This document declared that "it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations."⁴⁸ To accomplish this purpose, the Order decreed that "any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations."⁴⁹

Executive Order 13771 further directed that, in future fiscal years, agency heads must identify off-setting regulations for each regulation that increases incremental costs, along with an estimation of the total costs or savings associated with each new regulation.⁵⁰ Moreover, the Order outlines a process under which, in every fiscal year, the Director of the Office of Management and Budget (OMB) is to identify "a total amount of incremental costs" regarding new regulations that agencies will not be permitted to exceed "unless required by law or approved in writing by the [OMB] Director."⁵¹

Executive Order 13771 was important, in part, for the tone it set regarding regulatory policy. This Order sent an unmistakable signal that the Trump Administration would be focused on the costs of regulations to regulated entities, with scant concern for the benefits of regulatory mandates to the public. With regard to environmental regulations, however, the Order appears to run afoul of a provision in

⁴⁷ Reducing Regulation and Controlling Regulatory Costs, Exec. Order No. 13771, 82 Fed. Reg. 9,339 (Feb. 3, 2017).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 9,340.

the National Environmental Policy Act (NEPA) that is all-too-rarely invoked, yet clear on its face.⁵² This NEPA subsection (hereafter “the NEPA interpretation mandate”) declared that: “The Congress authorizes and directs that, to the fullest extent possible: the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter.”⁵³

When one considers whether (and if so, how) this subsection of NEPA applies to Executive Order 13771, several questions arise. First, what does the interpretation mandate actually mean? Is it binding on the regulations and actions of the federal executive branch? If so, what “policies set forth in this chapter” must executive branch officials apply as they establish regulatory policies and promulgate specific regulations?⁵⁴ What is meant by the phrase “to the fullest extent possible”?⁵⁵ Does the NEPA Interpretation Mandate generally apply to presidential Executive Orders? Is the Trump Administration’s Two-For-One Order a “policy, regulation, or public law[.]” within the meaning of NEPA § 102(1)?⁵⁶ And finally, does Executive Order 13771 conform to Congress’s directive in NEPA § 102(1)?⁵⁷

In clear terms, Congress has not merely urged or suggested that the interpretation and administration of the laws referred to in the provision be consistent with NEPA’s policies—it has *required* that to occur. The subsection employs the verb “shall,” as opposed to “may”

⁵² National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1970).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ The analysis that follows borrows extensively from Joel A. Mintz, *The President’s Two For One’ Executive Order and the Interpretation Mandate of the National Environmental Policy Act: A Legal Constraint on Presidential Power*, 87 UMKC L. REV. 681, 682–83, 687, 692–95 (2019) (applying a similar analysis to Executive Order 13771 and its compliance with § 102(1) of NEPA). See also Joel A. Mintz, *Taking Congress’ Words Seriously: Towards a Sound Constructor of NEPA’s Long-Overlooked Interpretation Mandate*, 38 ENV’T L. 1031, 1033 (2008); Eric Pearson, *Section 102(1) of NEPA*, 41 CREIGHTON L. REV. 369, 372, 374, 377–78 (2008) (arguing that § 102(1) of NEPA is not properly implemented by the Council of Environmental Quality or enforced by the judicial system in accordance with the Congressional mandate).

to describe what must occur.⁵⁸ The first sentence of § 102 also indicates that Congress both “authorizes and *directs*” the sort of legal interpretation and administration that the provision mentions must occur.⁵⁹ That phraseology further provides an unambiguous indication that Congress intended the provision to be nondiscretionary in its application. Thus, at a bare minimum, § 102(1) directs that the nation’s *environmental laws*—certainly including but by no means limited to NEPA itself—must be administered and interpreted in the fashion indicated in the provision.

The phrase *to the fullest extent possible* has not been judicially construed as it pertains specifically to § 102(1). Nonetheless, the same phrase has been broadly construed in the context of applying the NEPA environmental impact statement (EIS) requirements in two influential cases. In *Calvert Cliffs Coordinating Committee, Inc. v. Atomic Energy Commission*,⁶⁰ the D.C. Circuit took a strong stance with respect to the meaning of *to the fullest extent possible*:

We must stress as forcefully as possible that this language does not provide an escape hatch for footdragging agencies; it does not make NEPA’s procedural requirements somehow “discretionary.” . . . Indeed, the requirement of environmental consideration “to the fullest extent possible” sets a high standard for agencies, a standard that must be rigorously enforced by the reviewing courts.⁶¹

Five years following the *Calvert Cliffs* decision, the Supreme Court accepted the D.C. Circuit’s overall interpretation of § 102(1) in *Flint Ridge Dev. Co. v. Science Rivers Ass’n of Oklahoma*.⁶² The *Flint Ridge* Court stated:

⁵⁸ National Environmental Policy Act of 1969 § 102(1), 42 U.S.C. § 4332.

⁵⁹ *Id.* (emphasis added).

⁶⁰ 449 F.2d 1109, 1112–14 (D.C. Cir. 1971).

