

The Rollback of Environment Justice: Executive Orders, Rulemaking, and the Administrative Process Under the Trump Administration

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ABSTRACT

Most substantive policy issue areas, particularly environmental policies, have been legitimized through the legislative process since the 1970s with the enactment of the Clean Air Act and the Clean Water Act. However, with a divided Congress, amendments to these two landmark pieces of legislation have become increasingly difficult to compromise and negotiate solutions to the most salient environmental problems in today's society, namely, climate change. The primary impacts of climate change are numerous: however, the changing weather patterns and factors affecting environmental health are at the highest risk. In the policy issue of environmental justice, Presidents Clinton and Obama used executive orders in an attempt to remedy some of the latent problems for minority and low-income populations, most notably, the regulation of carbon dioxide and methane. The coal industry lobbied candidate Trump who promised to rollback the regulations that affected that industry. This research investigates the executive orders issued in the Trump administration, presents a discussion of administrative rulemaking and federalism, and assesses the status of the executive orders to date.

Keywords: rollback, climate change, executive orders, rulemaking, administrative process

INTRODUCTION

MOST SUBSTANTIVE POLICY AREAS, such as environmental policies, have been legitimized through the legislative process since the 1970s with the enactment of the Clean Air Act and the Clean Water Act being two of the hallmarks for subsequent environmental legislation. However, with a divided Congress, amendments to these two landmark pieces of legislation have become increasingly difficult to broker and negotiate solutions to the most salient environmental problems in today's society, specifically compromised local ambient air quality (point source pollution) and, more generally, climate change (nonpoint source pollution). Some of the impacts may include changing weather patterns rendering a higher incidence of natural disasters, such as Hurricane Harvey that made landfall in the Texas Coastal Bend in 2017 and

the floodwater of this same natural disaster inundating Houston and the Upper Texas Coast releasing fugitive chemicals¹ throughout the Texas Coast especially in cities with petrochemical plants.

For almost four decades, environmental justice scholars have studied the effects of environmental pollution and estimated that it was thought to cause 1% to 5% of cancers,² and a decade later, the World Health Organization (WHO) estimated that the contribution of the environment to cancer may be as high as 25%.³

¹Jaime Madrigano, Juan Carlos Osorio, Eddie Bautista, Ryan Chavez, Christina F. Chaisson, Erika Meza, Regina A. Shih and Ramya Chari. "Fugitive Chemicals and Environmental Justice: A Model for Environmental Monitoring Following Climate-Related Disasters." *Environmental Justice* 11 (2018): 95–100.

²Richard Doll and Richard Peto. *The Causes of Cancers: Qualitative Estimates of Avoidable Risks of Cancer in the United States Today*. (Oxford University Press, 1981).

³World Health Organization. *The World Health Report 1996: Fighting Disease, Fostering Development*. (World Health Organization, 1996).

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Other environmental health studies have found linkages between pesticides and herbicides, heavy metals, industrial solvents, petroleum products, industrial chemicals and cancers of the brain, liver, breasts, kidney, prostate, esophagus, skin, bone marrow, and lymph nodes.⁴ Since the early 1980s, numerous epidemiological studies were conducted to assess the health effects of air pollution in children. The outcomes of these studies reflected varying degrees of respiratory and pulmonary disease, and at times, mortality.⁵

Other ecological studies conducted around this time period found a statistical association although not causation between environmental pollution and disease rates. Some of these associations targeted chemical pollution and infertility, lung disease, brain damage, birth defects.⁶ Chronic conditions such as cardiovascular disease, cancer, and chronic pulmonary disease are also associated with compromised air quality, where disease rates are substantially influenced by economic and environmental conditions such as in low-income, high-minority areas.⁷ These studies lacked the robustness for statistical causation; however, they were able to bring salience to a previously ignored policy issue area by identifying factors influencing environmental health. As a result of these focusing studies, President William Clinton issued an Environmental Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations* in 1994. This executive order also established the Office of Environmental Equity within the Environmental Protection Agency (EPA).⁸

The policy issues today involve climate change or compromised ambient air quality that can result in environmental health problems. The levels, composition, size, and exposure continue to be risk factors for environmental health from different emission sources, primarily those associated with fossil fuel plants due to higher concentrations of particulate matter (PM).⁹ The contaminants and levels of contamination include carbon dioxide, methane, and black carbon.¹⁰ The health risks associated with these contaminants have been linked with

cardiovascular disease and decreased life expectancy¹¹ and will most likely impact vulnerable populations. Other health impacts attributed to air pollution and the proximity to polluting sources, such as nitrogen dioxide and sulfur dioxide, were found to contribute to cardiopulmonary mortality, cardiovascular disease, and respiratory disease.¹²

