



The [Washington Post](#) is reporting that the Trump Administration will very shortly roll out two executive orders to curtail environmental protection. These rollbacks follow on the heels of the Senate's confirmation of Scott Pruitt, who [has made no secret](#) of his antipathy for federal environmental regulations. The first executive order, as widely expected, will tell the Environmental Protection Agency to redo the [Clean Power Plan](#). The CPP is at the heart of the Obama Administration's climate policies, and requires the electric generating sector to cut greenhouse gases by more than 30 percent by 2030. Importantly, the CPP is also at the core of [the U.S. commitment](#) to reduce greenhouse gases by 26 to 28 percent by 2025 under the Paris Agreement. The second Executive Order, also predictable, will instruct EPA and its sister administering agency, the Army Corps of Engineers, to withdraw the [Waters of the United States Rule](#).

In some respects, the rollback of these rules will do very little in the immediate run. That's because federal courts have already halted the implementation of both rules pending resolution of the merits of each case. Here's an [explanation](#) of the Supreme Court "stay" of the Clean Power Plan, which was a brazen and highly controversial decision handed down just before Justice Antonin Scalia passed away. The WOTUS rule, as it is known, was stopped from going into effect by several courts, including the [Sixth Circuit Court of Appeal](#), on both substantive and procedural grounds.

But in one very important respect, the actual effect of the two executive orders is quite different for each rule. By ordering that the CPP be withdrawn and redrafted, the Trump Administration allows existing power plants around the country to continue doing nothing to reduce their greenhouse gas emissions. No backup regulations are in place and nothing currently on the books will require power plants to do anything (although several states, notably California and member states of the Regional Greenhouse Gas Initiative, have their own laws to require reductions and many states require their utilities to procure a certain percentage of their energy from renewable sources like solar and wind). For this reason, I've been a bit puzzled over assertions that rolling back Obama-era climate rules and

regulations will be [a tricky, multiyear process](#). It is true that rolling back and rewriting the rules will take a long time. But the immediate effect of withdrawing the rules will be to ensure that power plants need do nothing to reduce their emissions. So the effect of withdrawing the rule is precisely what Pruitt and his fossil fuel-loving friends want: no regulation. Eventually, EPA will have to come up with a new rule to regulate the power sector. But delay is the friend of those who are anti-regulation here. The multi-year process means that we will lose years in our fight to reduce carbon emissions. And once a new rule is issued, lawsuits challenging the rule as too weak — almost certain to be filed — will not speed up the process. Moreover, withdrawal of the rule signals to the rest of the world — even if not explicitly — that the U.S. does not intend to live up to its Paris commitment.

The effect of repealing the WOTUS rule is quite different. To explain why requires some explanation of the rule itself. As I have written previously:

Under [Section 404](#) of the Clean Water Act, anyone seeking to dredge or fill wetlands by placing material “into the navigable waters” of the United States is required to obtain a permit from the Army Corps of Engineers (or a state to which EPA has delegated authority to issue wetlands permits). Regulatory authority for regulating wetlands is [split](#) between EPA and the Army Corp, with both agencies having policy authority and the Army Corps issuing permits. The question of what constitutes “navigable waters” is a contested one and the Clean Water Act itself gives very little guidance, defining “navigable waters” only as “waters of the United States.”

The result of the lack of definition in the Clean Water Act is that the agencies have to decide (because Congress hasn't been clear) which wetlands are covered by the Act. This attempt to define CWA jurisdiction has been difficult, to say the least. The U.S. Supreme Court has weighed in on how far Clean Water Act jurisdiction extends over wetlands three separate times (as explained in more detail [here](#)). Ironically, perhaps, Chief Justice Roberts has implored federal agencies to issue a new rule to define EPA and Army Corps jurisdiction and said that if the agencies did so the rule would be entitled to significant deference from courts. After a number of years, the Obama Administration issued the WOTUS rule to answer Roberts' call.

I could go on at length about how important wetlands are for coastal protection, flood control, species protection and so forth. For all of those reasons every President since George H.W. Bush has [committed](#) to a policy that we should have no net wetlands losses.

But for now, my point is a different one. Without the WOTUS rule in place, EPA and the Army Corps will still be required to make determinations about which wetlands they have jurisdiction over and which ones they do not. The repeal of the rule does *not* mean that wetlands will not be regulated. Instead, the question will continue to be *which* wetlands are covered by the Clean Water Act. And to make that determination, EPA and the Corps will not have the benefit of having a rule in place. So how are they to determine jurisdiction? The agencies will have to be guided by a single voice, that of Justice Anthony Kennedy. In the most recent wetlands case to reach the Supreme Court more than ten years ago, [*Rapanos v. United States*](#), the justices split three different ways in trying to decide which wetlands the Clean Water Act covers. The four conservatives then on the Court would have restricted jurisdiction significantly. The four liberals would have upheld expansive jurisdiction. Justice Kennedy authored his own opinion which included a more expansive definition of jurisdiction than the four conservatives. When you add Justice Kennedy's vote to the four liberals on the Court, you get a majority that would uphold Clean Water Act jurisdiction as long as, in Justice Kennedy's words, the government can show that wetlands have a 'significant nexus' to waters "that are or were navigable in fact or that could reasonably be so made." Since Justice Kennedy authored that opinion more than ten years ago, agency employees responsible for determining whether a property owner must get a wetlands permit have been left to determine — with some [guidance](#) but no rule — on a case by case basis whether the wetlands at issue have a "significant nexus" to waters "that are or were navigable in fact or that could reasonably be so made." The withdrawal of the WOTUS rule will leave the Army Corps employees with significant discretion to continue to determine what that standard means until EPA and the Corps can issue a new rule. That process will be tricky and cumbersome. And if the rule is too weak, legal challenges will continue to cause uncertainty (and might even cause a new rule to be halted in its implementation). And jurisdictional questions will remain difficult and uncertain and subject to individual legal challenge.

As the Trump Administration continues its assault on environmental protection, then, each rule rollback will raise an important question about what remains in its place. Sometimes, there will be nothing left at all. If the Senate follows the House of Representative's lead in [repealing](#) the new rule regulating methane releases from oil wells on federal lands, for example, there will be no rule left in its place (though some states provide some regulatory backstop). Drillers will not have to do anything to stop methane releases. By contrast, if Pruitt's EPA [withdraws](#) federal automobile standards to regulate greenhouse gas emissions for 2017-2025 passenger year automobiles, nothing will remain in place at the federal level but California's standards, which are identical, will remain in effect and other states can choose to follow California's rule. If Pruitt's EPA also attempts to withdraw its permission

to allow California to issue its standards, then no standards will remain in place (unless a court orders EPA to keep the standards in place pending a ruling on whether withdrawal of the permission is legal). When nothing remains in place, then there is nothing tricky at all about the Trump/Pruitt strategy. They will have succeeded in eviscerating the policy. Delay effectively means no regulation for many years.