⁶¹ *Id.* at 1114.

⁶² 426 U.S. 776, 776 (1976).

NEPA's instruction that all federal agencies comply with the impact statement requirement—and with all the other requirements of § 102—“to the fullest extent possible,” . . . is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle.⁶³

As noted previously, § 102(1) does not indicate on its face whether the type of interpretation (of policies, regulations, and public laws) that it mandates applies to those implemented by the President or federal agencies. NEPA's legislative history fails to clarify that question. Nonetheless, there is good reason to conclude that this is indeed the case.

As seen, § 102(1) directs that interpretation of United States public laws, along with the nation's policies and regulations, must be in accordance with NEPA's policies. The language of this subsection contrasts sharply with that of § 102(1), NEPA's EIS provision, which contains a specific set of mandates that are expressly made applicable to “all agencies of the Federal Government.”⁶⁴ The omission of any reference to “all agencies of the Federal Government” in § 102(1) appears highly significant. Had Congress wished to limit the applicability of the interpretation mandate to federal agencies, it could surely have drafted the subsection to declare that “all agencies of the Federal Government shall interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in this chapter.” Its refusal to do so carries an unmistakable implication: § 102(1) applies to *all* governmental entities that are responsible for interpreting and administering our nation's policies, regulations, and public laws, presumably including the President of the United States.

Subsection 102(1) does not itself define the “policies set forth

⁶³ *Id.* at 787. However, the Supreme Court limited the scope of NEPA to an extent, concluding that NEPA must give way where there is “clear and unavoidable statutory conflict” with another Congressional mandate.

⁶⁴ *Id.* at 788; 42 U.S.C. § 4332.

in this chapter” to which the interpretation mandate applies.⁶⁵ Nonetheless, it is apparent that those policies were fully expressed in sections 2 and 101 of NEPA, the portions of the statute to which that phrase evidently refers. Section 2 provides:

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.⁶⁶

In § 101(a), Congress declared that:

[I]t is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.⁶⁷

Moreover, at § 101(b) NEPA provides that:

[I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions,

⁶⁵ National Environmental Policy Act of 1969 § 102(1), 42 U.S.C. § 4332.

⁶⁶ 42 U.S.C. § 4321.

⁶⁷ 42 U.S.C. § 4331(a).

programs, and resources to the end that the Nation may—(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings; (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice; (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.⁶⁸

In considering the legality of the Two-For-One Order in light of the NEPA interpretation mandate, as the Order affects federal regulations that protect the environment, one must inquire whether the Order is a “policy, regulation or public law of the United States.”⁶⁹ If so, the interpretation and administration of the Order must be carried out in accordance with NEPA’s policies. There seems little doubt that Executive Order 13771 falls within the meaning of that phrase.

By imposing a regulatory regime that considers only the private costs of regulations without examining their benefits, the Two-For-One Order undoubtedly creates a new federal policy. Moreover, along with other regulations, the Order clearly affects the implementation of several federal environmental statutes—including the Clean Air Act,⁷⁰

⁶⁸ 42 U.S.C. § 4331(b).

⁶⁹ *Id.* § 4332.

⁷⁰ *See generally* Clean Air Act, 42 U.S.C. § 7401(b) (initiating a national program to promote better air quality, public health, and public well-being through the prevention and control of air pollution).

the CWA,⁷¹ the Toxic Substances Control Act,⁷² and the Endangered Species Act⁷³—by constraining the authority of regulatory agencies to implement those statutes consistent with the statutes’ express purposes and goals.

Given this, it is difficult to escape the conclusion that President Trump’s Two-For-One Executive Order is entirely inconsistent with the policies underlying NEPA. Rather than being calculated to “create and maintain conditions under which man and nature can co-exist in productive harmony,”⁷⁴ Executive Order 13771 established a policy that contradicts a number of federal environmental policies. This misguided directive obsessively focuses on the costs of environmental regulations while taking no account of their important benefits to public health, welfare, and the environment. Its legality—as squared with environmental regulations—is in very serious doubt.

The foregoing three Trump-era regulatory policies exemplify several common facets of how the Trump Administration approached environmental regulation. The Trump EPA’s rollback of vehicle mileage standards illustrates the Trump Administration’s willingness to ignore sound scientific analysis, its eagerness to overturn the Obama Administration’s environmental policies, and its utter failure to come to grips with the very real threats to human health and safety that global climate change poses. The Administration’s interpretation of *Waters of the United States* demonstrates its tendency to give environmental statutes the narrowest possible reading to benefit the regulated companies while ignoring environmental concerns. The Two-For-One Executive Order reflects the Trump Administration’s emphasis on the economic costs to industries of environmental regulation, even though it is at odds with straightforward congressional mandates. Sadly—singly or in combination—these themes

⁷¹ See generally Clean Water Act, 33 U.S.C. § 1252(a) (protecting waters for the public and the environment without regard to the costs of the regulation).

