



How to Advance Environmental Protection During a Turbulent Era

Having been reelected by what he describes as “an unprecedented and powerful mandate,” in his second term President Donald Trump is expected to take up a deregulatory agenda—which environmentalists anticipate with trepidation but which businesses generally welcome as an appropriate relaxation of regulations they say inhibit a creative free market and stymie investments in needed projects. President Trump has announced he will seek to reverse President Joe Biden’s climate change policies and will support expansive oil and gas development.

As activists gird to defend what they

deem to be essential conservation and environmental policies and standards while conservative and business interests expect Trump to eliminate what they deem to be unjustified regulations and to take new approaches, what will be the most salient environmental reform goals over the next four years for Republicans and their allies in the private sector? What will Democrats and environmental activists want to do to ensure continued forward movement—and ensure a half century of progress isn’t erased while Republicans are in control of the policymaking machinery? Why do advocates on both sides think they will succeed? What’s at stake if they fail?



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Let Feds and States Do What Each Does Best

By Jonathan H. Adler

During the last days of the Biden administration, the White House issued a flurry of sweeping environmental measures, blocking new energy leases offshore and establishing new national monuments covering nearly 850,000 acres. This comes after four years of aggressive environmental regulatory action across the board—action that the Trump administration will immediately try to undo, just as the Biden administration's first order of business was to undo the environmental initiatives of the first Trump administration, which spent much time undoing the work of the Obama administration, and so on.

This see-saw of executive branch action is what modern environmental policy has become—and environmental protection is not better for it. Continued environmental progress will require a more forward-looking, principled agenda. A near-exclusive focus on how to reverse what was done before fuels polarization, generates uncertainty and litigation, wastes resources, and destroys any hope for a stable and predictable regulatory environment.

The second Trump administration should seek to do more than rollback disfavored Biden rules. It should aim to reorient federal environmental law for the 21st century, recognizing the need for jurisdictional matching, policy experimentation, technological innovation, and voluntary conservation.

The new administration could start by articulating a set of conservative principles to guide agency discretion in developing regulations and enforcing existing rules, such as emphasizing tangible results over technical requirements, pursuing voluntary compliance before punitive measures, respecting

property rights and protecting market dynamism, and embracing subsidiarity in priority-setting and decisionmaking.

The administration should focus federal efforts on those concerns that cannot be adequately addressed by other levels of government, such as interstate pollution, while accepting greater state leadership when it comes to localized environmental harms. The causes, contributors, and solutions to many environmental concerns will vary from place to place, and one-size-fits-all solutions too often fit nobody well. Allowing states more flexibility, where permitted by law, will facilitate policy innovation and give diverse jurisdictions greater latitude to pursue environmental priorities in line with local preferences and conditions.

During its first term, the Trump administration was too quick to abandon its commitment to federalism when states pursued policies that conservative groups or business interests disfavored. This sort of federalism-for-me-but-not-for-thee approach is unprincipled and undermines the potential to build cross-ideological coalitions for meaningful reform. Subsidiarity necessarily means that not every state or region will pursue environmental policies to everyone's liking, but such flexibility is necessary to get the degree of innovation and experimentation that we need.

There seems to be a consensus that permitting rules and regulatory restrictions can hamper environmentally beneficial innovation and improvement. The new administration can build on this consensus, while also encouraging greater consideration of non-regulatory approaches to conservation and pollution control.

However much the Trump administration wants to change the course, it cannot reform environmental law alone. There is only so much the President can do with the proverbial phone and pen. Major policy decisions require legislative action. Thus, ultimate responsibility for reforming and updating our environmental laws will fall to Congress.

Most major environmental laws have not been reauthorized, let alone revised, in this century. That is inexcusable, and one contributor to the conflict and dysfunction in contemporary environmental policy. Revisiting existing environmental laws will require coalition-building and compromise—admittedly things Congress is not particularly good at anymore. But it is also an opportunity to focus federal environmental efforts on contemporary concerns for which the federal government has a comparative advantage but fit poorly within statutory frameworks drafted in the 20th century.