With more recent air quality studies conducted, environmental health risks were found to be associated with ambient point-source emissions from predominantly fossil fuel power plants. In the Northeastern United States, exposure to PM was found to be associated with health effects for the general population such as aggravation of heart and lung disease. Other research called for more risk assessment studies for subpopulations, including those with respiratory disease, heart disease, and diabetes; young and aging populations.¹³ In 2016, the WHO reaffirmed this assessment and posited that socially vulnerable populations, especially children, are at a higher risk of development and cognitive functions. The WHO estimated that environmental risk factors cause around 1.7 million deaths in children younger than 5 years and 12.6 million annual deaths.¹⁴

Texas is also perceived as a high-risk area due to the predominance of the fossil fuel industry, toxic waste storage tanks, and high ozone and fine PM levels, especially in the Houston metropolitan area. Because of the coal-burning power plants, this area has experienced high levels of nitrogen oxides, sulfur dioxide, and carbon dioxide. Current research is focused on developing risk assessment models to measure the degree of health impacts as a tool for policymakers.¹⁵

California has had a more progressive and proactive approach to climate change. This state has embraced a broader definition of environmental justice, which is based on the relationship between disadvantaged communities and impacts emanating from and related to the

⁴Sandra Steingraber. *Living Downstream, An Ecologist Looks at Cancer and the Environment*. (Addison-Wesley Publishing, 1997).

⁵T. Nurminen, M. Nurminen, C. Corvalan and D. Briggs. *Linkage Methods for Environment and Health Analysis, General Guidelines*. (World Health Organization, 1996); Lawrence Folinsbee. "Human Health Effects of Air Pollution." *Environmental Health Perspectives* 100 (1992): 46; Christopher J. Murray, Alan D. Lopez (eds). *The Global Burden of Disease, Vol. 1*. (World Health Organization, Harvard School of Public Health and The World Bank, 1996).

⁶National Research Council. *Science and Judgement in Risk Assessment*. (National Academy Press, 1994).

⁷Dean T. Jamison, W. Henry Mosley, Anthony R. Measham and Jose Luis Bobadilla. *Disease Control Priorities in Developing Countries*. (The World Bank, 1993).

⁸William J. Clinton. *Executive Order 12898—Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations*. (Government Printing Office, 1994).

⁹Dan Costa. "Air Quality in a Changing Climate." *Environmental Health Perspectives* 119 (2011): A154–A155.

¹⁰Dan Costa. "Air Quality in a Changing Climate."

¹¹Rebecca Tanzer, Carl Malings, Aliaksei Hauryliuk, R. Bubramanian, and Albert A. Presto. "Demonstration of a Low-Cost Multi-Pollutant Network to Quantify Intra-Urban Spatial Variations in Air Pollution Source Impacts and to Evaluate Environmental Justice." *International Journal of Environmental Research and Public Health* 16 (2019): pii: E2523.

¹²Rebecca Tanzer, Carl Malings, Aliaksei Hauryliuk, R. Bubramanian, and Albert A. Presto. "Demonstration of a Low-Cost Multi-Pollutant Network to Quantify Intra-Urban Spatial Variations in Air Pollution Source Impacts and to Evaluate Environmental Justice."

¹³Phillip R. S. Johnson and John J. Graham. "Fine Particulate Matter National Ambient Air Quality Standards: Public Health Impact on Populations in the Northeastern United States." *Environmental Health Perspectives* 113 (September 2005): 1140–1147.

¹⁴A. Pruss-Ustumn, J. Wolf, C. Corvalan, R. Bos, and M. Neira. *Preventing Disease through Healthy Environments, A Global Assessment of the Burden of Disease from Environmental Risks*. (World Health Organization, 2016).

