

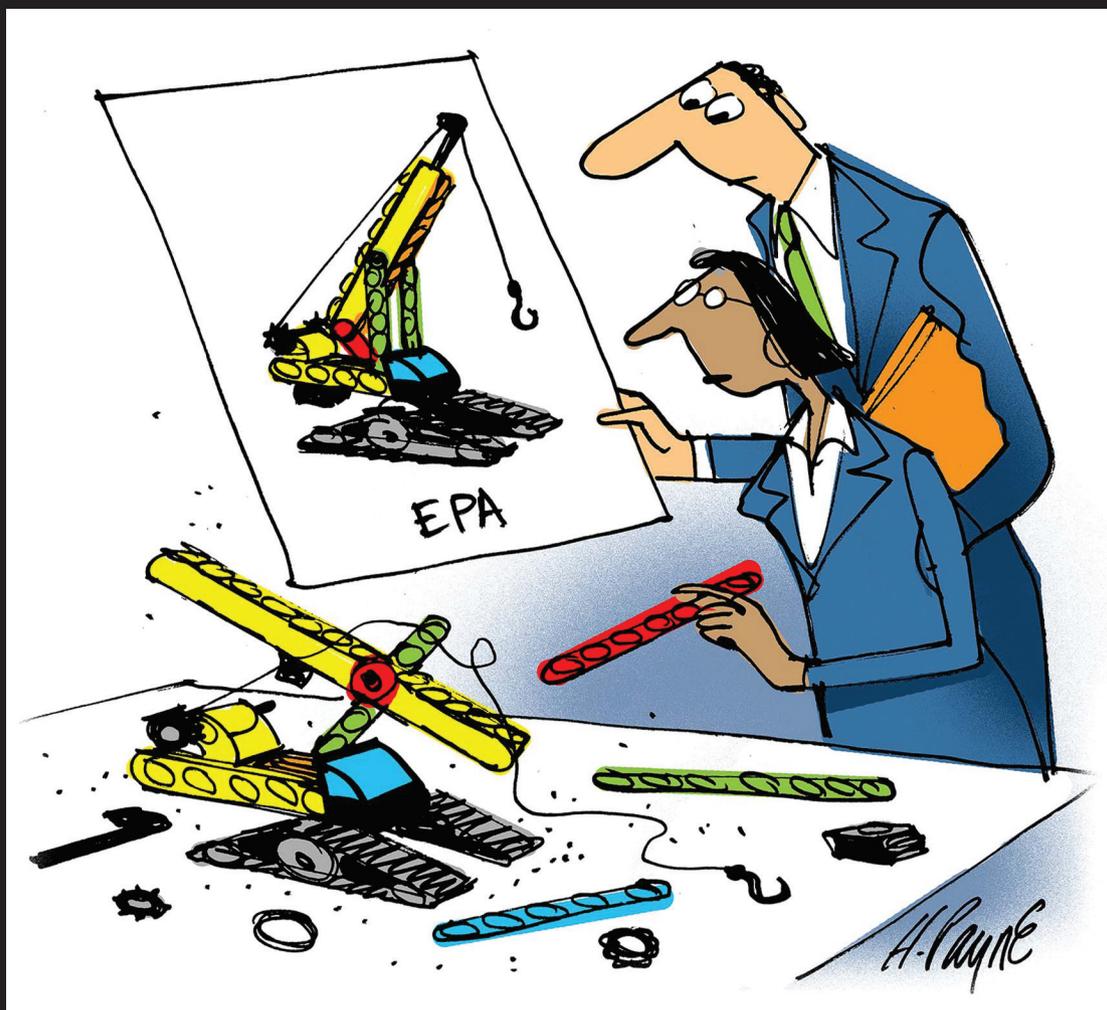
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Reconstruct an Administrative Agency

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Reconstruct an Administrative Agency

By examining the structures that Scott Pruitt dismantled during his tenure at EPA, the agency's mission comes into focus and a blueprint for rebuilding its functions is revealed — if successor Andrew Wheeler likes the shape intended by the pollution statutes' drafters



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EDITOR'S NOTE: The *Forum* invited EPA Acting Administrator Andrew Wheeler to submit a Sidebar to accompany this article, but an agency spokesperson declined on his behalf. We have invited Mr. Wheeler to write a feature essay in a future issue.

BE GRATEFUL TO EVERYONE.” Buddhists in Tibet say this to remind themselves that adversity offers a path to enlightenment. In that spirit, this is an overdue thank you note to former administrator Scott Pruitt, for reminding us what EPA is for. His efforts to roll back a host of air, water, and waste rules have forced us to recognize the extent to which those regulations reduce pollution and protect the environment.