Legislative reform will also be an opportunity to revive the partnerships with state governments and create more opportunities for non-federal actors to contribute to environmental protection. At present, federal environmental law devotes too much attention to dictating how local jurisdictions must address their own environmental concerns and too little to those areas in which federal involvement is most necessary.

Some will see efforts to reorient environmental law as a threat, as not every state or community will make the right choices, but it is also an opportunity. Most meaningful environmental innovation occurs outside of Washington, D.C., and we see more bipartisan cooperation in environmental law in state capitols than inside the Beltway as well. There is more pressure to ignore ideological flashpoints and focus on tangible results when addressing matters close to home.

The new administration has the opportunity to set a new course for environmental policy, but that will require looking forward, not back, and embracing clear principles that can guide policy reform. This did not happen the first time around. Will this time be any different?

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Pushback for Administration's Pledges Ahead

By DJ Gerken

In social media posts and a 900-page action plan, the new president and his supporters have proposed changes to environmental law that would undermine protections for natural resources and communities and stall urgent climate progress. Elections have consequences and federal priorities will change with this new administration. But experience teaches that a wholesale reinvention of environmental law is unlikely.

Our system of environmental safeguards is shaped by more than the policy whims of any president. Regulations must honor congressional intent and be supported by a logical record. A regulation on its way out must retrace the administrative path it followed to promulgation. Every presidential administration finds that four years is not enough time to do everything they hoped.

The Trump administration will find their lofty ambitions must navigate through historically challenging terrain. The business of regulatory change is conducted by agency experts, the same career staff the incoming president aspires to decimate and has already demoralized. And Trump's first term had little patience for administrative law or statutory mandates. As a result, its regulatory actions fared poorly in court. And recent precedent may not help matters. Post-*Loper* courts will not defer to the statutory interpretation of President Trump's agencies.

The Biden administration's climate policy, in particular, may prove especially resilient to the usual cycle of presidential action and reaction. The groundbreaking Inflation Re-

duction Act advanced climate goals through spending, grants, and incentives. That approach, which distributed funds and kickstarted manufacturing and other industries across the country, built a broad, supportive political coalition. And in its waning days, the Biden administration worked overtime to transform grant and loan programs into enforceable grant and loan contracts.

The most significant barrier to the incoming administration's agenda will be the American public. Here in the South, my organization partners with communities across the political spectrum, and I don't know anyone who voted for dirty water or polluted air. My hometown in western North Carolina just experienced generational flooding because of Hurricane Helene; we know climate change is not a "hoax."

Vague campaign promises are one thing; actions that undermine commonsense environmental protections, or favor political allies over the environment we all share, are something else altogether. That is where the incoming administration will discover the election was not a mandate to contaminate our water with forever chemicals, pollute our air with hazardous emissions, or trade away our natural heritage.

No one can predict with certainty how the next four years will play out. But if past is prologue, first we will see a flurry of executive orders, some significant, but many with little practical effect. In short order, federal agencies currently reviewing permits, proposals, and major federal actions will (arbitrarily) reverse course and issue approvals for politically connected proponents—with little record or justification for their final (capricious) decisions. Litigation will follow.

Before long we will see notices of proposed rulemaking. My colleagues and their peers will build administrative records grounded in science, making the case for the environment and burdened communities.

Again, litigation will likely follow because the first Trump administration was proudly contemptuous of administrative process and statutory mandates.

But elections have consequences, and environmental protection will suffer under this administration. Federal enforcement of environmental laws will fall off a cliff; my colleagues and our peers will step up to protect resources and communities. The Biden administration's focus on environmental justice will be immediately reversed and overburdened communities will face renewed threats. Long-standing efforts to safeguard environmental resources will lose some ground over the next four years, including time we cannot afford in our race to address the climate crisis. Still, the changes actually implemented by this administration will likely be a pale shadow of its sweeping promises.