¹⁵Brian Strasert, Su Chen The, and Daniel S. Cohan. "Air Quality and Health Benefits from Potential Coal Power Plant Closures in Texas." *Journal of the Air and Waste Management Association*, 69 (2019): 333–350

health effects of climate change, focusing on increases in temperature, storm activity, and other factors that may pose threats to the environment, public health, and economic activity. They have institutionalized numerous indicators and risk assessment models that relate these elements to environmental justice.¹⁶ This state has historically been at the forefront of reducing greenhouse gases (GHGs) by lowering automobile emission standards through the use of federal waivers from the corporate average fuel economy (CAFE) standards established by the Clean Air Act.¹⁷

As the consensus about the causes of climate change coalesced among the scientific community, it is apparent that the Clean Air Act of 1970 and its amendments excluded the chemical elements that contributed to GHG emissions. During the Obama administration, the divided government was not likely to enact legislation on climate change policy. However, President Obama issued Executive Order 13653, Preparing the United States for the Impacts of Climate Change in November 2013, which came to be known as the Clean Power Plan (CPP) and became effective in 2017.¹⁸ This executive order became the new focus for environmental justice. The focus of this article is at the national level, specifically the Clean Air Act and effects of the executive orders issued by Presidents Clinton and Obama for environmental justice, and the repeal of these executive orders by Trump who was heavily lobbied by the fossil fuel industry. It is through the use of federalism and preemption that different states had been able to be granted waivers from the federal standards through the use of federal/state relationships.

DISCUSSION

As Trump was campaigning for election, his campaign rhetoric included promises to replace, repeal, and roll back administrative rules targeting environmental policy, specifically the establishment of CO₂ standards issued by decree through the CPP under President Obama's administration. Article II of the Constitution provides the parameters of presidential power in terms of execution of the enacted legislation¹⁹ through administrative rulemaking. A president may also issue executive orders to pursue the policy agenda.²⁰ Presidential executive decrees can be used to influence the direction of social policy but must also adhere to the administrative pro-

cess and bureaucratic rulemaking.²¹ This was the case for the environmental justice executive orders issued by Presidents Clinton and Obama.

President Clinton issued Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations in 1994, considered a major gain for scholars in this policy area. The initial provisions of this executive order²² are enumerated in Table 1. The current status of these provisions is presented since executive orders are subject to amendment, repeal, or revocation from an incoming presidential administration.

The Executive Order 12898 itself was nonexistent in the *Federal Register*, the U.S. National Archives, and the U.S. EPA website. However, in 2004, the EPA redefined environmental justice where it would no longer identify or address the "disproportionately high and adverse human health and environmental effects."²³ In effect, the EPA would not use demographics. Instead, they purported to protect all communities regardless of race or income. In 2014, President Obama issued a proclamation reaffirming the need for environmental justice in minority and low-income communities.²⁴ Many of the provisions are addressed and included in the Environmental Justice 2020 Action Agenda²⁵ in terms of policy enforcement and coordination of agencies. The Environmental Data and Governance Initiative was established under the Obama administration; however, this research tool has been defunded and no longer available under the Trump administration.²⁶ The advisory council continues to meet and hold public meetings. While the council has a voice at the table, it is unclear if the table still exists due to the budget cuts and defunding of the Trump administration. In 2018, the proposed federal budget targeted cuts for the EPA and completely defunded and shut down the Office of Environmental Justice.²⁷

²¹Cornelius M. Kerwin. *Rulemaking, How Government Agencies Write Law and Make Policy*, 3rd ed. (CQ Press, 2003), 118–157.

²²Clinton, William J. *Executive Order 12898—Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*. (Washington DC: Government Printing Office, 1994), 276.

²³U.S. Environmental Protection Agency. *Agency Statement on the Inspector General's Report on EPA's Environmental Justice Implementation*. (EPA, 2004).

²⁴Barak Obama. Presidential Proclamation—20th Anniversary of Executive Order 12898 on Environmental Justice. <<https://obamawhitehouse.archives.gov/the-press-office/2014/>> (Last accessed on July 23, 2019).

²⁵U.S. Environmental Protection Agency. *EJ 2020 Action Agenda, The U.S. EPA'S Environmental Justice Strategic Plan 2016–2020*. (U.S. EPA, 2016).

²⁶Lindsey Dillon, Dawn Walker, Nicholas Shapiro, Vivian Underhill, Megan Martenyl, Sara Wylie, Rebecca Lave, Michelle Murphy, and Phil Brown. "Environmental Data Justice and the Trump Administration: Reflections from Environmental Data and Governance Initiative," *Environmental Justice*. <online.liebertpub.com>. (Last accessed on November 13, 17).

²⁷Lisa Garcia. "Environmental Justice Office Could be Shuttered by Proposed EPA Cuts." *Earthjustice*. <<https://earthjustice.org/blog/environmental-justice-office>>. (Last accessed July 23, 2019).