⁷² See generally Toxic Substances Control Act, 15 U.S.C. §§ 2601(a)–(c) (regulating industrial chemical substances and mixtures that present an unreasonable risk of injury to public health or the environment).

⁷³ See generally Endangered Species Act, 16 U.S.C. § 1531(b) (requiring the federal government to prioritize conservation of threatened and endangered species).

⁷⁴ 42 U.S.C. § 4331(a).

characterize very many of the environmental regulatory policies and approaches that prevailed throughout the Presidency of Donald Trump.

III. EPA ENFORCEMENT IN THE TRUMP ERA

Enforcement has been widely recognized as a critical component of implementation work. As Peter C. Yeager has observed: “To the public mind, enforcement is the centerpiece of regulation. . . . Both symbolically and practically, enforcement is a capstone, a final indicator of the state’s seriousness of purpose and a key detriment of the barrier between compliance and lawlessness.”⁷⁵ At EPA, the process of enforcing environmental laws is at once laborious, time-consuming, and technical. It is also often contentious. Enforcement cases typically go through three distinct phases: information-gathering, administrative case development, and (if the matter has not been resolved through negotiation) formal litigation.⁷⁶ In noncriminal cases, the Agency has several primary sources of compliance information, including record-keeping and self-reporting by individual sources of pollution; on-site inspections of facilities by EPA employees or contractors; and reports of suspected violations from citizen informants or state or local government personnel.⁷⁷

Once information-gathering is completed, EPA’s enforcement staff must determine whether the source in question is in violation of applicable standards and, if so, what type of enforcement response the Agency will make. These decisions are typically made in EPA’s ten regional offices. Under most federal pollution control statutes, EPA has a range of legal enforcement options available. These options include sending a warning letter or a Notice of Violation to the pollution

⁷⁵ PETER C. YEAGER, *THE LIMITS OF LAW, THE PUBLIC REGULATION OF PRIVATE POLLUTION* 251, (Cambridge University Press ed. 1990).

⁷⁶ For a more detailed description of the process of enforcement at EPA, see Bertram C. Frey, “Federal Enforcement of Environmental Laws,” in *Afterword for EPA Going Forward*, in RICHARD W. EMORY, JR., *FIGHTING POLLUTION AND CLIMATE CHANGE: AN EPA VETERANS’ GUIDE ON HOW TO JOIN IN SAVING OUR LIFE ON PLANET EARTH* (Booklocker, revised edition, August, 2020).

⁷⁷ See Clean Air Act, 42 U.S.C. § 7414; Clean Water Act, 33 U.S.C. § 1311; Toxic Substances Control Act, 15 U.S.C. § 2607; Endangered Species Act, 16 U.S.C. § 1540.

source, issuing the source an administrative order requiring compliance, and (in some cases) an assessed civil penalty. Additionally, the Agency is authorized to refer enforcement matters to the U.S. Department of Justice (DOJ) for civil action or criminal prosecution.⁷⁸

Criminal cases are developed in a manner that differs from non-criminal matters. The information that begins the information-gathering process most often comes from a tip from a disgruntled employee of a suspected violator, an environmental citizens organization, or a civil investigation in which criminal conduct of a corporation is found. Criminal investigations are pursued by a staff of professional EPA criminal investigators. These investigations may involve undercover operations, search warrants, and grand jury proceedings under the auspices of the DOJ. Criminal prosecution is a particularly powerful enforcement mechanism. It is typically reserved for violations that were clearly intentional and/or matters in which the defendant has caused grave environmental harm.⁷⁹ Unfortunately, the aforementioned downward trend in environmental regulation at EPA during the Donald Trump Presidency was paralleled by a decline in the overall volume and effectiveness of the Agency's enforcement work.⁸⁰ As was the case on the regulatory side, Trump Administration officials made a consequential set of policy changes that had significant impacts. Perhaps most significantly, EPA reversed the overall pattern

⁷⁸ U.S. DEP'T. OF JUST., GUIDELINES FOR JOINT STATE/FEDERAL CIVIL ENVIRONMENTAL ENFORCEMENT LITIGATION 1 (2017) <https://www.justice.gov/file/928531/download> (explaining the Department of Justice, Environment and Natural Resources Division can work cooperatively with a state's Attorney General to enforce environmental laws); U.S. EPA, MEMORANDUM, STRENGTHENING ENVIRONMENTAL JUSTICE THROUGH CRIMINAL ENFORCEMENT 1 (June 21, 2021), <https://www.epa.gov/system/files/documents/2021-07/strengtheningenvironmentaljustice062121.pdf> (utilizing the DOJ's enforcement powers for environmental prosecutions).

⁷⁹ *Summary of Criminal Prosecutions*, U.S. EPA https://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm? (last visited Dec. 8, 2021) (cataloging criminal prosecutions from egregious environmental harms).

