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Elizabeth Glass Geltman

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THE NEW ANTI-FEDERALISM: LATE TERM OBAMA ENVIRONMENTAL REGULATIONS AND THE RISE OF TRUMP

ELIZABETH GLASS GELTMAN, JD, LL.M.*

ABSTRACT

Donald Trump ran his campaign on an anti-federalist agenda. He asserted that the federal government was too large and that regulation was the key problem choking the economy. A large portion of the country agreed. Apparently, Trump's arguments especially resonated with voters in Republican led states. Polling did not accurately predict Trump's success in the 2016 Electoral College. To many, Donald Trump's election as President came as a great surprise. Traditional polling reported in the press did not predict Trump's electoral victory.

Patterns in public response to some of President Obama's second term environmental health regulation more accurately predicted the electoral map. As the second term Obama EPA proposed additional regulation, resistance in the central United States grew.

This Article tracks the legal reaction of states across the country to Obama second term regulations governing shale oil and gas extraction (what the public calls "fracking"), the rule revising the definition of "Waters of the United States,"¹ and the "Clean Power Plan."² The Article demonstrates that with each new regulation, opposition to the Obama environmental plan grew. The map of state reaction to the Clean Power Plan (the final rule in the suite of rules examined) shows a map that resembles, if not mirrors, the November 2016 electoral map.

*† Elizabeth Glass Geltman is the author of seventeen books on environmental law and policy and is an Associate Professor at the CUNY School of Public Health, Secretary of the Law Section of the American Public Health Association, and Director of the Atlantic Emerging Technologies & Industrial Hygiene Training Center funded by the NIEHS Superfund Hazardous Substances Basic Research and Training Program.

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1. Clean Water Rule: Definition of 'Waters of the United States,' 80 Fed. Reg. 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 and scattered parts of 40 C.F.R.).

2. Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

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I. THE OBAMA ADMINISTRATION AND FEDERAL FRACKING RULES

In 2005, President George W. Bush signed the Energy Policy Act of 2005 into law.³ That law contained a small provision that went unnoticed by the environmental and public health community.⁴ The Halliburton Loophole exempted hydraulic fracturing (what the public calls “fracking”) from most environmental laws, including the Safe Drinking Water Act.⁵

The oil and gas industry grew precipitously during the Obama years. In 2008, when Obama took office, the United States produced an average of about 5.8 million gallons of oil per day.⁶ By 2015, oil production had gained 88% to produce about 9.4 million gallons per day.⁷ With increased production, however, came increased public concern about adverse environmental and public health effects⁸— which grew in tandem as the practice of fracking expanded.

3. 42 U.S.C. § 15801 *et seq.*

4. See generally Barbara Warner & Jennifer Shapiro, *Fractured, Fragmented Federalism: A Study in Fracking Regulatory Policy*, 43.3 PUBLIUS: THE JOURNAL OF FEDERALISM 474-96 (2013).

5. *Id.*

6. Robert Rapier, *The Irony of Obama’s Oil Legacy*, FORBES (Jan. 15, 2016, 8:30 AM), <http://www.forbes.com/sites/rpapier/2016/01/15/president-obamas-petroleum-legacy/>.

7. *Id.*

8. See Allan Mazur, *How did the Fracking Controversy Emerge in the Period 2010-2012?*, 25.2 PUB. UNDERSTANDING OF SCI. 207 (2016); Barry G. Rabe & Christopher Borick, *Conventional Politics for Unconventional Drilling? Lessons from Pennsylvania’s Early Move into Fracking Policy Development*, 30.3 REV. OF POL’Y RES. 321 (2013); Charles Davis, *The Politics of “Fracking”: Regulating Natural Gas Drilling Practices in Colorado and Texas*, 29.2 REV. OF POL’Y RES. 177 (2012); see also Hilary Boudet et al., *“Fracking” Controversy and Communication: Using National Survey Data to Understand Public Perceptions of Hydraulic Fracturing*, 65 ENERGY POL’Y 57 (2014). See generally Elizabeth Ann Glass Geltman, *Drilling for Common Ground*, 35 VA. ENVTL. L. J. 59 (2016); Elizabeth Ann Glass Geltman, *Shipping Fracking Wastes on the Ohio River: A Case Study in Effective Public Advocacy and How Citizen Groups Can Do Even Better*, 10 ENVTL. JUST. 137 (2017).

Congress responded to public concern about public health effects from fracking by commissioning the United States Environmental Protection Agency (EPA) to conduct a drinking water study in 2010.⁹ EPA also began developing suggested revisions to rules controlling air pollution in the oil and gas industry that would react to increased air pollution from the near doubling in production.¹⁰ In addition, the Bureau of Land Management (BLM) began developing rules to govern fracking operations on lands owned by the federal government.¹¹ The BLM rules aimed to balance the need to preserve lands for future use with the requirement to maximize use of land to benefit the present public.¹²

By the 2012 campaign, the Obama administration had begun examining the need to balance public health implications of fracking with the need to obtain energy independence but had promulgated no federal rules governing fracking. In fact, in 2012, President Obama campaigned on an “all of the above” strategy that encouraged development of a whole suite of alternative fuels, including extraction of oil and gas from shale using high volume, hydraulic fracturing.¹³ Obama reiterated his promise to maintain an “all of the above” energy strategy in his 2013 State of the Union address,¹⁴ but the agencies continued to explore ways to balance energy development with protecting the environment and public health. After the 2012 election, the federal government revised its BLM fracking proposal,¹⁵ introduced a controversial

9. *See EPA’s Study of Hydraulic Fracturing for Oil and Gas and Its Potential Impact on Drinking Water Resources*, EPA, <https://www.epa.gov/hfstudy> (last updated Sept. 25, 2017).

10. *Compare* New Source Performance and National Emission Standards for Hazardous Air Pollutants Reviews, 76 Fed. Reg. 52,738 (proposed Aug. 23, 2011) (to be codified at 40 C.F.R. pts. 60 and 63), *with* Emission Standards for New and Modified Sources, 80 Fed. Reg. 56,593 (proposed Sept. 18, 2015) (to be codified at 40 C.F.R. pt. 60) (revised proposal), *and* Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824 (Aug. 2, 2016) (to be codified at 40 C.F.R. pt. 60) (final rule). *See generally* *Controlling Air Pollution from the Oil and Natural Gas Industry*, EPA, <https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry> (last updated Dec. 13, 2017).

11. Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands, 77 Fed. Reg. 27,691 (proposed May 11, 2012); *see also* Neil Kornze, U.S. DEP’T OF THE INTERIOR, HYDRAULIC FRACTURING RULE (July 15, 2015), <https://www.doi.gov/ocl/hydraulic-fracturing-rule>.

12. Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands, 77 Fed. Reg. 27,691 (proposed May 11, 2012).

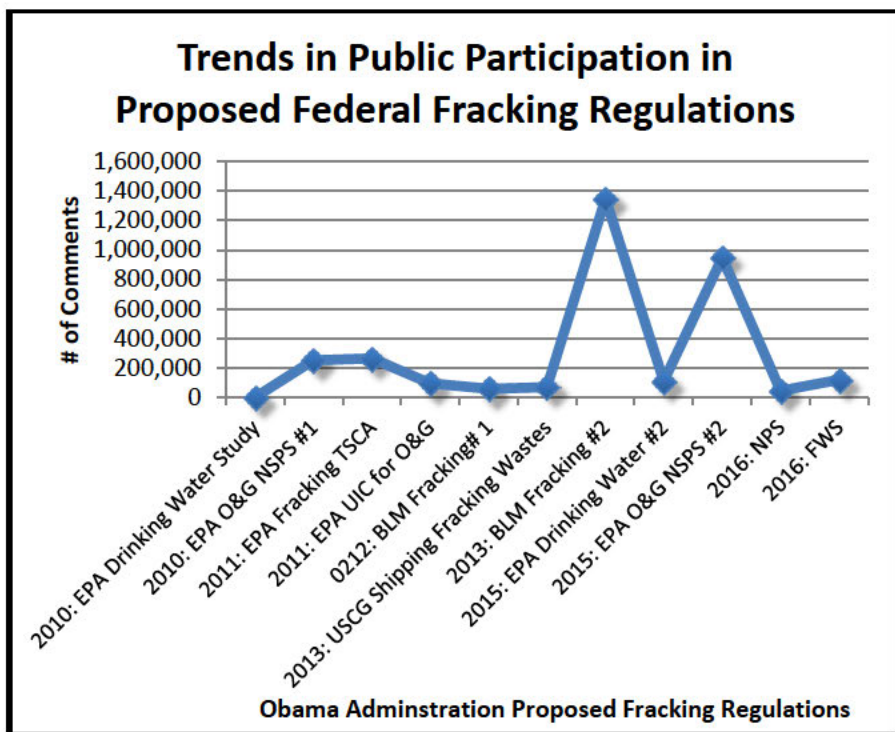
13. *See* EXEC. OFFICE OF THE PRESIDENT OF THE U.S. THE ALL-OF-THE-ABOVE ENERGY STRATEGY AS A PATH TO SUSTAINABLE ECONOMIC GROWTH (2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/aota_report_updated_july_2014.pdf.

14. President Barack Obama, 2012 State of the Union Address (Jan. 24, 2012).

15. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 78 Fed. Reg. 31,636 (proposed May 24, 2013); *see also* Press Release, U.S. Dep’t. of the Interior (May 16, 2013), <https://www.doi.gov/news/pressreleases/interior-releases-updated-draft-rule-for-hydraulic-fracturing-on-public-and-indian-lands-for-public-comment>.

interim report on drinking water impacts of fracking,¹⁶ and drafted guidance concerning transport of fracking wastes by barge on US rivers.¹⁷

These, and a suite of additional federal rules, were designed to address specific environmental health concerns identified by the scientific community in conjunction with fracking. Each rule attracted public interest and became part of the red state/blue state debate on the role of the federal government to safeguard environmental determinants of health.¹⁸ The graph below reflects trends in public participation in federal rulemaking concerning fracking during the entire Obama administration:¹⁹



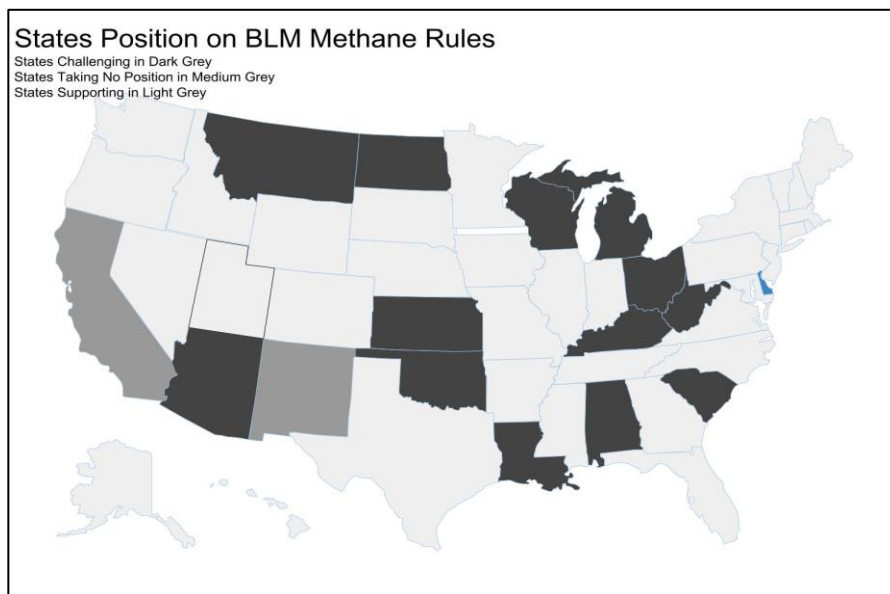
16. *Assessment of the Potential Impacts of Hydraulic Fracturing for Oil and Gas on Drinking Water Resources*, EPA (Jan. 24, 2017), <https://cfpub.epa.gov/ncea/hfstudy/recordisplay.cfm?deid=244651>.

17. Proposed Policy Letter: Carriage of Conditionally Permitted Shale Gas Extraction Waste Water in Bulk, 81 Fed. Reg. 8976 (proposed Oct. 31, 2013).

18. For a discussion of how geography impacts views of fracking see Christopher E. Clarke, et al., *How Geographic Distance and Political Ideology Interact to Influence Public Perception of Unconventional Oil/Natural Gas Development*, ENERGY POL'Y 97, 301-09 (2016).

19. See author's research, *herein* cited as 1 CUNY GRADUATE SCH. OF PUB. HEALTH & HEALTH POL'Y, Late Term Obama Environmental Regulations Research (2017) (unpublished) (on file with author).

had bipartisan support, and were not challenged in court after they became final in the fall of 2016.²⁵ As reflected in the chart below, the number of states challenging the 2016 BLM methane rules was greater than the number of states that joined suit in the challenge to the first BLM rule governing fracking on federal and Indian land. The new map of states challenging the methane fracking rules looked like this:²⁶



Since the 2016 election and the inauguration of Donald Trump in January 2017, Congress moved unsuccessfully to revoke the BLM methane rules

25. Despite a lack of challenge to the NPS fracking rules, which took effect on December 5, 2016, H.J. Res. 46 was introduced pursuant to the Congressional Review Act (CRA) to repeal and forever prevent NPS revision to its 9B rules governing oil and gas in National Parks. H.J. Res. 46, 115th Cong. (2017-2018); *see also* Press Release, Rep. Gosar Sets the Record Straight on Bill Protecting Private & State-Owned Mineral Rights from Federal Overreach (Feb. 1, 2017), <https://gogar.house.gov/news/documentsingle.aspx?DocumentID=2068>; Travis McKnight, *Congressman who Introduced National Parks Drilling Bill got \$250K from Big Energy*, TRIBUNE MEDIA (Feb. 3, 2017), <http://fox6now.com/2017/02/03/the-rep-who-introduced-national-parks-drilling-bill-got-250k-from-big-energy-tmwsp/>.