¹⁶California Office of Environmental Health Hazard Assessment. Environmental Justice and Climate Change. <<https://oehha.ca.gov/environmental-justice/climate-change>>. (Last accessed March 29, 2020).

¹⁷Samantha Oller. "California Strikes Back at Trump Efforts to Revoke Emission Waivers." <<https://www.cspdailynews.com/fuels/californis-strikes-back-trump-efforts>>. (Last accessed on March 28, 2020).

¹⁸U. S. Environmental Protection Agency. *Final Review of Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources Under Executive Order 13783*. (EPA 2017).

¹⁹U.S. Const. S. art.2, sec. 2.

²⁰Adam L. Warber. *Executive Orders and the Modern Presidency, Legislating from the Oval Office*. (Lynne Rienner Publishers, 2006), 29–51.

TABLE 1. EXECUTIVE ORDER 12898: FEDERAL ACTIONS TO ADDRESS ENVIRONMENTAL JUSTICE IN MINORITY POPULATIONS AND LOW-INCOME POPULATIONS

<i>Provision</i>	<i>Status</i>
Provide guidance to federal agencies on identifying disproportionately high and adverse human health effects—an environmental justice impact analysis	Redefined in 2004 Reaffirmed in 2014
Develop and environmental justice strategy for administration and enforcement of consistency in activities and policies	Environmental Justice 2020 Action Agenda, The U.S. EPA's Environmental Justice Strategic Plan 2016–2020
Coordinate research among EPA, Department of Health and Human Services, and other agencies	Environmental data and governance initiative no longer available
Coordinate data collection and studies affecting this population	Environmental health studies in EPA archives
Hold public meetings on impacts	National Environmental Justice Advisory Council Meetings continue to be held
Provide interagency projects to encourage cooperation among federal agencies	EJ 2020 Action Agenda, The U.S. EPA's Environmental Justice Strategic Plan 2016–2020
Expand the scope of the EPA's Office of Environmental Equity	Replaced by Office of Environmental Justice
EPA, Environmental Protection Agency.	

In 2014, President Obama issued Proclamation of Executive Order 12898 promoting his agenda for environmental justice by identifying climate change as the primary issue affecting minority and low-income populations. He proposed to regulate carbon emission and develop alternative energy sources. Toward this end, President Obama issued Executive Order 13653, Preparing the United States for the Impacts of Climate Change²⁸ in 2013, which became effective in 2017 after numerous court challenges. The EPA developed the rules for the CPP. The most notable components are the inclusion of GHGs that contribute to climate change, specifically carbon dioxide and methane. The fossil fuel industry heavily lobbied and contributed to the Trump campaign with the explicit intent to repeal the CPP due to economic concerns. When Trump took office in 2017, one of the first executive orders that he issued was Executive Order 13783, Repeal of the CPP; Emission Guidelines for GHG Emissions from Existing Electric Utility Generating Units; Revisions to Emissions Guidelines Implementing Regulation effective September 6, 2019.²⁹ This EPA program is known as the Affordable Clean Energy (ACE) Rule 2019. Table 2 provides a comparison of the two programs and their current status.

The primary difference between the two programs is the inclusion of measures for GHG. Under the CPP, health risks of climate were included in the calculation

for risk assessment. Under the ACE Plan Rule, the methodology used to assess health risks from polluted air was downplayed and the estimates downgraded. The new methodology was neither based on science nor peer reviewed for health effects. Specifically, PM (2.5, less than 2.5 µm in diameter) incurred the highest health risks. The fossil fuel industry lobbied to have this changed to a yearly average of 12µg/m³.³⁰

In EPA's final report for the ACE, the agency invoked the Clean Air Act and the Clean Water Act. The rules and regulations for the implementation of the statutes would be relegated back to the states.³¹ This type of new federalism was promoted by President Ronald Reagan starting in the 1980s and became the norm under Republican Party administrations. Under this type of federalism, the states must adhere to national-level standards, but they are administered and, to some extent, funded at the state level. In the past, more progressive states were granted waivers to exceed the national-level standards; however, that practice is no longer available.³² Under this rationale, carbon dioxide and methane are not included elements in the Clean Air Act and will not be implemented.