⁸⁰ Unfortunately, at this writing, (in December 2021) EPA has not released any measures of the final fiscal year of Donald Trump's Presidency. The metrics cited in this article are thus to that extent, necessarily incomplete.

of its relationship with state environmental agencies. Until 2017, the federal agency had engaged in extensive oversight of state enforcement levels.⁸¹ Traditionally, EPA attempted to coax states into implementing assertive, relatively strict, and formal enforcement strategies. In the Trump years, however, EPA's leadership adopted a *laissez-faire* attitude towards state environmental enforcement. Rather than continuing its usual oversight role, beginning in 2017 the Agency generally deferred to the decisions of state environmental agency personnel as to which enforcement cases to bring and how they should pursue them.⁸²

This change weakened the nation's overall environmental enforcement efforts for two reasons. First, a number of states with significant pollution problems were not equipped with either the staff, resources, or the requisite expertise to enforce environmental laws effectively.⁸³ Second, some states did not have the political will to enforce environmental standards in a manner that would effectively sanction noncompliance and deter future violations. As a result, when one considers the aggregate volume (and likely impact) of federal, state, and local environmental enforcement taken together throughout the Trump era—much ground was lost.

⁸¹ See EPA, RESOURCE CONSTRAINTS, LEADERSHIP DECISIONS, AND WORKFORCE CULTURE LED TO A DECLINE IN FEDERAL ENFORCEMENT 3 (2021), https://www.epa.gov/sites/default/files/2021-05/documents/_epaig_20210513-21-p-0132_0.pdf (documenting the decline of federal enforcement actions and noting the deference to state enforcement programs after 2017); see e.g., EPA, EPA REGION 5 CLEAN WATER ENFORCEMENT DECLINES 1 (2020), https://elpc.org/wp-content/uploads/2020/04/ELPC-Region5Report_FINAL.pdf (demonstrating an example of this decline in EPA's region 5 under the CWA).

⁸² In the run up to the 2020 general election, Susan Parker Bodine, EPA's Assistant Administrator for Enforcement and Compliance Assurance in the Trump administration, defended the quantity and quality of EPA's enforcement in the Trump era. *ICYMI: Trump EPA's Focus on Enforcement and Compliance is Paying Off*, U.S. EPA (Oct. 20, 2020), www.epa.gov/newsreleases/icymi-trump-epas-focus-enforcement-and-compliance-paying (noting that the number of facilities that returned to compliance under EPA's self-audit program more than doubled between 2016 and 2019).

⁸³ From 2008 through 2018 state environmental agencies lost in aggregate total of 4,400 employees. Many of these employees worked in state environmental enforcement programs, which were hard hit by state budget cuts. ENV'T INTEGRITY PROJECT, *THE THIN GREEN LINE* 4 (2019).

By all accounts, the morale of EPA's professional enforcement staff plummeted during the Trump years. The Agency's top-ranked civil servants—those who had been appointed to EPA's senior executive service (SES)—were (and still are) subject to being permanently reassigned to different duties (sometimes in a distant city) on very short notice. Anxious to avoid such personally disruptive reassignments, and/or otherwise suffering career damage, the Agency's SES employees typically refrained from openly criticizing Trump Administration policy changes that they disagreed with. Fear of retribution also percolated to lower levels of EPA's enforcement—particularly among relatively new enforcement staff members in the Agency's regional offices and headquarters—who feared being let go in future budget cuts.⁸⁴

Although EPA's Office of Enforcement and Compliance Assurance (OECA) established the overall direction of enforcement policies, much internal opposition to EPA enforcement during the Trump era came from EPA's ten Regional Administrators. These officials—who were all-too-frequently conservative, anti-regulatory ideologues—occasionally met with the defendants' counsel in enforcement cases outside of the presence of assigned staff engineers and attorneys assigned to those cases. Not surprisingly, the professional staff in those matters were dismayed when those regional office meetings occurred without their input and sometimes without their knowledge. It is hard to measure the extent of the damage these closed-door meetings did. Nevertheless, they had an obvious negative impact on the morale of EPA's regional enforcement staff.

The Trump Administration's non-traditional policies regarding

⁸⁴ See Stephen Lee, *EPA, in Midst of Hiring Spree, Faces Uphill Push for More Staff*, BLOOMBERG LAW (July 14, 2021), <https://news.bloomberglaw.com/environment-and-energy/epa-in-midst-of-hiring-spree-faces-uphill-push-for-more-staff> (noting the major staff losses during the Trump Administration); see, e.g., Eric Lipton & Lisa Friedman, *E.P.A. Employees Spoke Out. Then Came Scrutiny of Their Email*, N.Y. TIMES, (Dec. 17, 2017), <https://www.nytimes.com/2017/12/17/us/politics/epa-pruitt-media-monitoring.html> (documenting an example of intimidation tactics within the EPA during the Trump Administration); see UNION OF THE CONCERNED SCIENTISTS SURVEYING THE ENVIRONMENTAL PROTECTION AGENCY 2 (2018), <https://www.ucsusa.org/sites/default/files/2019-09/science-under-trump-epa.pdf> (reporting EPA scientists are most likely to report challenges to incorporating science into agency decision making).

enforcement had a noticeable impact, as reflected in the numbers that the Agency used to measure its own enforcement accomplishments. In other writings, I have suggested that evaluating the effectiveness of governmental enforcement programs objectively, on the basis of their levels of “outputs” in various categories of enforcement activities, is an extremely tricky task.⁸⁵ While that is true, self-reports on programmatic accomplishments in enforcement regarding certain periods, regimes, or governmental units may sometimes yield at least a rough overall indication of an enforcement program’s relative effectiveness.