Similarly, despite bipartisan support for the rule and no lawsuit challenging it, Congress introduced H.J. Res. 45 to repeal the rules governing oil and gas drilling in wildlife refuges issued by the Fish & Wildlife Service. *See* H.J. Res. 45, 115th Cong. (2017-2018).

26. 1 CUNY GRADUATE SCH. PUB. HEALTH & HEALTH POL'Y, *supra* note 19.

under the Congressional Review Act. The rules governing fracking in National Parks,²⁷ National Wildlife Reservations,²⁸ and concerning the venting of methane on federal land²⁹ continued to be targeted by the Trump administration after the election as in need of review and repeal in Executive Order 13783.³⁰ Efforts by the Trump Administration to delay the effective date of the BLM methane rule³¹ were thwarted on February 22, 2018 by the U.S. District Court for the Northern District of California.³² BLM responded by publishing proposed revisions to the methane rule also on February 22, 2018.³³

II. WATERS OF THE UNITED STATES (WOTUS) RULE

On April 21, 2014, EPA and the Army Corps of Engineers (COE) first proposed the Waters of the United States (WOTUS) rule in an effort to clarify when a permit was required under section 404 of the Clean Water Act (CWA).³⁴ EPA and the Corps proposed WOTUS to clarify ambiguities created by certain Supreme Court decisions³⁵ and after certain federal enforcement proceedings were declared “outrageous” – mostly by parties vigorously defending their failure to obtain a permit.³⁶

27. Management of Non-Federal Oil and Gas Rights, 81 Fed. Reg. 79,948 (Nov. 14, 2016). Compare 80 Fed. Reg. 65,571 (proposed on Oct. 26, 2015). *see also National Park Service Updates Non-federal Oil and Gas Regulations*, NAT'L PARK SERV. (Nov. 3, 2016), <https://www.nps.gov/orgs/1207/11-03-2016-9b-regs.htm>.

28. Management of Non-Federal Oil and Gas Rights, 81 Fed. Reg. 79,948 (Nov. 14, 2016).

29. Waste Prevention, Production Subject to Royalties, and Resource Conservation; Correct, 81 Fed. Reg. 88,634-01 (Dec. 8, 2016).

30. 82 Fed. Reg. 16093 (Mar. 31, 2017). For discussions of effectiveness of past administration executive orders *see*, Elizabeth Glass Geltman, Gunwant Gill, & Miriam Jovanovic, *Inquiry into the implementation of Bush's Executive Order 13211 and the Impact on Environmental and Public Health Regulation*, 27 FORDHAM ENVTL. L. REV. 225 (2016); Elizabeth Glass Geltman, Gunwant Gill, & Miriam Jovanovic, *Impact of Executive Order 13211 on environmental regulation: An empirical study*, 89 ENERGY POLICY 302 (2016); Elizabeth Glass Geltman, Gunwant Gill, & Miriam Jovanovic, *Beyond baby steps: An empirical study of the impact of environmental justice executive order 12898*, 39 FAMILY & COMMUNITY HEALTH 143 (2016).

31. *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation: Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58050 (Dec. 8, 2017).

32. *California v. BLM* (Feb. 22, 2018), <https://www.blm.gov/sites/blm.gov/files/2.23.18%20Suspension%20Rule%20PLTransfer%20Order.pdf>

33. 83 Fed. Reg. 7924 (Feb. 22, 2018).

34. Definition of Waters of the United States Under the Clean Water Act, 79 Fed. Reg. 22,188 (Apr. 21, 2014).

35. *Id.*

36. For discussions of the debate *see* Thomas P. Redick & Christopher Brooks, *WOTUS Wars and Endangered Species: Where Will Farmers Find Their Legal High Ground?*, 31 NAT. RESOURCES & ENV'T 20 (2016); Samuel Worth, *Water, Water, Everywhere, and Plenty of Drops to Regulate: Why the Newly Published WOTUS Rule Does Not Violate the Commerce Clause*, 43 BC ENVTL. AFF. L. REV., 605 (2016); Micah Adkison, *The Significant Nexus Test: Why the Waters of the United States are so Murky*, 1.6 OIL & GAS, NAT. RESOURCES & ENERGY J. 487 (2016).

EPA and the COE finalized the WOTUS rule on June 29, 2015 as a clarification of existing CWA law.³⁷ About one-third of the United States' population, approximately 117 million Americans, currently drink surface waters.³⁸ The CWA requires a permit before developers or industry can add materials that pollute streams and rivers that are considered "waters of the United States."³⁹ The CWA does not preclude development of land or operation of industry; rather, the law requires issuance of a permit if activities will adversely impact water quality.⁴⁰ Under the CWA, the states in conjunction with the federal government, can keep track of total pollution loads to be deposited in drinking water sources and institute controls to protect drinking water where needed.⁴¹ Cases before the Supreme Court of the United States (SCOTUS) and subsequent lower court interpretations of SCOTUS rulings created ambiguity in what waters are protected and what waters are not protected by the CWA.⁴² The purpose of the proposed revision to the WOTUS rule was to clarify what waters are protected under the CWA and accordingly, which waters would require a permit before depositing pollutants into the water body.⁴³

37. Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37,054 (June 29, 2015). *See generally*, *Clean Water Rule*, EPA, <https://www.epa.gov/wotus-rule> (last updated Feb. 6, 2018).

38. *Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S.*, EPA, <https://www.epa.gov/cwa-404/geographic-information-systems-analysis-surface-drinking-water-provided-intermittent> (last updated Oct. 25, 2017).