Longer term, attempted overreach by the new administration will remind us that we cannot take our environmental future for granted. We must build on the political consensus that drove environmental protection in the 1970s and implement solutions to expand environmental protections for the resources we all rely on, the natural treasures we love, and communities burdened by decades of neglect.

We must also build a coalition that supports clean energy at a massive scale: solar, wind, battery storage, transmission capacity—infrastructure essential to addressing climate change and building a vibrant 21st century economy. We believe that coalition exists because we've seen it in small towns and big cities throughout our region. Expanding that coalition around the values we all share is the work my colleagues and I will be doing over the next four years and beyond.

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Time for States to Flex Their Legal Muscles

By Michael B. Gerrard

IN these dark several years ahead, with all three branches of the federal government moving backwards on environmental protection, the states can do much to stem the retreat.

With only a few exceptions, federal environmental standards are the floor, not the ceiling. States may impose stronger requirements. Though the Supreme Court in its 2023 decision in *Sackett v. EPA* severely limited the coverage of the Clean Water Act, states are free to protect their own wetlands. States may require the cleanup of contaminated sites that EPA deems of low priority. The Federal Power Act and the Natural Gas Act give states broad authority over power plants and natural gas extraction within their borders. States may adopt their own lists of endangered species. States set their own zoning and building codes. States and municipalities determine where wind and solar farms can be built, and states decide where electric transmission lines can go.

Some state actions can have important impacts beyond their borders. Notable here are Renewable Portfolio Standards. RPSs are state rules that a certain percentage of the electricity sold within the state come from clean sources. If generators in a state without an RPS want to sell their power to a state that has one—such as Idaho to California, or Indiana to Illinois—they must meet the importing state's RPS. This has led to a considerable increase in wind and solar in the non-RPS states.

While the federal government sets the national fuel economy and emissions standards for motor vehicles, California can impose stronger standards with a federal waiver, and

other states may then adopt the California standards. States with about 40 percent of the automobile market have usually gone along. The Biden administration granted the needed waivers, which help drive the transition to electric vehicles. Trump has vowed to revoke the waivers; their fate will be battled out in court.

Even without the waivers, states can do much to advance EVs. They can build out their networks of public charging stations and require parking garages and lots to install chargers. They can make their own fleets electric. They can provide their own subsidies for EV purchases. As California has done, they can try to reach agreements with vehicle manufacturers to make EVs regardless of what happens in Washington.

EVs, data centers, and many other uses will require much more electricity. New York has been a leader in preventing its municipalities from enacting ordinances that block the construction of the wind, solar and transmission that will supply the needed clean power.

Of the six states with the largest populations, three—California, New York, and Illinois—are solidly blue. They have so much market power that their actions can have nationwide impacts. States may adopt their own energy efficiency standards for appliances where there are no federal standards; California for many years spurred advances in refrigerators until the Department of Energy began imposing its even stronger standards. Many appliances still lack federal standards.

States can also use their purchasing power to require some of the items they buy in large quantities, like cement and steel, to come from clean production methods. Their public pension funds can invest in clean rather than dirty industries.

New California laws require companies that do business there to disclose their direct and indirect greenhouse gas emissions and their climate vulnerabilities. These laws

are stronger than the Securities and Exchange Commission's disclosure regulations, and become much more important when the SEC rules disappear under Trump. The California laws are under attack in court, but similar laws are under consideration in New York.

Many states are fighting to hold fossil fuel companies financially accountable for their roles in the climate crisis. Eight states and 18 counties and cities have sued these companies for climate deception; some of these cases have been working their way through the courts since 2017. New York and Vermont have adopted "climate superfund" laws that would assess fossil fuel companies for their past roles. These, too, will have their days (or years) in court.

Building codes, which are mostly creatures of state law, are powerful ways to require buildings to be energy efficient, to have solar panels or greenery on their roofs, to be resilient to floods and wildfires, and otherwise both to be climate-friendly and to help advance technological progress.

Acting together, states can adopt important programs such as the Regional Greenhouse Gas Initiative and the Western Climate Initiative. Similar programs on renewable fuels have been under discussion. With all of these, and much else, the state politics of the moment are key factors in what is and is not adopted. But with the federal government pulling back for now, state action is all the more essential.