One area in which reported numbers may be especially revealing is with respect to the number of criminal environmental enforcement cases initiated annually by the DOJ upon referral from EPA. Because it can directly affect high-level corporate officials, criminal enforcement is a powerful arrow in the federal government’s environmental enforcement quiver. Its implementation is widely believed to have a strong deterrent effect. In a carefully prepared report by the University of Michigan Law School’s Environmental Crimes Project, Professor David Uhlmann and his assistants analyzed the publicly available data regarding federal pollution prosecutions from 2005 through the first two years of the Trump Administration.⁸⁶ Professor Uhlmann noted a 71% decrease in CWA prosecutions from what they had been under President Obama⁸⁷ and a similar dramatic decline in Clean Air Act prosecutions.⁸⁸ Uhlmann concluded that “[n]o matter what the future holds, the data from the first two years under President Trump reveals a dramatic departure from the non-partisan support for pollution prosecutions that had existed across administrations, which leaves Americans less safe and the environment

⁸⁵ Joel A. Mintz, *Measuring Environmental Enforcement Success: The Elusive Search for Objectivity*, 44 ENV’T L. REP. 10751, 10755 (2014).

⁸⁶ DAVID M. UHLMANN, PAPER NO. 685, NEW ENVIRONMENTAL CRIMES PROJECT DATA SHOWS THAT POLLUTION PROSECUTIONS PLUMMETED DURING THE FIRST TWO YEARS OF THE TRUMP ADMINISTRATION 3 (2020).

⁸⁷ *Id.* at 7 (showing the average number of Clean Water Act defendants charged per year during 2017 and 2018 decreased from 44.5 defendants to 13 defendants).

⁸⁸ *Id.* at 12 (demonstrating that the average number of Clean Air Act prosecutions declined by 54% during the first two years of the Trump administration).

less protected.”⁸⁹ The number of new criminal investigations begun by EPA in given years is also a meaningful statistic. EPA criminal investigations opened 170 new investigations in fiscal year 2019.⁹⁰ In contrast, in fiscal year 2010, the Agency conducted nearly 400 investigations.⁹¹

Beyond a pronounced fall-off in federal criminal prosecutions and in EPA criminal referrals to DOJ, civil and administrative environmental enforcement also declined notably from past years during the Trump years.⁹² In my view, two annually reported metrics provide especially telling insights into how effectively a non-criminal enforcement program is functioning in a given year: (1) the number of in-person facility inspections agency personnel and contactors conducted and (2) the aggregate amount of money polluters were compelled to invest in pollution controls as a direct result of agency enforcement actions.⁹³ By these measures, EPA enforcement was down considerably in the Trump Administration.

In fiscal year 2019, EPA inspected 10,320 facilities—a far cry from the 21,278 potential pollution sources that the Agency and its contractors visited in fiscal year 2010.⁹⁴ Similarly, EPA enforcement directly resulted in \$4.43 billion in pollution control expenditures in

⁸⁹ *Id.* at 16.

⁹⁰ EPA, FISCAL YEAR 2019 EPA ENFORCEMENT AND COMPLIANCE ANNUAL RESULTS 10 (2020), <https://archive.epa.gov/epa/sites/production/files/2020-02/documents/fy19-enforcement-annual-results-data-graphs.pdf>.

⁹¹ COMPLIANCE AND ENFORCEMENT ANNUAL RESULTS 2009 FISCAL YEAR, EPA (2009), <https://archive.epa.gov/enforcement/annual-results/web/pdf/eoy2009.pdf>.

⁹² See EPA OFF. OF INSPECTOR GEN., REP. NO. 20-P-0131, REPORT: EPA’S COMPLIANCE MONITORING ACTIVITIES, ENFORCEMENT RESULTS GENERALLY DECLINED FROM FISCAL YEARS 2006 THROUGH 2018 at 6 (2020) [hereinafter EPA Office of Inspector General enforcement trend report].

⁹³ While the aggregate amount of penalty money extracted from violators can sometimes also be a significant indicator, those numbers tend to vary annually to a great degree, particularly in years where single case settlements result in extremely large penalty amounts. When that occurs, the large one-case penalty amounts can diminish the significance of the aggregate amount of penalties paid by environmental law violators during the fiscal year in question.