39. Clean Water Act § 404, 33 U.S.C. § 1344 (2012).

40. Clean Water Act § 404(c), 33 U.S.C. § 1344(c) (2012).

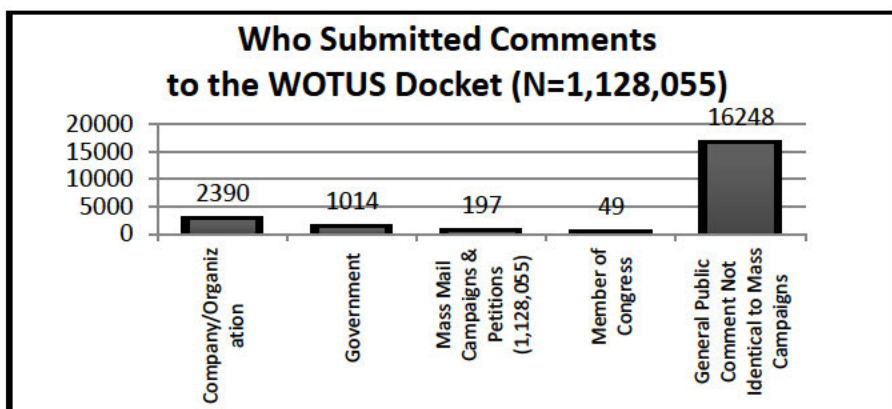
41. Clean Water Act § 303(d), 33 U.S.C. § 1313(d) (2012); *see also Program Overview: Impaired Waters and TMDLs*, EPA, <https://www.epa.gov/tmdl/program-overview-impaired-waters-and-tmdls> (last updated Nov. 28, 2017).

42. *See Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cty. ("SWANCC,") v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). For a discussion of these cases *see* Kristen Clark, *Navigating Through the Confusion Left in the Wake of Rapanos: Why a Rule Clarifying and Broadening Jurisdiction Under the Clean Water Act is Necessary*, 39 WM. & MARY ENVTL. L. & POL'Y REV. 295 (2014).

43. *See Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cty. ("SWANCC,") v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); Kristen Clark, *Navigating Through the Confusion Left in the Wake of Rapanos: Why a Rule Clarifying and Broadening Jurisdiction Under the Clean Water Act is Necessary*, 39 WM. & MARY ENVTL. L. & POL'Y REV. 295 (2014). For commentary on the rule *see* Nathan E. Vassar, *Within the Flood Plain? An Analysis of the New "Waters of the United States" Rule in the Context of History and Existing Regulations*, 46 TEX. ENVTL. L.J. 1 (2016); Patrick Parenteau, *A Bright Line Mistake: How EPA Bungled the Clean Water Rule*, 46 ENVTL. L. 379 (2016); Reggie L. Bouthillier et al., *The Uncertain Fundamentals of Federal Regulation of Wetlands*, 37.4 THE REPORTER 1, 14-18 (2016); Taylor Fritsch, *Muddying the Water, Clearing the Way for Judicial Review of Clean Water Act Jurisdictional Determinations*: *Hawkes Co. v. US Army Corps of Eng'rs*, 782 F.3d 994 (8th Cir. 2015), 95 NEB. L. REV. 277 (2016). For a historic

A vocal segment of the population immediately sounded alarm that the WOTUS rule proposed by EPA and COE⁴⁴ was overreaching and an infringement of property rights.⁴⁵ An enormous campaign was launched on social media to “Ditch the Rule.”⁴⁶ EPA resisted with its own education campaign attempting to clarify what the agency deemed misinformation about the rule.⁴⁷ EPA’s education campaign asked the public to “Know the Facts.”⁴⁸

EPA and COE established docket EPA-HQ-OW-2011-088 on Regulations.gov pursuant to administrative law to collect and organize public comments on the WOTUS rule.⁴⁹ As with social media, the docket received robust attention. The comments posted to the docket reached 1,128,055.⁵⁰ Of those, 1,108,157 were written as part of mass write in campaigns by organized NGOs.⁵¹ Below is a chart depicting who submitted comments to the WOTUS docket.⁵²



discussion of ambiguities in the WOTUS rule see Elizabeth Ann Glass Geltman, *Regulation of Non-Adjacent Wetlands Under Section 404 of the Clean Water Act*, 23 NEW ENG. L. REV. 615 (1988).

44. Definition of “Waters of the United States” under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed Apr. 21, 2014).

45. See Patrick Parenteau, *A Bright Line Mistake: How EPA Bungled the Clean Water Rule*, 46 ENVTL. L. 379 (2016); see also Erin Ryan, *Federalism, Regulatory Architecture, and the Clean Water Rule: Seeking Consensus on the Waters of the United States*, 46 ENVTL. L. 277 (2016).

46. See Rachael Salcido & Karrigan Bork, *Ditching our Innocence: The Clean Water Act in the Age of the Anthropocene*, 46 ENVTL. L. 415 (2016).

47. Shannon O’Neil, *Thunderstruck: The Government Accountability Office’s Recent Ruling on Agency Social Media Use*, 17 N.C. J.L. & TECH. ONLINE 293 (2016).

48. *Id.*

49. Clean Water Rule: Definition of “Waters of the United States”, 80 Fed. Reg. 37,054 (June 29, 2015).

50. *Id.*

51. *Id.*

52. 1 CUNY GRADUATE SCH. PUB. HEALTH & HEALTH POL’Y, *supra* note 19.

Opponents of the proposed WOTUS rule questioned the legality of EPA's use of social media to educate and influence the public about revisions to the WOTUS rule.⁵³ The "Ditch the Rule" campaign led by farmers, manufacturers, and other groups was largely located in "red" states.⁵⁴ In a December 2015 GAO report, EPA's Inspector General agreed.⁵⁵

Beyond concern about whether EPA's education campaign crossed the line into advocacy, debate centered on the degree to which WOTUS's expanded federal jurisdiction unduly intruded on property rights.⁵⁶ The issue presented was whether or not the federal policy's interference with how landowners could use their land was excessive and whether the cost of obtaining a permit to do so was unreasonably high.⁵⁷ In fact, 1,128,158 million people filed comments on the proposed WOTUS rule.⁵⁸

Republicans across the country held the WOTUS rule as an example of federal overreach generally and President Obama's illegal expansion of executive authority specifically.⁵⁹ Thirteen states filed suit to challenge the rule immediately after WOTUS became effective and the Sixth Circuit stayed the WOTUS rule.⁶⁰ The stay first applied to only the thirteen states party to the original lawsuit: Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota and Wyoming.⁶¹ Fourteen additional states joined the efforts to challenge the

53. See generally Shannon O'Neil, *Thunderstruck: The Government Accountability Office's Recent Ruling on Agency Social Media Use*, 17 N.C.J.L. & TECH. 293-329 (2016).

54. See Rachael Salcido & Karrigan Bork, *Ditching our Innocence: The Clean Water Act in the Age of the Anthropocene*, 46 ENVTL. L. 415 (2016).

55. EPA—*Application of Publicity or Propaganda and Anti-Lobbying Provisions* (Dec. 14, 2015), U.S. GAO, <http://www.gao.gov/products/B-326944>.