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Utilities Need Regulatory Certainty

By Tim Profeta

Twenty-five years ago, as the lead staffer in the Senate for the Clean Air and Climate Change subcommittee, I hosted a delegation of utility CEO's from the Midwest. These executives represented several of the largest power generators in the country, and correspondingly several of the nation's largest emitters of greenhouse gases.

My guests' request of us was simple: to provide a clear, stable, and certain long-term policy environment under which their utilities could plan energy investments, and they would achieve societal goals. It was the uncertainty of our political system, and the whiplash between regulatory obligations, that prevented the efficient pursuit of those goals.

For 25 years, the government has attempted to provide this certainty, and for 25 years it has largely failed. Election day outcomes have had major consequences for legislation and regulation affecting the industry, and we have careened between regulatory and deregulatory efforts every four to eight years.

This year promises a similar story, as the Trump administration has pledged to roll back many of the Biden regulations governing the power sector, and the certainty they provide. Many of Biden's executive actions are likely to be reversed as soon as permitted by the Administrative Procedure Act. The Republican-led Congress also has cast its eyes on the public investment programs passed by its predecessors for clean energy.

Nonetheless, while this year seems like it will be a replay of years past, there are indications that

things may be different this time. First, the clean energy sector is a far more powerful player in both the marketplace and political arena. Investments have flowed at historic rates into the sector. According to a Rhodium Group analysis, \$78 billion in direct federal investments into clean energy and technology projects have been made since the Inflation Reduction Act's passage, stimulating \$493 billion in private investment through the first half of 2024. Many expectations underlie those investments.

A new report released this month by the American Clean Power Association and endorsed by the Chamber of Commerce and the Edison Electric Institute forecasts that this trend is poised to accelerate. In particular, ACP's findings anticipate that current public programs—if left in place—will drive \$2 trillion in private investments and \$3.8 trillion in related economic benefits over the next decade. This investment is projected to create 1.2 million jobs annually, mostly in regions dominated by Republican legislators in the South and Midwest.

Second, we are in the midst of a massive increase in energy demand for which we do not have the luxury to let politics interfere. Re-shoring of manufacturing and electrification of major energy demand have started a new era of load growth, but it is the boom of artificial intelligence and the hyperscaling companies aiming to capture that market that have forced the conversation to an entirely different level. The latter trend also carries major geopolitical implications as the United States seeks to dominate AI technology, requiring us to find enough energy to service it. Given that most of the energy generation under development is from clean sources, we may need to put political debate aside to bring this abundant supply to market as soon as possible.

Third, energy investment decisions are driven by economic, not

political considerations, and many of the new sources of demand are asking for clean sources of power. New major emitting sources only make sense if those 30-year investments look like they will not suffer from another policy reversal in four or eight years. And many of the new sources of demand have long-term internal climate commitments that will hew to cleaner sources of power. These "clean" sources will likely expand past traditional renewable technologies and embrace "firmer" clean assets like nuclear, natural gas with full capture, and geothermal, but nonetheless drive investment toward technologies that avoid greenhouse gas emissions.

With these new dynamics, clean energy investment will likely survive this political moment. The path to lowering energy prices, building U.S. manufacturing, and winning the AI race runs through retaining the clean energy investment boom, and a coalition of energy buyers and generators can bring that argument to Wall Street and Washington. There is hope that they will be able to preserve the public investment programs that underpin our current explosion of investment in energy projects.

Nonetheless, this repetitive whiplash of government reversals must end if our nation is going to achieve the true energy dominance that our politicians desire. Clear and durable rules of the road are what our private sector needs, and investment that achieves the societal goals of those rules will follow.

While we may not be in a moment of compromise, we need to begin to cultivate such a moment. Perhaps this same coalition of buyers and generators, stoked by the necessity of the energy demand of the moment, can spur that outcome.