⁹⁴ EPA Office of Inspector General enforcement trend report, *supra* note 92, at 24, 26; COMPLIANCE AND ENFORCEMENT ANNUAL RESULTS 2009 FISCAL YEAR, *supra* note 91.

fiscal year 2019.⁹⁵ But, by contrast, in fiscal year 2011, Agency enforcement efforts compelled private expenditures of \$19 billion in pollution controls.⁹⁶

Other measures of enforcement accomplishments also point towards a troubling decline in enforcement success during the Trump Administration. When comparing fiscal years 2018 and 2007, EPA initiated 52% fewer non-criminal enforcement actions and concluded 51% fewer such actions.⁹⁷ Moreover, when comparing fiscal years 2018 and 2012, the number of concluded non-criminal enforcement actions that included defendant commitments to reduce, treat, or eliminate pollution declined by 31%.⁹⁸

The response of EPA's enforcement program to the COVID-19 pandemic of 2020 was particularly controversial. On March 26, 2020, Susan Bodine, EPA's Assistant Administrator for Enforcement and Compliance Assurance, issued a memorandum announcing a "temporary policy" governing EPA enforcement during the pandemic.⁹⁹ Under this new policy, EPA would no longer seek penalties where a pollution source violates "routine compliance monitoring, integrity testing, sampling, laboratory analysis, training and reporting or certification obligations" as a result of COVID-19.¹⁰⁰ Facilities that suspended those activities during the pandemic were not compelled to immediately notify the Agency that they were doing so.¹⁰¹ Instead, they were required to explain the basis for their actions and decisions if—and only if—EPA later sought to learn whether what particular facility owners and operators did during the pandemic period

⁹⁵ EPA, FISCAL YEAR 2019 EPA ENFORCEMENT AND COMPLIANCE ANNUAL RESULTS *supra* note 90, at 3.

⁹⁶ EPA COMPLIANCE AND ENFORCEMENT ANNUAL RESULTS 2011 FISCAL YEAR 3 (2011), <https://archive.epa.gov/enforcement/annual-results/web/pdf/eoy2011.pdf>.

⁹⁷ See EPA Office of Inspector General enforcement trend report, *supra* note 89, at 8, 9.

⁹⁸ *Id.* at 17.

⁹⁹ U.S. EPA, MEMORANDUM, COVID-19 IMPLICATIONS FOR EPA'S ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAM 1 (Mar. 26, 2020), <https://www.epa.gov/sites/default/files/2020-03/documents/oecamemooncovid19implications.pdf>.

¹⁰⁰ *Id.* at 3.

¹⁰¹ *Id.*

was justified.¹⁰²

On its face, the Agency's written policy could be viewed as benign. It did provide that the appropriate implementing authority (i.e., the state environmental agency or else EPA) must be notified "if facility operations impacted by the COVID-19 pandemic may create an acute risk or imminent threat to human health or the environment."¹⁰³ It also declared, in bold-face type, that "[t]he EPA expects all regulated entities to continue to manage and operate their facilities in a manner that is safe and that protects the public and the environment."¹⁰⁴ Despite that language, however, Bodine's March 26 memorandum failed to recognize that self-monitoring, facility staff training, accurate laboratory analysis, and self-reporting are critical aspects of environmental regulation in the United States.

In fact, EPA's COVID-19 enforcement policy was issued shortly after the oil and gas industry lobbied the administration for a pandemic-related relaxation of environmental standards. Whether or not that had been its actual intent, EPA's new "temporary policy"—which was announced with no stated end date—was very widely interpreted as a signal that EPA suspended its enforcement activities for the duration of the pandemic.

Numerous state environmental agencies responded to Bodine's March 26 memorandum by relaxing their own regulatory policies. In addition, in the wake of the new EPA policy, state agencies and EPA received more than 3,000 pandemic-based requests for waivers of environmental policies.¹⁰⁵ All too often, those requests were granted by state officials with little or no review, notwithstanding the risks those suddenly legal emissions posed to public health and the environment.¹⁰⁶ Strikingly, more than 50 of the facilities that obtained rule exemptions had troubling pre-pandemic records of violating

¹⁰² *Id.*

¹⁰³ *Id.* at 4.

¹⁰⁴ *Id.*

¹⁰⁵ Cathy Bussewitz et al., *Thousands Allowed to Bypass Environmental Rules in Pandemic*, AP (Aug. 24, 2020), <https://apnews.com/article/virus-outbreak-ky-state-wire-ia-state-wire-ap-top-news-health-3bf753f9036e7d88f4746b1a36c1ddc4>.

¹⁰⁶ Joel A. Mintz & Victor Flatt, *Pandemic Spawns Dangerous Relaxation of Environmental Regulation*, THE REVELATOR (Sept. 17, 2020), <https://therevelator.org/pandemic-environmental-regulations/>.

environmental regulations.¹⁰⁷ Those parties' applications for regulatory relief clearly deserved far more careful scrutiny than they in fact received from state officials.

