

# Lawyer Insights

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## Core Functions and Cooperative Federalism at the EPA

by Dan Jordanger

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The U.S. Environmental Protection Agency released its draft strategic plan for 2018-2022 on Oct. 5, 2017.<sup>1</sup> Not surprisingly, the draft plan differs greatly from the Obama EPA's last strategic plan. The change in administrations has produced innumerable shifts in the policies, goals and operations of the federal government. The EPA's draft strategic plan is emblematic of these shifts.

In a fundamental way, the EPA's draft plan exemplifies a line attributed to management consultant Peter Drucker: "There is nothing so useless as doing efficiently that which should not be done at all."<sup>2</sup> The draft plan starkly narrows the items on which the EPA will focus its resources and turns the agency's back on many objectives contained in the previous plan — things that the Trump administration and Administrator Scott Pruitt believe should not be done at all.

The theme underlying the draft plan is the need for a dramatic shift in the EPA's focus and approach, embodied in the plan's three goals: "(1) refocus the Agency back to its core mission; (2) restore power to states through cooperative federalism; and (3) lead the Agency through improved processes and adhere to the rule of law." For each goal the plan identifies objectives, strategic measures, strategies to achieve the objectives, and "external factors and emerging issues." Attention to a few key terms provides a useful road map.

**Core mission focus:** Pruitt intends to refocus the agency on its foundational role to support states' and tribes' efforts to achieve the goals of clean air, water and lands. The EPA proposes to do this by streamlining operations and staff, reducing duplicative efforts and collaborating more with partners. Where the EPA must take the lead role — as with large Superfund sites — it will focus on a "top 10 list" of sites and accelerate decision-making to produce results more quickly.

**Collaboration and partnership:** A consistent theme in the draft plan is an aim to support, partner, fund and assist others' efforts to realize environmental goals. "[The] EPA will foster strong partnerships with other federal agencies, states, tribes, local governments, and other organizations that facilitate achieving ... goals while supporting robust economic growth."

**Infrastructure investments:** Through both direct investment and the leveraging of other funding sources, the EPA plans to encourage development and improvement of infrastructure projects. This includes not only regulatory needs like improved wastewater treatment and drinking water systems but also land cleanup that produces new development opportunities.

**Consistency and certainty for the regulated community:** "One of EPA's highest priorities must be to create consistency and certainty for the regulated community." The EPA intends to accomplish this

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through enhanced outreach, transparency and accelerated rulemaking.

Notable is the omission of any mention of climate change, a phrase ubiquitous in the 2014-2018 strategic plan. “Climate change” (51 times) and related terms (“changing climate” with 26 mentions, “adaptation” or “adapt” with 27 mentions, “greenhouse gas” and “GHG” with a combined 57 mentions) appear throughout the 2014-2018 plan. None of these terms appear in the new draft plan.<sup>3</sup>

Similarly, the draft plan sets aside sustainability as an explicit strategy of the agency. Former EPA Administrator Gina McCarthy noted in her introductory message to the 2014-2018 plan: “Moving beyond the foundation of traditional regulatory approaches to environmental protection, we are seeking to build sustainability into our day-to-day operations.” Sustainability was woven throughout that document on such diverse topics as drinking water systems, environmental justice, enforcement, chemical and materials management, and pollution prevention. In contrast, the new draft plan never uses the term “sustainability.” As noted above, the draft plan emphasizes narrowing the agency’s focus to its core statutory obligations and making the states the primary drivers for implementation of environmental laws.

Some will decry this pivot away from a more activist EPA. Yet even the most pessimistic observer may find a silver lining. Environmental law is a subject for which federalism empowers states to move policy in new directions. A test for the Trump administration will be whether its vision of cooperative federalism can accommodate state activism that the federal government may consider anything but cooperative.