The rollback of the CAFÉ standards invoked federalism's preemption and supremacy clauses to withdraw the use of waivers used by states, especially California, to set more stringent standards. This provision was purported to be the most contentious and an agreement was made to

²⁸Barak Obama. Executive Order 13653, "Preparing the United States for the Impacts of Climate Change." *Federal Register*. 2013. <<https://www.federalregister.gov/documents/2013/11/06/2013-26785/>>

²⁹Donald Trump. Executive Order 13783, "Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementation Regulations." *Federal Register* 2019. <<https://www.federalregister.gov/documents/>>

³⁰*San Antonio Express-News*. "EPA to Change Way it Calculates Health Risks." May 21, 2019.

³¹U.S. Environmental Protection Agency. *Final Report on Review of Agency Actions the Potentially Burden the Safe, Efficient Development of Domestic Energy Resources Under Executive Order 13783*. (Washington DC: The Agency, 2017).

³²Michael D. Reagan. *Regulation, The Politics of Policy*. (Little, Brown and Company, 1987), 154–177.

TABLE 2. COMPARISON OF ENVIRONMENTAL PROTECTION AGENCY RULE CHANGES:
EXECUTIVE ORDER 13783, AFFORDABLE CLEAN ENERGY RULE 2019

<i>EPA rule</i>	<i>Affordable Clean Energy Rule</i>	<i>Clean Power Plan</i>	<i>Status</i>
Carbon emission stationary sources	Repealed	Established first-ever standards for states to reduce GHGs from existing fossil fuel generating units.	Rules at state level; no waivers
GHG emissions for new stationary sources	Repealed	Established standards for emissions for CO ₂ for newly constructed, modified, and reconstructed fossil fuel units.	Rules at state level; no waivers
Federal plan/model trading framework	Repealed	Established rules to implement emission guidelines for domestic energy resources.	Rules at state level; no waivers
Methane emission standards	Repealed	Established standards for oil and natural gas category and set first-time standards for methane and volatile organic compounds.	Judicial review rendering a stay. Proposals under Office of Management and Budget interagency review
CAFÉ standards for light-vehicle GHG emissions Safer affordable fuel-efficient vehicles	Requested reconsideration of finding Withdrawal of waivers CAFÉ standards changed to 1.5% from 5%	Midterm evaluation requirement to assess whether standards GHG emissions for light-duty vehicles were appropriate. The GHG emissions determined to be appropriate.	New rules submitted for reconsideration Updated below Final Rule effective November 26, 2019 Invoked federalism's preemption clause, Supremacy clause Effective April 1, 2020 Rules at state level
Steam electric effluent limitation guidelines	Repealed	Contained limitations and standards on waste streams at steam electric coal power plants.	Rules at state level
Coal combustion residuals	Repealed	Established minimal national criteria for landfills and active coal fire power plants.	Rules at state level

Sources: Federal Register. "2019 Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations." <<https://www.federalregister.gov/documents/2019/>>; EPA. "Final Report on Review of Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources Under Executive Order 13783." 2017. <<https://www.epa.gov/laws-regulations/regulatory-reform/>>; Federal Register. "Final Ruling on The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One." 2019. <<https://www.federalregister.gov/documents/2019/>>.

CAFÉ, corporate average fuel economy; GHGs, greenhouse gases.

reconsider this rule through a public commenting period as well as undergoing judicial review after numerous lawsuits were filed. The final rule, effective from April 1, 2020, changed the CAFÉ standards from the proposed 0.05% to 1.5% decreasing it from 5% under the CPP. It was a minor victory.

CONCLUSION

The U.S. Constitution explicitly provides for a president to issue executive orders under Article II. When a new president is elected, executive orders are used, to varying degrees, to shape and implement the rules and regulations to promote his or her ideology. When there is an absence of an enacted law, a president may issue an executive order such as the environmental justice executive orders executed by Presidents Clinton

and Obama. Executive orders can also propose changes to existing legislation. In either case, the administrative process stipulated under the Administrative Procedures Act must be followed. The primary difference between the two is that a new president can revoke or repeal a prior executive order with more facility rather than when a law already exists. Trump used these Article II powers to roll back the gains of environmental justice.

This Administrative Procedures Act allows for the public to challenge any ruling after publication in the *Federal Register* and the final ruling made. Numerous states and health-related organizations, such as the American Lung Association and the American Public Health Association challenged the ACE rules alleging that they failed to fulfill the requirements of the clean air act and contributed to climate change and compromised

health effects. The recent final rule on the CAFÉ standards reflected a slight change from the original rule.

The executive orders under the Trump administration have served to roll back many of the gains of environmental justice. The states are being constrained and denied the ability to set more stringent standards through the use of waivers. The disadvantaged and minority communities are likely to suffer the negative health-related impacts of these provisions.

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