First, a measurement of his tenure's impact. David Cutler and Francesca Dominici, two public health experts at Harvard University, recently published a column in the *Journal of the American Medical Association* quantifying the impact on human lives and health as the critical metric for the stakes of the Pruitt EPA's deregulatory agenda. They pegged the number of Americans facing premature death over the next decade at an additional 80,000, thanks to his regulatory rollbacks. And that may be a conservative estimate.

It gets worse. Beyond highly publicized changes to pollution standards, Pruitt took on a less visible, if more destructive, project. Like King Arthur confronting the Black Knight in *Monty Python and the Holy Grail*, Pruitt has lopped off the agency's critical limbs, disabling its capacities and diminishing its public health agenda. He attacked the very mechanisms EPA relies on to create and enforce pollution rules. But unlike the Black Knight, the professionals who work at the agency and their pollution-fighting colleagues in industry, NGOs, law firms, and state governments are not ignorant of the agency's diminished abilities.

EPA is an agency built to fill a variety of roles, all rooted in scientific, analytic, and technical expertise. That expertise is intended to benefit the public, by informing rulemakings and guidelines for states and businesses to follow to reduce harmful pollution. It was, with some exceptions, also used to ensure compliance with those rules and enforce them. EPA carried all this out under a mandate to keep the trust of a well-informed public and to be accountable to that public.

In his short tenure at the agency, Pruitt moved against almost all of these critical functions, from the way the agency evaluates and applies science, to how it collects information, fosters compliance, and pursues enforcement. Even the way EPA assesses the public health benefits of reducing pollution fell into Pruitt's destructive path. Oblivious to the agency's protective mission, he seized upon former Trump advisor Steve Bannon's call to “deconstruct the administrative state”

and made it his literal-minded mission to curtail, if not shut down, his branch of the targeted organism.

After Pruitt resigned in July, Deputy Administrator Andrew Wheeler became acting and the front-runner for the permanent job. Wheeler continues to follow the same deregulatory agenda outlined by the president and enacted by Pruitt, but with a different leadership style. The divergence between Wheeler and

across the federal government. Rather, it is in the substantive statutes — the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, Toxic Substances Control Act, and Superfund, to name the most important — that we can find the agency's purpose. It is through these laws that Congress asserted its role and built the agency by assigning it specific tasks. Over time EPA acquired or expanded

the functions needed to perform those tasks. Pruitt took aim not just at these protective rules but also at the usually dovetailed capacities to promulgate them and to carry them out.

In this article, we will take as an example the Clean Air Act to shed light on the functions the agency has needed to master to do its job — and how Pruitt has sought to hamper EPA's smooth operation. Enacted in its modern version in 1970 and extensively amended in 1977 and 1990, the CAA offers a good look at the de facto blueprint Congress followed in building EPA. Congress made the law's overriding purposes clear: to enhance air quality for the sake of public health, welfare, and productivity; to promote research and development in service of pollution control; and to



Pruitt may be visible in the extent to which the new chief seems to follow administrative procedure and other standard processes, in contrast with the often corner-cutting work Pruitt's EPA produced. Gone, too, thanks to Pruitt's departure and Wheeler's apparent probity, are the innumerable scandals that swirled around the former's personal conduct and spending. Wheeler's seasoning thanks to time spent as an EPA career lawyer and senior staffer on the Senate Environment and Public Works Committee seems to count for something.

The Environmental Protection Agency wasn't created by a comprehensive, organic statute laying out its mission and functions. The executive order forming EPA focused simply on rehousing under one roof a variety of research, monitoring, standard-setting, and enforcement activities that were previously spread

provide financial assistance to states and localities in support of anti-pollution programs. Where Congress did its concrete agency-construction, though, was in charging EPA with numerous building-block tasks. These include setting ambient air quality standards to protect human health, determining how best to achieve emissions reductions, establishing technology-based standards for industry, setting tailpipe pollution standards, performing risk and technology reviews for toxic air pollutants, equitably allocating pollution-control responsibilities among local sources in polluted areas along with upwind sources, and considering cost and available technology for many of these jobs.

The standards and requirements that these tasks produce are directions to states and businesses to take the actions needed to reduce pollution. Public health benefits depend, in turn, on governments and firms complying with those directions and achieving reductions. Congress assigned EPA the task of ensur-

ing, via compliance assurance or enforcement, that they do so.

