

ENVIRONMENTAL

REGULATORY ROLLBACK—AND PUSHBACK



The Trump campaign made it clear that it wanted to roll back Obama-era environmental regulations, and the new administration started doing so almost immediately after the inauguration. But those actions have triggered significant litigation by citizen groups—and this is

likely to be just the beginning of a long-lasting trend.

History has shown that when there is a decrease in federal implementation and enforcement of environmental laws and regulations, the response is typically a surge of private legal action—and that seems to be very much the case now. Much of the recent citizen-group litigation has focused directly on the administration's efforts to change the environmental regulatory regime. For example, in April 2017, the EPA announced a delay in implementing an Obama-era rule limiting methane emissions in oil and gas drilling operations. That move was quickly challenged in court by several environmental groups. Then, in July, the D.C. Circuit blocked the EPA's action, saying that the agency did not have the authority to stop the implementation. As a result, the rule remained in effect.

Similar litigation is waiting in the wings. For instance, the EPA and the Army Corps of Engineers are in the process of trying to roll back the Waters of the United States rule—a broad definition of the waters under agency control—which had already been stayed by the courts. When that effort is complete and when the agencies issue a replacement rule, "it is almost certainly going to be litigated," says [Kirsten Nathanson](#), a partner in Crowell & Moring's [Environment & Natural Resources Group](#). And the courts have been delaying action on the Clean Power Plan, which is designed to cut electricity-generation emissions, as the EPA moves forward with its repeal effort. When the EPA does finalize its repeal action, that, too, is likely to bring environmentalists to the courtroom. Overall,

says Nathanson, "what we're seeing is a very ambitious and aggressive policy agenda that's running up against the realities of our judiciary and our existing laws."

Meanwhile, other citizen-initiated litigation is focusing on enforcement—or the perceived lack thereof. Nearly every major federal environmental statute includes a citizen suit provision that allows private parties to sue government agencies when they fail to carry out their duties under the law. The administration is working to cut back on EPA resources and enforcement activity—and as it does so, "citizen suits are starting to fill in the resulting enforcement vacuum, with claims that the agency is failing to perform as required," says Nathanson.

Citizen suits are being pursued against corporations for vio-

KEY POINTS

Filling the void

As government enforcement declines, environmental citizen suits are increasing.

New tools are fueling litigation

Citizen suits can draw on advancing technology to collect data and identify violations.

A growing list of players

Environmental groups, activists, and state governments are pursuing litigation at the federal, state, and local levels.



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lations of environmental laws, such as illegal emissions or the release of hazardous waste. A prominent example could spark an uptick in the coming years: in April, the Southern District of Texas ordered ExxonMobil to pay a \$19.95 million fine as a result of an air pollution suit brought under the Clean Air Act by the Sierra Club and Environment Texas. A statement from those environmental groups noted that it was the largest penalty ever levied in an environmental citizen suit. Says Nathanson: “If that penalty is upheld on appeal, it will generate lots of interest among the plaintiffs’ bar in filing similar suits.”

A COMPLICATED—AND EXPANDING—PLAYING FIELD

While such federal litigation continues, citizen suits are increasingly common at the state, federal, and even municipal levels. Here, drinking water and environmental justice are areas of growing focus, driven in part by the high-profile lead-contamination crisis in Flint, Michigan. Environmental justice cases are not a priority for the EPA, says Nathanson. “But the activist groups, the community groups, the citizen groups, and the environmental groups at the local level are continuing even without policy support from the federal government,” she notes.

There are other factors fueling the increase in citizen suits, including advancing technology. For example, new devices can detect very low levels of chemicals in water. “They are finding new, different forms of contaminants we didn’t know about before because the science didn’t exist to measure their presence and their impact,” says Nathanson. Indeed, there is a growing toolkit of inexpensive monitoring technologies that make it easier for private groups and individuals to detect environmental violations and collect evidence. Drones with cameras can give people a closer look inside facilities, for example, while infrared cameras can be used to spot otherwise invisible emissions.

At the same time, the rhetoric from the new administration—and moves such as withdrawing from the Paris Agreement on climate change—is itself a driver of citizen suits. These factors are not only motivating environmentalists, they’re also helping to fund activist litigation. In the three months following the election, for example, the Sierra Club reported a sevenfold increase in money raised compared to the same period the previous year. And ironically, the administration’s efforts to cut back on EPA resources and enforcement could lead to the agency’s failing to meet some mandated duties—creating more litigation opportunities for environmentalists.

It’s worth noting that citizen suits are not the whole story when it comes to litigation pushing back on the administration’s changes. State governments, too, have been weighing in. For example, in March 2017, the U.S. Interior Department lifted a ban on the leasing of federal lands for coal mining. In May 2017, four states—California, New Mexico, New York, and Washington—sued the department to challenge the lifting of the ban, saying the move would aggravate climate change,

CLIMATE CHANGE LITIGATION: THE NEXT WAVE(S)

In its 2011 *American Electric Power Company v. Connecticut* ruling, the U.S. Supreme Court said that corporations cannot be sued for greenhouse gas emissions under federal common law. However, it did leave the door open to state law-based suits for damages from climate change—and the plaintiffs’ bar is working hard to find a theory to take advantage of that.

In recent years, says Crowell & Moring’s Kirsten Nathanson, “There has been a series of cases in which plaintiffs sued fossil fuel companies for the effects of Hurricane Katrina. And there was a case in which natives in Alaska sued companies for rising sea levels that were flooding their island.” Both of those approaches failed in court.

Now, environmentalists are turning to new theories. In July 2017, two counties and one city in California sued dozens of fossil fuel companies under the public nuisance doctrine, saying the companies’ actions were contributing to increased flooding and rising seas, which the plaintiffs would have to pay for. And in another case now with the U.S. District for Oregon—*Juliana, et al. v. United States of America, et al.*—21 young plaintiffs, including children, have sued the federal government for violating the public trust doctrine and the plaintiffs’ due process rights. The government’s actions, they say, are preserving a system that drives greenhouse gas emissions, threatening future generations.

violate the federal government’s duties to protect public lands, and burden the states with expenses related to mining. In addition, says Nathanson, “the California attorney general has committed to taking legal action against future moves of the Trump administration to roll back the Obama administration’s regulatory legacy.”

All of this points to ongoing court battles. While a broad range of companies could find themselves targeted by citizen suits, the industries at highest risk are those that are seeing the biggest reductions in enforcement, such as mining and oil and gas drilling.

As the reshaping of the regulatory landscape makes its way through the courts, corporations can expect to face more uncertainty—and in some cases, troubling dilemmas. With the D.C. Circuit’s decision that left the Obama-era methane rule in effect, for example, companies have had to continue to make investments in reducing emissions—in essence, going to the trouble of complying with a rule that the EPA clearly intends to eliminate. Altogether, says Nathanson, “we’re going through a major transition in environmental regulation, and the growing pains will continue for some time.”