EPA's COVID-19 enforcement policy led to howls of protests from environmental NGOs as well as government officials in certain states. On August 18, 2020, the Center for Biological Diversity, Waterkeeper Alliance, and Riverkeeper, Inc. filed a lawsuit in the U.S. District Court for the Southern District of New York seeking to enjoin EPA's pandemic enforcement policy.¹⁰⁸ Ultimately, notwithstanding the fact that the COVID-19 pandemic was still in full swing, EPA terminated its COVID-19 enforcement policy as of August 31, 2020, and the plaintiffs successfully moved to dismiss their own suit.¹⁰⁹

It may be that the Agency's policy regarding the pandemic had been well-intended. Nonetheless, even if that were so, at minimum the policy's delivery amounted to a gross failure of communications that severely damaged whatever remaining credibility EPA's enforcement program had retained. At worst, the policy was a reckless, highly inappropriate attempt to cater to the wishes of powerful regulated industries at the public's expense. Regrettably, the full scope of the environmental harm that occurred while the policy was in force may never be known. The absence of self-monitoring and self-reporting permitted by the policy obviously precludes accurate estimates of that harm. Nonetheless, the COVID-19 policy fiasco stands out as a particularly low point in an otherwise undistinguished period in EPA's enforcement history.

¹⁰⁷ Rachel Frazin, *Dozens of Facilities Skipping Out on EPA Pollution Monitoring Have Prior Offenses*, THE HILL (July 29, 2020), <https://thehill.com/policy/energy-environment/509489-dozens-of-facilities-skipping-out-on-epa-pollution-monitoring-have>.

¹⁰⁸ See Press Release, Ctr. for Biological Diversity, *Lawsuit Challenges Trump Administration's Suspension of Pollution Monitoring: EPA Failed to Consider Impacts on Imperiled Species*, (Aug. 18, 2020), <https://biologicaldiversity.org/w/news/press-releases/lawsuit-challenges-trump-administrations-suspension-of-pollution-monitoring-2020-08-18/>.

¹⁰⁹ COVID-19 Enforcement and Compliance Resources, <https://www.epa.gov/enforcement/covid-19-enforcement-and-compliance-resources> (updated Oct. 13, 2021).

IV. REPAIRING THE DAMAGE: HOW CAN EPA REGULATION AND ENFORCEMENT BE REFORMED IN THE POST-TRUMP ERA EPA?

The regulatory and enforcement shortcomings described above provide considerable evidence that EPA suffered a clear loss of focus, a sharp drop in morale among its career workforce, and disastrous policy reversals from 2017–2020. Remedying these problems will require a sustained and persistent effort. Nonetheless, so long as it has the will to do so, the new administration will have ample authority to reverse the Agency’s recent setbacks.

At the outset, the Biden Administration will be wise to appoint (and a new Congress should promptly confirm) top leaders at EPA with knowledge of environmental issues who have no ties to entities that the Agency regulates. Those appointments will go far towards erasing the reality and perception that EPA is merely a “captive agency,” whose policies are driven by influential industrial polluters and their lobbyists.

Beyond this, the Agency’s full-time (or full-time equivalent) workforce is overdue for a significant increase. Over the years, even as Congress has piled additional resource-consumptive responsibilities on EPA, the size of the Agency’s career staff has steadily declined.¹¹⁰ At its apex towards the end of the 1990s, EPA employed more than 18,000 full-time employees.¹¹¹ At the time of this writing, however, the Agency currently has approximately 14,000 employees¹¹²—far too few to effectively implement the charges that Congress imposed upon it to date. Ideally, any workforce increase will be gradually phased in to allow EPA to fully absorb its newest staff members. A staff augmentation must also certainly take account of any new obligations the Agency may have under future federal climate-change legislation. Moreover, staff increases will require EPA to devote ample time and effort to recruiting and training its newest employees, even as it carries out its other important responsibilities.

¹¹⁰ *EPA’s Budget and Spending*, <https://www.epa.gov/planandbudget/budget> (last updated July 30, 2021) (documenting EPA’s allocated budget and total workforce for each fiscal year since 1970).

¹¹¹ *Id.*

¹¹² *Id.*

A restored EPA will also need to rebuild its foundation of scientific expertise. The Trump Administration's attempts to censor sound science by imposing untenable limitations on the application of legitimate research findings disingenuously disguised as improvements in governmental "transparency" must be promptly reversed. A new administration should sharply change course by restoring EPA's prior emphasis on mitigation and adaptation to the global climate crisis (hopefully in a context of renewed international cooperation regarding this crucial issue). EPA's scientific staff and its panels of advisors should once again be assigned to focus on climate-related research, and the Agency must be part of an urgent, administration-wide push for comprehensive legislation to reduce the nation's greenhouse gas emissions.

In a deliberate and legally sound way, a revived EPA must undo a number of specific Trump Administration regulatory actions and policies that substantially weakened critical protections of public health and the natural environment. The Trump EPA rolled back numerous pre-existing regulatory policies and safeguards, and a number of these rollbacks have been challenged in court. Rather than waiting for those lawsuits to run their course, a Biden Administration EPA will certainly be wise to ask the courts to put the cases in question on hold while it develops, proposes, and promulgates effective substitutions for the Trump-era regulations that have been the basis for litigation.