The task list thus demands an agency that possesses expertise in relevant sciences — notably public health, epidemiology, and biomechanics, along with atmospheric chemistry and physics — as well as engineering, technology, and economics. The job list also demands competency in detection, monitoring, and information-gathering in support of EPA's obligation to ensure compliance with pollution limits.

The authors of the CAA were not done with tasks, however. Grasping the progressive nature of science and technology, and the dynamics of a market-based economy, Congress committed the agency to continual, open-ended improvement, requiring EPA to ensure that progress is reflected in the level of protection delivered to the public. Thus, the statute mandates that the agency review health-based standards every five years and technology-based standards every eight years — and to change them if new information compels. Congress considered this ongoing cycle of tasks so vital that it authorized any member of the public to sue EPA for failing to meet these deadlines, and the courts to order the agency to meet a schedule for completing the reviews and rule-makings in each case.

This last task, thus, is accountability, which falls as much to the public and the courts as to EPA. This accountability ethic Congress established is in addition to the formal accountability created by the Administrative Procedure Act and sections 307(b) and (d) of the Clean Air Act.

The Environmental Protection Agency has historically relied on the best available peer-reviewed science in carrying out its mission. With his “Strengthening Transparency in Regulatory Science” proposal, Pruitt sought to restrict the science EPA will consider. The proposal effectively excludes two gold-standard public health studies, by the American Cancer Society and Harvard University, that show the health threats and increased mortality from particulate pollution, which kills or harms more Americans than any other form of pollution.

The proposal made by Pruitt in April would bar

the agency from considering scientific studies unless the raw data were made publicly available. The proposal offered a barely coherent explanation for why the data-availability requirement is needed for studies that had already undergone peer review and the other quality-assurance processes of state-of-the-art science. What is clear, however, is that the proposal attacks the foundational ACS and Harvard studies, because both rely on a large body of confidential patient data that legally cannot be made public.

These thoroughly reanalyzed and replicated studies, long relied on by the world's leading researchers, have also long been relied on by EPA. The result of this policy will be to hamstring the National Ambient Air Quality Standards program that drives air pollution controls and the agency's mandatory work in evaluating the costs and benefits of reducing pollution. It's easy to understate benefits when doing these calculations, especially if the benefits of reduced mortality and illness as assessed through confidential surveys are excluded.

Because science is central to so many of the agency's tasks, EPA has long since absorbed the fundamental principles of scientific inquiry. None is more vital than that of following the data and analysis to where they lead rather than leading the data and analysis to a predetermined destination. In advancing a “science” proposal so clearly designed to deliver a preferred result — excluding studies that support

the case for regulating particle pollution — Pruitt committed what remains a cardinal sin outside the administration: corrupting the scientific method and suborning it to a pre-ordained agenda.

The science advisory panels EPA has relied on, through both Democratic and Republican administrations, have been objective, independent, highly qualified, disinterested, and rarely, if ever, legitimately questioned. But Pruitt has purged the panels, ushering out independent academic experts and replacing them with scientists affiliated with the very firms under regulation. By one count, during Pruitt's tenure the proportion of leading academics on the main Science Advisory Board fell from 79 percent to 50 percent and the proportion of industry-employed scientists rose from 6 percent to 23 percent.

In an October 2017 directive, Pruitt decreed that

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no one will be allowed to serve as an advisor who has received a grant from the agency — a condition that mostly affects academic experts who routinely receive government funding for research. Never mind that at least one federal appeals court has already found that “working for or receiving a grant from [an agency], or coauthoring a paper with a person affiliated with the department, does not impair a scientist’s ability to provide technical, scientific peer review of a study sponsored by . . . one of its agencies.” Meanwhile, Pruitt’s novel theory of “independence” features no such exclusion for experts working for industry even if their firm is regulated by the agency. Nor does it offer any explanation of what it is about being affiliated with a corporation that demonstrates a scientist’s independence.

Now the SAB and other reconstituted science panels will guide EPA on important decisions like health-based ambient air quality standards, determinations of acceptable risk levels for exposure to toxic chemicals, assessments of the net carbon impact of burning biomass, studies of the impact of hydraulic fracturing on drinking water, and how to value human life for purposes of economic analysis.

If anything in the CAA is sacrosanct it’s the requirement that EPA set NAAQS exclusively on the basis of science. Both the statutory language of Section 7409(b) and a unanimous Supreme Court decision exclude other considerations, even those of cost and feasibility. Once new standards are set, importantly, the action-based provisions of the act are set in motion to reduce air pollution, and these provisions put cost and technical feasibility front and center. As the Court found, NAAQS are based on answering only the question, What air quality is the science telling us is safe for human health?