The 2014-2018 strategic plan conveys the Obama EPA’s view that “federal, state, and tribal agencies work cooperatively together as co-regulators to achieve compliance” with environmental laws. Not everyone agreed that the EPA’s stance represented a “cooperative” approach. Some states chafed at what was, in their view, the EPA’s heavy-handedness.<sup>4</sup> President Donald Trump and Pruitt promised a different approach.

In the Trump era, cooperative federalism should allow state and local governments the opportunity to pursue different paths on environmental initiatives. In some instances, the emphasis in the federal-state relationship will continue to be on cooperation. Upgrading drinking water systems is an area for which the EPA leadership on standard-setting and grant funding, alongside state and local efforts to carry out the work on the ground, should see healthy partnerships. On issues in dispute, however, such as the need for more aggressive action to address GHGs, in some states federalism will predominate.<sup>5</sup> Already, some gubernatorial candidates are pledging to adopt state-level measures to replace regulations that the Pruitt EPA intends to drop.<sup>6</sup> Funding new initiatives will be a challenge in some cases. Yet it has always been the case that the balancing of costs and benefits associated with a policy, a regulation or a project is — and should be — a critical step in analyzing whether to pursue it.

At this point in the history of environmental regulation, states should be prepared to chart a course that is in the best interests of their citizens. Environmental laws never were intended to be one-size-fits-all. The natural resources of Alaska and Florida differ, and the ways in which people use and protect those resources differ. Absent a compelling need that is embodied by Congress in law, a single, national solution to a challenge, or a single, national mechanism to protect, enhance or use a resource, is arguably inappropriate. State and tribal governments can and should take the lead in forging local solutions. Where cooperation with neighboring states or the federal government makes sense, a state can decide to pursue it — all the more so when cooperative federalism, the rule of law and core mission focus are the EPA’s guideposts for the next four years.

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<sup>1</sup> See 82 Fed. Reg. 46490 (Oct. 5, 2017), Notice of availability, request for public comments on Draft FY 2018-2022 Environmental Protection Agency Strategic Plan. The notice states, in part: “The agency anticipates the final Strategic Plan will be submitted to Congress in February 2018 ... EPA is seeking comment from individual citizens, states, tribes, local governments, industry, the academic community, non-governmental organizations, and all other interested parties.” Comments were due by Oct. 31, 2017. The EPA received over 4,500 comments, many of which were part of a concerted effort asking the agency to eschew animal testing as part of scientific studies.

<sup>2</sup> This is neither to imply nor to concede that the Obama EPA did everything, or even anything, “efficiently.” The focus of this article is on the Trump EPA’s views about “that which should not be done at all.”

<sup>3</sup> Not coincidentally, on Oct. 16, the EPA published in the Federal Register a proposal to repeal the Clean Power Plan, which would regulate existing fossil-fuel fired electric generating units. See 82 Fed. Reg. 48025 (Oct. 16, 2017). Comments on the proposal are due to the EPA by Dec. 15, 2017.

<sup>4</sup> Indeed, during his seven years as attorney general of Oklahoma, Pruitt participated in 14 lawsuits against the EPA. See <https://www.nytimes.com/interactive/2017/01/14/us/politics/document-Pruitt-v-EPA-a-Compilation-of-Oklahoma-14.html> (accessed Oct. 9, 2017).

<sup>5</sup> For example, west coast states already have teamed with British Columbia in the “Pacific Coast Collaborative” to collaborate on efforts that are “sustainable, driven by innovation and low-carbon solutions, energy and resource conservation, and provide secure and meaningful jobs to [their] citizens.” See [http://pacificcoastcollaborative.org/wp-content/uploads/2016/02/Pages/Vision/PacCoastCollaborative\\_WEB.pdf](http://pacificcoastcollaborative.org/wp-content/uploads/2016/02/Pages/Vision/PacCoastCollaborative_WEB.pdf) (accessed Nov. 9, 2017).

<sup>6</sup> See, e.g., <https://www.eenews.net/eedaily/2017/10/10/stories/1060063161> (accessed Oct. 10, 2017).