56. See, e.g., Daren Bakst, *What You Need to Know About the EPA/Corps Water Rule: It's a Power Grab and an Attack on Property Rights*, BACKGROUND NO. 3012 (Apr. 29, 2015).

57. See generally, Samuel Worth, *Water, Water, Everywhere, and Plenty of Drops to Regulate: Why the Newly Published Wotus Rule does not Violate the Commerce Clause*, 43 B.C. ENVTL. AFF. L. REV. 605 (2016).

58. Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37,054 (June 29, 2015).

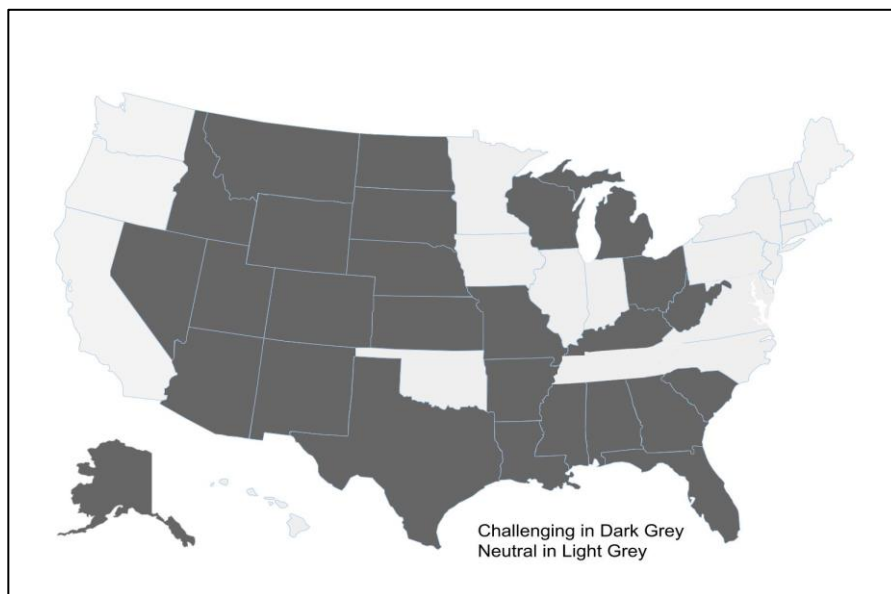
59. See, e.g., Majority Report to the House Committee on Oversight & Government Reform, *Politicization of the Waters of the United States Rule* (Oct 26, 2016), <https://oversight.house.gov/wp-content/uploads/2016/10/WOTUS-OGR-Report-final-for-release-1814-Logo-1.pdf>. For commentary on the report, see *Report Finds Politicizing of WOTUS Rulemaking*, <https://oversight.house.gov/report/oversight-committee-report-finds-politicizing-wotus-rulemaking/>. Compare Jonathan Adler, *Testimony on the Scope of the Waters of the United States After Rapanos v. United States*, https://www.epw.senate.gov/109th/Adler_Testimony.pdf.

60. In re EPA and Dep't of Def. Final Rule; *Ohio v. U.S. Army Corps of Eng'rs*, 803 F.3d 804 (6th Cir. 2015). Joining the State of Ohio as Petitioners in the case were Michigan, Tennessee, Oklahoma, Texas, Louisiana, Mississippi, Georgia, West Virginia, Alabama, Florida, Indian, Kansas, Kentucky, North Carolina, South Carolina, Utah and Wisconsin. See generally *Clean Water Rule Litigation Statement*, EPA, <https://www.epa.gov/wotus-rule> (last updated Feb. 6, 2018).

61. *North Dakota et al. v. EPA*, No. 3:15-cv-59, 2015 WL 7422349 (D.N.D. Aug. 27, 2015).

WOTUS rule. The stay was later broadened to cover the entire nation.⁶² In January 2017, the Supreme Court granted *certiorari* to determine whether the Sixth Circuit had jurisdiction to hear legal challenges to the WOTUS rule.⁶³ On February 28, 2017, President Trump issued Executive Order 13790 demanding that EPA and the Army Corps of Engineers review and consider repeal of the WOTUS rule.⁶⁴ On January 22, 2018, in a unanimous decision written by Justice Sonia Sotomayor, the Supreme Court reversed the Sixth Circuit and remanded the case on procedural grounds holding that cases challenging the WOTUS rule must be filed in federal district courts rather than federal appellate courts.⁶⁵

The map below illustrates the states that brought judicial challenges opposing and attempting to set aside the proposed WOTUS rule:⁶⁶



62. EPA, *supra* note 55.

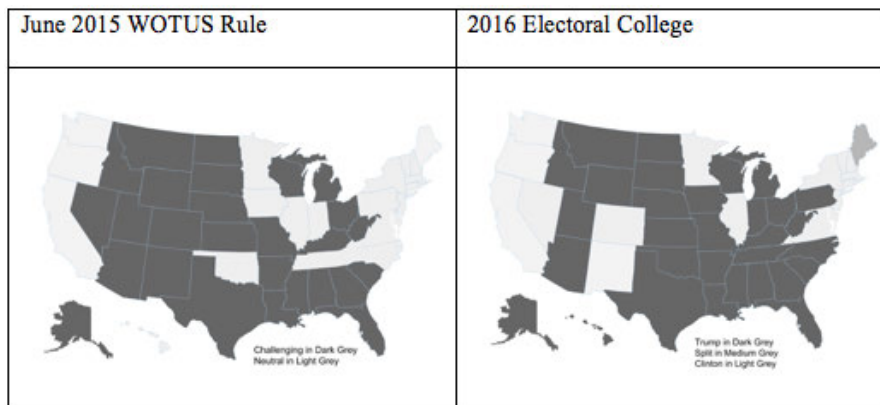
63. Nat'l Ass'n of Mfrs. v. Dep't of Def., 137 S. Ct. 811 (Mem), 2017 WL 125667 (2017). For a procedural history of the litigation *see*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/national-association-of-manufacturers-v-department-of-defense/> (last updated Jan. 22, 2018).

64. 82 Fed. Reg. 12,497 (Apr. 25, 2017).

65. Nat'l Ass'n of Mfrs. v. Dep't of Def., 137 S. Ct. 1452, No. 16-299 (2017).

66. 1 CUNY GRADUATE SCH. PUB. HEALTH & HEALTH POL'Y, *supra* note 19.