But in May, Pruitt issued a memo that threatens to undermine the integrity of the standard-setting process. Until then, the various steps EPA followed to propose and then, after public comment, issue final NAAQS were carefully phased. The phasing ensured that the NAAQS-setting process focused exclusively on the science of human health, and was insulated from other considerations. The Pruitt pro-

cess collapses steps so that the Clean Air Act Science Advisory Committee and the agency itself will be compelled to review science, cost, technology, and implementation together in a single step, not separately. That is obviously contrary to what the Court has decreed is the legislative purpose of the NAAQS process.

Another essential principle EPA must follow in carrying out its tasks is accurately assessing the public health benefits of pollution reduction. Since at least October 2017, the agency has engaged in a coordinated series of attacks on how the benefits of pollution reduction are defined and quantified. For Pruitt, and now Wheeler, denying health benefits and changing how they are weighed in cost-benefit analyses helps clear the path to deregulation and inaction. For an agency dedicated to carrying out the tasks assigned to it under the CAA, embracing an “all-seeing” ethic is essential. If EPA applies analytic tools that blind it to the benefits of reducing harmful pollutants, then it need not take further action to cut pollution.

The Affordable Clean Energy and Clean Power Plan repeal proposals include Regulatory Impact Analyses featuring the domestic (but not global) benefits of reducing carbon dioxide emissions. Repeal model runs accounting for particulate reduction benefits show the repeal as unjustified by benefit-cost analysis. One repeal RIA run, however, zeroes out the value of particulate pollution-reduction benefits of the CPP if they would have occurred in areas already

meeting ambient air quality standards. It’s the only run where benefit-cost analysis justifies the repeal.

The premise of the analysis was that reducing pollution beyond the NAAQS had no beneficial effect and thus no value, even though major studies — designed to discern the realities of public health — contradict the zero-benefit premise. Most recently, for example, “Association of Short-term Exposure to Air Pollution With Mortality in Older Adults” in the *Journal of the American Medical Association* shows — as did the Harvard study now besieged by the “secret science” proposal — that fine particle pollution, even in concentrations below the current NAAQS, drive up mortality across the country. But if the answer to every question has already been decided as “no new regulation,” then imposing devices so as not to see

The proposed repeal of the Clean Power Plan features only the domestic benefits of reducing CO₂. It justifies repeal only by placing a zero value on the reduction in dangerous particulate pollution

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these results and the reality they reveal is vital. Again, this negative example reinforces the fact that public health protection depends on EPA's commitment to rigorous and open-ended scientific inquiry.

Fortunately, Congress did not leave the public entirely defenseless in the face of an untrustworthy EPA. Via notice-and-comment rulemaking, the right to petition the agency for reconsideration, and the right to petition the courts for review of rules, citizens have a fairly robust set of tools by which to hold the agency accountable for meeting its obligations. Congress reinforced the seriousness of EPA's requirement to review health and technology standards by giving the public the right to enforce the obligation in federal court if the agency misses a deadline. Historically, EPA has effectively embraced and facilitated its accountability by working with litigants to resolve these lawsuits via settlements establishing mutually agreed upon schedules and accepting in those settlements the complaining party's statutory right to collect attorney's fees.

In an October 2017 directive, however, Pruitt added a set of new obstacles to the public's effort to exercise that right. Under the directive, citizen litigants hoping to reach agreement with EPA on deadlines will face both a set of new procedural hurdles and a playing field tilted in favor of regulated businesses. Contrary to past practice, they will be at much greater risk of having to foot their own legal bills, even if they ultimately succeed in reaching settlement with the agency.

Pruitt's rationale for the directive was so lacking in foundation that more than fifty retired career EPA attorneys issued an extensive public rebuttal of its assertions, noting that the directive makes inflammatory and evidence-free allegations about "collusion" between government attorneys and litigants and ignores a recent Government Accountability Office report that found no basis for those claims.

One of the hurdles to settlement the directive introduces also creates an entirely new advantage for industry by requiring business sign-off before the agency agrees to a settlement. While the rationale Pruitt offered for the directive was hazy, the intend-

ed effect is crystal clear: to make it harder for the public to hold the agency accountable by making it that much more unlikely that actions to enforce EPA deadlines will be resolved by settlement, rather than costly litigation.

To deliver on its purpose of protecting the public from pollution, the Clean Air Act requires the agency to ensure that polluters reduce emissions and discharges. To do that, EPA can engage directly with sources to offer assistance and, if that fails, bring enforcement actions. Pruitt cut back on one of the pillars of these useful activities. The agency's ability to collect reliable and timely information from polluters both assures compliance and enables enforcement actions when needed. While most firms are committed to staying in compliance, that commitment is strengthened if they can count on EPA to gather the information needed to ensure that their competitors are also in compliance, leveling the playing field.