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Core Compliance and Enforcement Likely Will Go On

By Stephen P. Smith

Despite commentary forecasting significant shifts in U.S. environmental compliance and enforcement priorities under a second Trump term—some of which will require turbulent procedural efforts—EPA’s core programs in that area will continue largely as they have under prior administrations, whether Republican or Democratic. Companies and municipalities should continue to prioritize internal environmental compliance measures to maintain competitiveness and minimize environmental risks. This will ensure they are prepared not just for the next four years, but also administrations to come.

Working under the Obama, Trump, and Biden administrations while at EPA—notably at EPA Region 4 in Atlanta, Georgia—I focused on core environmental compliance and enforcement efforts and saw firsthand how administration changes can greatly impact the internal operations and priorities of the agency, which, in turn, impact regulated industries and affected communities. However, despite these changes, traditional, day-to-day environmental compliance and enforcement work continued at the agency throughout each administration, including under the first Trump administration.

Since joining private practice, I have seen how mission-driven environmental compliance efforts within corporate and municipal operations can meaningfully ensure that organizations are in the best possible position when the inevitable environmental violation or emergency occurs. Businesses must navigate times of uncertainty—especially when

faced with the turbulent federal environmental policy that they have become accustomed to over the past decade or more. That said, organizations can be certain that regardless of who occupies the White House, core environmental compliance and resulting enforcement will continue largely as it has in the past.

What *is* core environmental compliance and enforcement? It is traditional inspection-driven violation enforcement pursuant to the objectives of our country’s environmental statutes. It also entails cleanup-led compliance and enforcement pursuant to the Superfund law, as well as emergency scenarios like facility spills, fires, or other incidents that pose risk to life and property—and which require agency action and commonly lead to additional enforcement, including possible criminal referrals to the Department of Justice.

What is not included in my definition of core environmental compliance and enforcement are policies and regulations most susceptible to interpretation or prioritization based on political views by any particular administration. For example, policies like environmental justice and climate change that saw significant prioritization under the Biden administration—while critical and important in the eyes of many—will soon be replaced by the new administration’s anticipated priorities of streamlining permitting for oil and gas exploration, production, and transmission, cooperative federalism, and environmental deregulation efforts generally.

Notwithstanding the ebb and flow in the agency’s enforcement pipeline, most often due to pauses or delays from new administrations assessing existing cases and confirming priorities, as well as impacts from national or global issues like Covid, which significantly reduced inspections and enforcement cases in 2020 and 2021, compliance and enforcement programs remain gen-

erally consistent throughout past administrations.

While many in the regulated community will be keen to pursue the Supreme Court’s newly sanctioned arguments against EPA’s administrative enforcement efforts, including the agency’s authority to pursue penalties via administrative action, we will need to wait and see what benefits, if any, come from such pursuits.

There can, however, be mutual benefits—depending on the circumstances—for both EPA and regulated industry to resolve alleged violations via an administrative settlement rather than going to federal court, especially for minor violations. Also, if Elon Musk’s plans to deregulate industry and cut funding to the federal government, including EPA, materialize early and sizably in President Trump’s second term, such efforts could certainly curtail the ability of the agency to perform its core responsibilities. However, such programs have endured similar efforts, including during the first Trump term. Whether this time will be different is yet to be seen.

There will be a flurry of new executive orders, and Biden orders rescinded, thereby beginning another round of turbulent federal environmental policy. While organizations should strategically pursue regulatory enhancements where they can, do not lose sight that core environmental compliance and enforcement efforts are typically the least impacted programs from administration to administration, and companies that continue to invest in such compliance efforts will find themselves to be the most prepared and competitive when future presidents, not just this one, take office.

Stephen P. Smith is of counsel for Beverage & Diamond P.C., following a 12-year career as associate counsel of EPA Region 4. The viewpoints are his own and not necessarily those of Beverage & Diamond or its clients.

An Opportunity for a New Era of Conservation

By Jonathan Wood

The “20th Century Model” of “land designations and [] regulation . . . is incapable of meeting the challenges we face today.” This is because “top down, regulatory approaches are often not very effective, and they are often divisive.” To succeed in the 21st century, conservation must be done “with private landowners, not to them.”