The undoing of Trump's EPA rollbacks must be based on a strong foundation of legitimate science. It will thus behoove the new administration to direct a team of well-qualified scientists to conduct a reasonably prompt survey of the prior administration's regulatory changes, with the goal of identifying those Trump regulations that now do (or are likely to do) the most environmental harm. That set of regulations should receive priority attention for reversal.

Certain Trump-era policy approaches seem quite likely to be high on a reformed Agency's must-eliminate list. Without question, EPA's current refusal to recognize the "co-benefits" of regulations that will curb climate change (i.e., the side benefits to public health that will result from limiting greenhouse gas emissions) must be reversed. Instead, EPA must adopt a method of cost-benefit analysis that realistically measures all the benefits to society of protective

regulations while not exaggerating their aggregate costs. In addition, one hopes that all of President Trump's executive orders intended to slow or prohibit new regulatory initiatives will be promptly extinguished by a stroke of the presidential pen. Prominent among those orders is the President's Two-For-One Order, discussed above, which directs executive branch agencies and departments (including EPA) to rescind two existing regulations for every new regulation they establish.¹¹³

Additionally, a reinvigorated EPA will surely need to reverse certain specific Trump-era EPA regulatory initiatives. The current Agency's misguided attempt to repeal the vehicle emission standards imposed under the Obama Administration should be a top candidate for elimination. Stronger standards are urgently needed to encourage the timely development and deployment of environmentally friendly electric cars. The Trump Administration's abandonment of limitations on mercury emissions—a dangerous neurotoxin—cries out for reversal. So too do the Agency's ineffectual regulation of coal-ash waste, its lax new source review standards for existing power plants, its haphazard implementation of the most recent amendments to the Toxic Substances Control Act, its failure to regulate dangerous pesticide products, and all EPA regulations that encourage the continued burning of fossil fuels at power plants. The Trump Administration also issued permits for potentially destructive petroleum drilling and mining in environmentally sensitive areas of Alaska that urgently need to be reversed.¹¹⁴ EPA permits for petroleum drilling in Arctic waters and for mining in environmentally sensitive areas of Alaska must be reconsidered and rescinded. Moreover, the Agency's crabbed interpretation of *Waters of the United States* must be abandoned in favor of a statutory construction that once again applies the CWA to many of the nation's now-unregulated waterways.

Beyond these essential regulatory changes, a revived EPA must also implement major alterations in the Agency's enforcement programs. The goal of these enforcement reforms must be to fully

¹¹³ *Supra* Part II.C.

¹¹⁴ Brad Plumer & Henry Fountain, *Trump Administration Finalizes Plan to Open Arctic Refuge to Drilling*, N.Y. TIMES (Aug. 17, 2020), <https://www.nytimes.com/2020/08/17/climate/alaska-oil-drilling-anwr.html>.

restore and maintain the deterrent approach that characterized EPA enforcement throughout nearly all of the Agency's history prior to 2017. As described above, the past several years have been a time of sharp fall-off in the number of enforcement actions taken by EPA. This unfortunate development has been paralleled by a notable decline in the Agency's enforcement presence and its deterrent impact. Several measures are urgently needed to restore EPA enforcement. Like the rest of the Agency, EPA's enforcement programs are greatly in need of an influx of new personnel—particularly criminal investigators, lawyers, and engineers. After appropriate training, such new employees must be used to increase the number of plant inspections the Agency conducts, the number of new criminal enforcement investigations, and the overall volume of new administrative and civil cases pursued by EPA.

It is critical that the Agency's new leadership announce and continually reiterate their unwavering support for vigorous deterrent enforcement. The attitudes and pronouncement of the "top brass" are a subject of careful attention among the career staff at all levels, and they have considerable influence on the direction and amount of EPA enforcement work. To effectively deter environmental violations, EPA will also do well to extensively publicize its enforcement accomplishments as they occur. Announcements of particular enforcement activities—including administrative enforcement actions, penalties imposed on violators, civil and criminal cases referred to the DOJ, and settlements requiring meaningful private pollution control investments—should be routinely distributed to media outlets and trade associations. In addition, EPA must make clear that, absent clear proof of a *force majeure*, pollution sources must continue to conduct regular self-monitoring and self-reporting at all of their own pollutant emission and discharge levels.

CONCLUSION

In sum, EPA's work cannot be turned on and off like a light switch. Instead EPA is better conceptualized as a deep well that can yield the desired results if its pump is sufficiently primed. Recovery from the institutional and environmental damage the Trump Administration has done to the Agency must proceed

vigorously. At the same time, recovery must be accomplished with careful attention to legitimate scientific support for regulatory changes, a right-sizing of EPA, careful training of new EPA employees, and continuing support and strong and steady encouragement from the White House and from a new cadre of Agency leaders.

The stakes are very high, and the challenges are great. Nonetheless, as long as all needed reforms are pursued steadfastly and with renewed purpose, EPA will indeed be restored as an effective protector of the nation's health and environment.