The map of states contesting the WOTUS rule bears striking similarities to the 2016 electoral map:⁶⁷



III. DEBATE OVER THE CLEAN POWER PLAN (CPP)

On August 3, 2015, the Obama Administration introduced the key piece of regulation designed to combat climate change.⁶⁸ EPA called the proposal the “Clean Power Plan” (CPP).⁶⁹ Quite simply, the plan required coal fired power plants to convert to an energy source that burns cleaner than does coal. Public participation in the debate over the CPP was vigorous, with 4,381,024 people filing comments with EPA, many as part of organized campaigns by environmental groups.⁷⁰ The coal industry and those living in states dependent on coal extraction called the CPP a “war on coal.”⁷¹

67. *Id.*

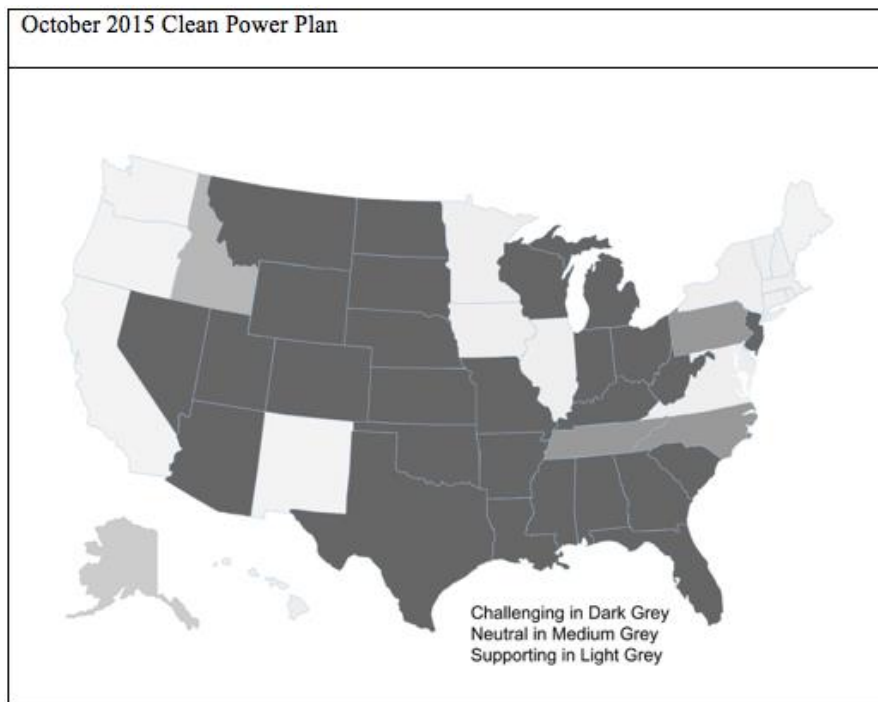
68. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,829 (Oct. 16, 2014).

69. *Id.*

70. STANDARDS OF PERFORMANCE FOR GREENHOUSE GAS EMISSIONS FROM EXISTING SOURCES: ELECTRIC UTILITY GENERATING UNITS, DOCKET ID: EPA-HQ-OAR-2013-0602, <https://www.regulations.gov/docket?D=EPA-HQ-OAR-2013-0602> (last visited Feb. 15, 2015).

71. Richard Revesz & Jack Lienke, *Struggling for Air: Power Plants and the “War on Coal”*, (Oxford Univ. Press, 2016); see also Ben Marley, *From War on Poverty to War on Coal: Nature, Capital, and Work in Appalachia*, 2.1 ENVTL. SOC. 88, 88-100 (2016); Gilson, Chris, *What to expect from state legislatures in 2016, the politics of Kentucky’s declining coal industry and a new healthcare proposal in Idaho: US state blog roundup for 2–8 January*, USAPP–AMERICAN POLITICS AND POL’Y BLOG (Jan. 4, 2017), <http://eprints.lse.ac.uk/68750/>.

Once the CPP was finalized,⁷² the states depicted in dark grey in the map below filed lawsuits attempting to set the policies aside.⁷³ The states depicted in light grey in the map filed in support of the CPP. The states depicted in medium grey on the following map were neutral on the policy and took no legal position in the court proceedings.⁷⁴

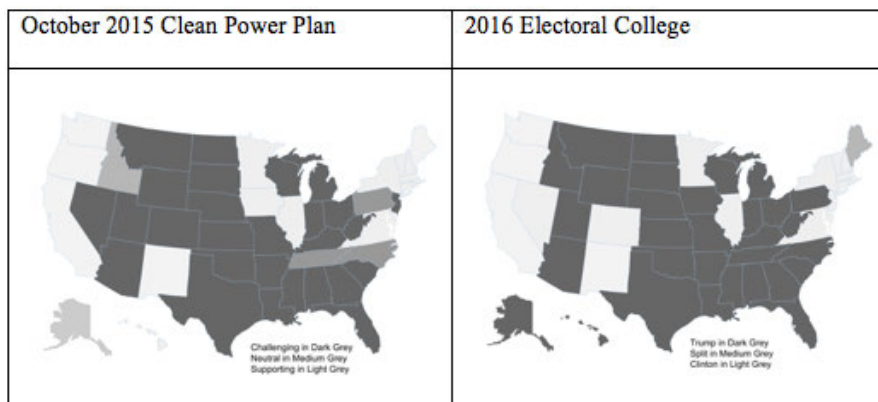


72. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015).

73. Petition for Writ of Certiorari, *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015) (No. 14-1112, 14-1151, 14-1146); *In re Murray Energy Corp.*, 788 F.3d 330, 334 (D.C. Cir. 2015). For commentary on the litigation, see Kara Beck, *In Re Murray's Judicial Effect on the Clean Power Plan and Future Climate Change Policy in America*, 18 DUQ. BUS. L.J. 189 (2016); Jose Miguel Abito et al., *The Economic Costs and Benefits of Implementing the Clean Power Plan*, PENN WHARTON PUBLIC POLICY INITIATIVE (2016); David B. Spence, *Some of the Parties to the Clean Power Plan Litigation are Defying Expectations*, KBH ENERGY CENTER BLOG (Apr. 4, 2016), <https://repositories.lib.utexas.edu/handle/2152/40274>. For commentary on why Wyoming objected to the rule, see Robert Godby & Roger Coupal, *A Comparison of Clean Power Plan Forecasts for Wyoming: The Importance of Implementation and Modeling Assumptions*, 29.1 THE ELECTRICITY J. 53, 53-62 (2016); Emily Hammond & Richard J. Pierce Jr., *The Clean Power Plan: Testing the Limits of Administrative Law and the Electric Grid*, 7 GEO. WASH. J. ENERGY & ENVTL. L. 1 (2016); Greg Stohr & Jennifer A. Dlouhy, *Obama's Clean Power Plan Put on Hold by US Supreme Court*, BLOOMBERG POLS. (Feb. 9, 2016); Lisa Heinzerling, *The Supreme Court's Clean-Power Power Grab*, GEO. ENVT'L L. REV. (2016), available at <https://ssrn.com/abstract=2737441>.