You might be surprised to learn that these quotes are not from the new administration but the outgoing one. In a speech celebrating the 150th Anniversary of Yellowstone National Park, Robert Bonnie, a Biden administration official and alum of the Obama administration and Environmental Defense Fund, called for a new approach to tackle today’s conservation challenges—one far removed from the regulatory conflict and litigation of the past.

Approached the right way, the Trump administration could help usher in this new era of conservation, one that recognizes tradeoffs, respects private landowners and local communities, and encourages collaboration over conflict. We certainly need it.

Consider the wildfire crisis fueled by an 80-million-acre backlog in needed forest restoration on national forest lands. No designation or litigation can get us out of that problem. Instead, it’s going to take permitting reform, to remove “green tape,” regulatory obstacles that slow or stop conservation efforts. Those permitting obstacles, and the litigation they promote, are why the Forest Service can’t restore more than a few million acres each year.

Over the last decade, no federal agency has had more projects delayed by the National Environmen-

tal Policy Act than the Forest Service. According to a 2022 study by my organization, the average forest restoration project spends more than three years under review before on-the-ground work begins. Complex projects, especially those involving prescribed fire, take closer to a decade. The new administration’s interest in permitting reform is an opportunity to address this green tape and, by doing so, reduce wildfire risks, restore wildlife habitat, and avoid billions of tons of greenhouse gas emissions in the process.

Or take the Endangered Species Act. Imposing top-down regulatory burdens on private landowners who conserve species and their habitats has stoked decades of conflict. But it hasn’t produced habitat restoration or species recovery. Last year, my organization found that only 13 species have recovered of the 300 the Fish and Wildlife Service predicted to recover by now. And, according to the Service, only 4 percent of species are even improving. Business-as-usual regulation done “to” private landowners, rather than “with them,” isn’t the solution—it’s the problem.

Last year, the Service reinstated its “blanket rule” automatically regulating threatened species the same as endangered species. This unscientific and lazy approach is a proven failure. When the blanket rule was previously in place, the Service recovered species at less than half the rate of the National Marine Fisheries Service, which has always designed less burdensome regulations tailored to the unique needs of each threatened species. It turns out denying states and landowners any reward for recovery progress is no way to encourage habitat restoration and recovery efforts.

The Trump administration can advance its deregulatory goals and conservation by eliminating the blanket rule in favor of an approach where regulations relax as species progress to recovery. Service biologists, state fish and wildlife agencies, and conservation organizations have

urged the agency to reduce regulatory burdens as species improve. Heeding their advice would be a win for states, private landowners, and species. Representative Bruce Westerman (R-AR), chair of the House Natural Resources Committee, has proposed pairing this reform with increased funding for state and tribal voluntary conservation programs, advancing a version of the long-stalled Recovering America’s Wildlife Act.

Restoring the crown jewels of American conservation, our national parks, could be the signature opportunity for the new administration. Since Covid, national parks have grown more popular and set new visitor records. In 2023, more than 325 million people visited national parks, a 50 million increase from 2013. This takes a toll on park infrastructure, one that can’t be fixed by more bureaucracy.

In 2020, President Trump signed the Great American Outdoors Act providing \$1.3 billion in a Legacy Restoration Fund to rebuild and maintain national parks. Four years later, the Park Service’s maintenance backlog has gotten worse, growing from \$14.9 billion to \$23.3 billion. The Legacy Restoration Fund will need to be reauthorized next year, and the growing maintenance backlog shows that further funding will need to be paired with policy reforms to make parks more sustainable.

From the fundraising emails I’ve received since November 6, many environmental groups are preparing for battle. But it would be better to heed Robert Bonnie’s advice: “Instead of waging war,” build a new conservation era that can work “no matter who’s in office.” To do that, we must recognize and seize opportunities to advance conservation through permitting reform, deregulation, and private enterprise, rather than reflexively opposing them.

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