EPA's nationwide network of 10 regional offices and subsidiary offices has historically been the cornerstone of information-gathering. They were authorized to request information as part of their frontline responsibility for identifying environmental non-compliance and even environmental crimes associated with waste dumping and illegal levels of pollution, and enforcing the environmental laws.

But Pruitt required regional personnel to clear each information request through headquarters. The immediate effect of this directive is delay as well as inefficiency, since requests must now go through an additional layer of review by headquarters employees, operating hundreds or even thousands of miles away from sites subject to information requests, with less knowledge of the facts underlying the requests than that of their regional counterparts.

Longer term, requiring centralized review of information requests leaves the process open to political influence from which EPA's compliance and enforcement activities have been rigorously shielded in the past. This policy has already led to fewer requests for information and slower enforcement actions, and the Pruitt EPA is underperforming previous administrations' collection of civil penalties from rule-violating polluters.

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Another example of Pruitt's indifference, at best, to enforcement is his actions against the CAA's New Source Review program, which has played a crucial role in protecting local airsheds when firms expand their operations or build new facilities. Robust enforcement has been instrumental to the success of the program. Until recently, EPA worked to ensure that polluters estimate potential emissions increases accurately, since those estimates were the first step in applying the NSR program's pollution-control tools. Businesses have an incentive to underestimate the emissions impacts of new projects in order to reduce the amount of control equipment they will need to install. EPA has countered that incentive by scrutinizing those estimates and enforcing against inaccurate emissions projections. Courts have repeatedly upheld EPA's right to scrutinize industry estimates of air pollution increases.

In December 2017, however, Pruitt adopted what amounts to a non-enforcement policy: the agency now will accept firms' estimates, and not scrutinize the accuracy of emissions projections, or the performance of new projects. This policy surrenders to industry a position that EPA itself secured in a recent case in the Sixth Circuit upholding the agency's authority to double-check emissions estimates themselves.

Since Congress gradually assigned the agency its duties and responsibilities in the statutes it is required to implement, EPA has taken shape and evolved into an agency that must incorporate science to comply with its statutory obligations. It has also grown to rely on its regional offices in order to act in accordance with the cooperative federalism structure set forth in our environmental statutes and to have the information it needs to assure, and when necessary enforce, compliance. The Trump EPA, first under Scott Pruitt and now under Acting Administrator Andrew Wheeler, constrains its own capacities to take action in areas crucial to its mission and intended functions. In some areas, it even shifts toward becoming focused no longer on process but on results — anathema to any expert agency subject to the Administrative Procedure

Act's requirements, as interpreted by the courts.

Wheeler has shown early signs of changing course from Pruitt's way of doing things. Wheeler, for example, withdrew the No Action Assurance letter for the annual manufacturing cap on high-polluting "glider trucks," which Pruitt issued as his last day's act of defiance against a remaining Obama-era regulation. Although the withdrawal came after the D.C. Circuit had taken the unusual step of issuing a stay against the No Action Assurance — an indication of how inappropriate the NAA was in the first place — the withdrawal is an indication that Wheeler is willing to observe proper boundaries. This refinement in technique sets up an intriguing plot line going forward. On the one hand, a more faithfully followed rulemaking process is likely to compel Wheeler to account for data and analysis inimical to rolling back existing protections and remaining inactive in the face of new understandings of environmental threats. On the other is the administration's unswerving commitment to across-the-board deregulation.

Case in point: during the summer, the *New York Times* reported that Wheeler raised questions in internal deliberations about safety data the National Highway Traffic and Safety Administration used to support the proposed rollback of Corporate Average Fuel Economy standards, slowing down the issuance of the proposal. On the one hand, NHTSA and EPA did issue the proposal, along with rollbacks in tailpipe carbon dioxide emissions standards. On the other, Wheeler's intervention may have nudged the proposal toward a more honest accounting of the issues.

Faithfully followed, the rulemaking process is a stern taskmaster that demands intellectual honesty. Is it too much to hope that Wheeler will remain true to those dictates, even if they point to a path that leads him away from implacable deregulation? Wheeler-specific optimism aside, it remains the case that Pruitt's deconstruction agenda will remain one of his legacies. Despite his intent, however, Pruitt created a reverse blueprint for rebuilding EPA's dismantled capacities. His handiwork has also reminded us just how essential a properly functioning EPA is to public health and environmental protection. **TEF**

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