74. 1 CUNY GRADUATE SCH. PUB. HEALTH & HEALTH POL'Y, *supra* note 19.

The map looks shockingly like the 2016 electoral map, as the graphic below depicts:⁷⁵



Congress passed a resolution to repeal the CPP, but the congressional resolution was vetoed by President Obama.⁷⁶ The Trump administration dictated EPA review the Clean Power Plan in Executive Order 13783.⁷⁷ EPA began that review on April 4, 2017⁷⁸ and announced plans to repeal on October 10, 2017.⁷⁹

IV. THE NEW ANTI-FEDERALISM

Donald Trump ran on a campaign that federal regulation of the environment was excessive, overly complicated, and too expensive for industry.⁸⁰ Trends showed increasing public interest in and debate over federal regulation of environmental health during the Obama administration, as the graph below depicts:⁸¹

75. *Id.*

76. S.J. Res. 24, 114th Cong. (2015).

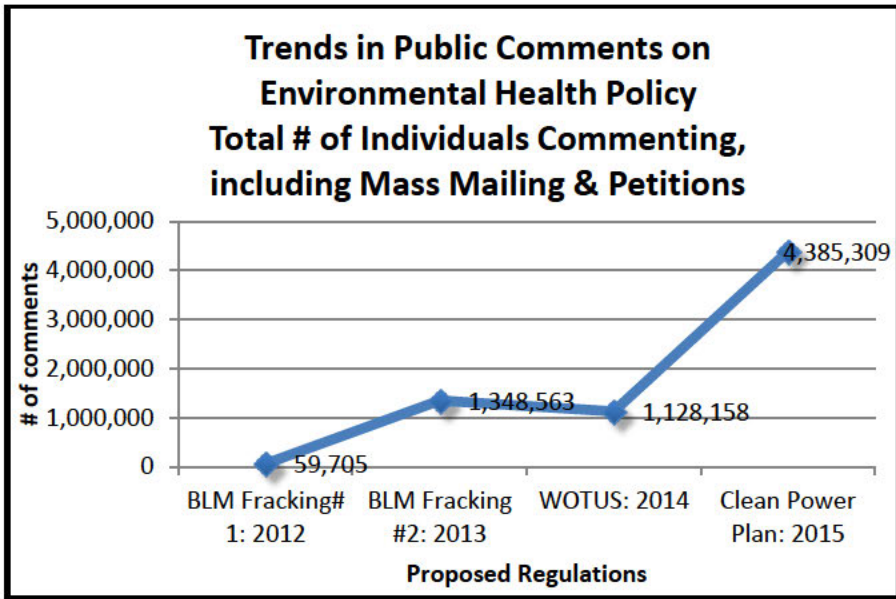
77. 82 Fed. Reg. 16,093 (Mar. 31, 2017).

78. 82 Fed. Reg. 16,330 (Apr. 4, 2017); 82 Fed. Reg. 16329 (Apr. 4, 2017).

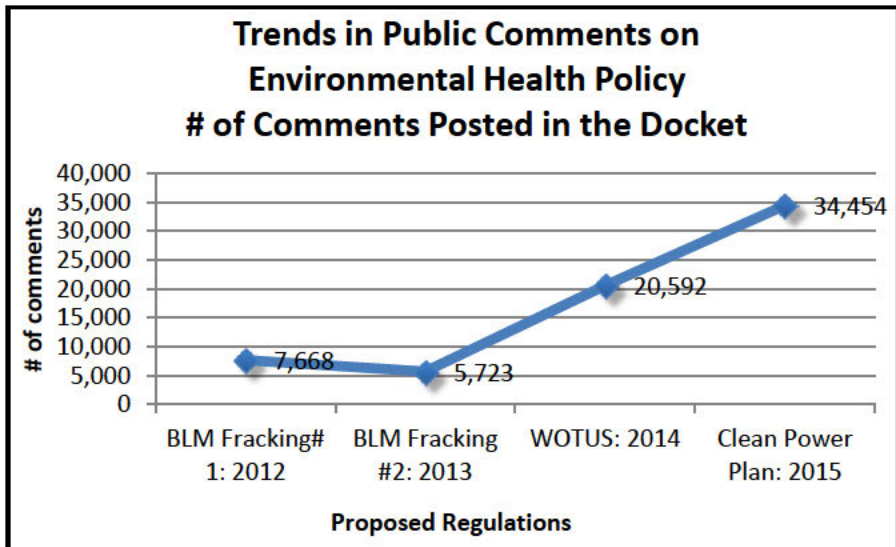
79. *See* 82 Fed. Reg. 61,507 (Dec. 28, 2017). *See generally* <https://www.epa.gov/stationary-sources-air-pollution/electric-utility-generating-units-advance-notice-proposed>.

80. *See* 82 Fed. Reg. 9339 (2017); 82 Fed. Reg. 12285 (2017); 82 Fed. Reg. 12497 (2017); 82 Fed. Reg. 16,093 (2017); 82 Fed. Reg. 40,463 (2017). *See also* 82 Fed. Reg. 20,237 (2017); 82 Fed. Reg. 20,815 (2017).

81. 1 CUNY GRADUATE SCH. PUB. HEALTH & HEALTH POL'Y, *supra* note 19.

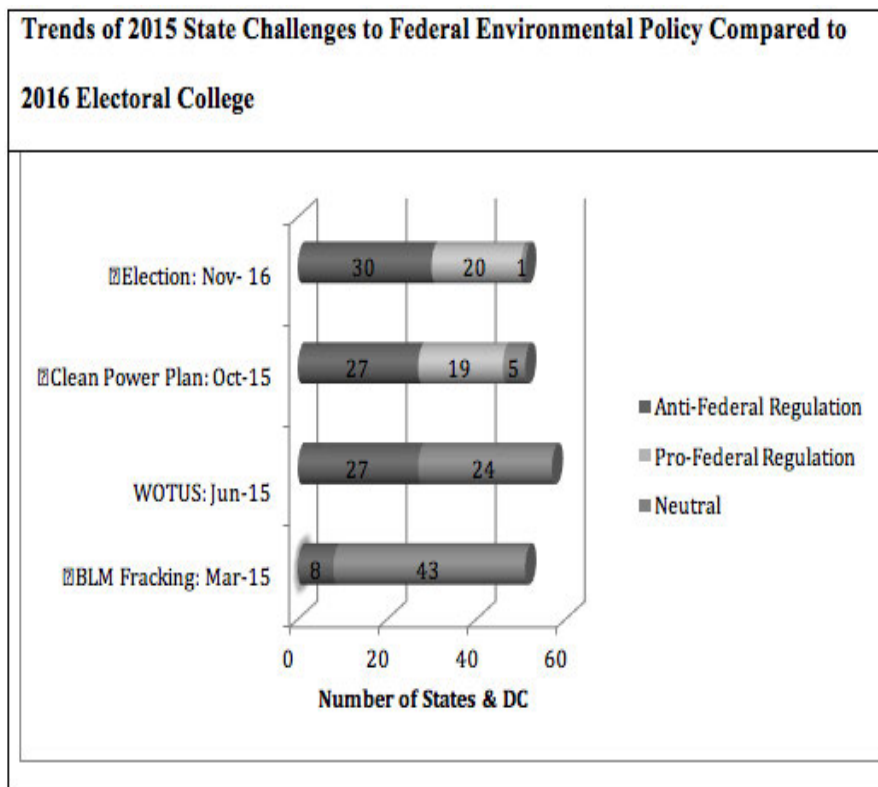


The same upward trend is demonstrated whether you evaluate the number of discrete comments filed in each docket or you look at the total number of people signing comments submitted in the dockets.⁸²



82. *Id.*





More importantly, the increased public participation in Obama administration environmental policy rulemaking also reflects geographic changes in public reaction to the Obama Administration policies on regulation of environmental health. The graphic below shows the number of states challenging environmental policy promulgated by Obama during his administration:⁸³



The map below shows how the number of states challenging environmental policy promulgated by Obama grew over time, with the 2016 electoral map as the final map:⁸⁴

83. *Id.*

84. *Id.*

March 2015 BLM Fracking Rule	June 2015 WOTUS Rule
 <p data-bbox="418 476 515 502">Challenging in Dark Grey Neutral in Light Grey</p>	 <p data-bbox="875 476 972 502">Challenging in Dark Grey Neutral in Light Grey</p>
October 2015 Clean Power Plan	2016 Electoral College
 <p data-bbox="437 917 547 943">Challenging in Dark Grey Neutral in Medium Grey Supporting in Light Grey</p>	 <p data-bbox="869 917 978 943">Trump in Dark Grey Split in Medium Grey Clinton in Light Grey</p>

Certain facts are clear. Public participation in federal rulemaking increased dramatically as the second term of the Obama administration progressed.⁸⁵ In addition, the number of states filing lawsuits objecting to Obama administration environmental rules also increased dramatically.⁸⁶ The final map of state positions on the CPP looks shockingly similar to the 2016 electoral map.

V. CONCLUSION

President Donald Trump ran his campaign on a promise of states' rights and the premise that states can better regulate environmental health matters

85. *Id.*

86. *Id.*

than the federal government.⁸⁷ In many ways, debate over the efficacy of Trump's agenda is reminiscent of the colonial Jefferson/Hamilton Federalist/Anti-Federalist debate.⁸⁸ But the seeds of the Trump anti-federalist movement are found in the greater and greater resistance of states to environmental policy changes made by the Obama administration in his last two years in office.

In 2015, President Obama joked with White House Press Association during the annual "Nerd Prom." The President began the speech using his impeccable timing by saying, "Six years into my presidency, some people

87. See EPA, *EPA Year in Review 2017-2018*, (2018) https://www.epa.gov/sites/production/files/2018-03/documents/year_in_review_3.5.18.pdf. stating:

'EPA most-effectively protects the environment and human health when it operates within the bounds of its authority. However, when EPA strays outside that role, it encumbers both environmental protections and economic growth. At the outset of EPA Administrator Scott Pruitt's tenure, he set forth a "back-to-basics agenda" centered on returning EPA to its proper role via three objectives: 1. Refocusing the Agency back to its core mission[;] 2. Restoring power to the states through cooperative federalism[;] and] 3. Adhering to the rule of law and improving Agency processes.'

See also EPA, *EPA Releases Administrator Pruitt's Year One Accomplishment Report* (Mar. 5, 2018), <https://www.epa.gov/newsreleases/epa-releases-administrator-pruitts-year-one-accomplishments-report> stating:

In just one year, we have made tremendous progress implementing President Trump's agenda by refocusing the Agency to its core mission, restoring power to the states through cooperative federalism, and adhering to the rule of law," said EPA Administrator Scott Pruitt. "The American people can now trust that states and stakeholders will be treated as partners, and regulations will provide clarity, not confusion.' The sum of these actions is monumental: In year one, EPA finalized 22 deregulatory actions, which could save Americans more than \$1 billion in regulatory costs."

See also Richard Revesz, *According to Scott Pruitt, states only have the right to pollute, not protect their environments*, L.A. TIMES (Mar. 20, 2017), <http://www.latimes.com/opinion/op-ed/la-oe-revesz-pruitt-epa-federalism-20170320-story.html> stating:

Throughout his confirmation hearing and in a recent interview, EPA Administrator Scott Pruitt wrapped himself in the mantle of federalism, calling the shared distribution of power between the federal government and states a "bedrock principle" of environmental laws. Pruitt accused the Obama administration of intruding on the autonomy that environmental laws give to the states and vowed to set this balance right.

See also Michael Hayden, *How Trump's EPA Pick, Scott Pruitt, Has Favored State Over Federal Authority on the Environment*, ABC NEWS (Jan. 18, 2017), <http://abcnews.go.com/Politics/trumps-epa-pick-scott-pruitt-favored-state-federal/story?id=44829662>. For a discussion of states role in innovative environmental law and policy, see generally Elizabeth Glass Geltman & Carey Ann Mathews, *Environmental Democracy*, 22 J. CORP. L. 395 (1996). For an alternative proposal on EPA reforms see Elizabeth Glass Geltman & Andrew E. Skroback, *Reinventing the EPA to conform with the new American environmentalism*, 21 COLUM. J. ENVTL. L. 1 (1998).

88. See generally David M. Konisky & Neal D. Woods, *Environmental Policy, Federalism, and the Obama Presidency*, 46 PUBLIUS: J. FEDERALISM 366, 385-86 (2016) (discussing a new model of "environmental federalism" where the states' climate change policies are incorporated into new federal regulations rather than the traditional approach wherein the federal government sets regulatory standards and the states implement and enforce them).

still say I'm arrogant and aloof, condescending. Some people are so dumb."⁸⁹ Later in the talk, the President joked, "[M]y advisors asked me, 'Mr. President, do you have a bucket list?' And I said, 'Well, I have something that rhymes with bucket list.' Take executive action on immigration? Bucket. New climate regulations? Bucket."⁹⁰ The 2016 election showed that a lot of folks throughout the country were not laughing at Obama's inside Washington jokes. The seeds of anti-federalism were sewn as the 2014-16 environmental policy changes were rolled out.

89. President Barack Obama, Remarks by the President at White House Correspondents' Association Dinner (Apr. 25, 2015).

90. *Id.*