

IS E.P.A. BECOMING A BANANA-REPUBLIC AGENCY?

It's being hollowed out to serve private interests -- like its counterparts in Honduras, Russia and other kleptocracies

Michael H. Levin

Recent investigations¹ have drilled down on Honduras – the original “banana republic” ruled behind the scenes by the United Fruit Company - - to demonstrate why kleptocracy generates environmental destruction. In describing how Honduran President Juan Orlando Hernandez disabled his country's environment ministry, they might be speaking about today's U.S. Environmental Protection Agency.

The U.S. was born of a revolt against un-accountable royal prerogatives and founded on the notion that government exists to serve the public, not answer to narrow personal interests. The U.S. Constitution's suddenly-popular Emoluments Clauses are merely the tip of that

¹ E.g., <http://carnegieendowment.org/2017/05/30/when-corruption-is-operating-system-case-of-honduras-pub-69999>

iceberg.² “Kleptocracies” erase the line between profit-seeking and public power, retooling government agencies as instruments of a ruling clique while sabotaging those which retain any independence. Put crudely, they weaponize public institutions for private gain, turning the public's business into back-room deals.

By some calculations more than 60 countries – for example, Indonesia, Azerbaijan and Afghanistan, let alone Russia -- are governed this way.³ Their veneers of civil democracy mask very different operating principles.

Why does this matter? Disgust at public corruption drives its victims to extremes. Afghans shaken down by police or forced to bribe crooked courts support the Taliban.⁴ Tunisians or Ukrainians watching a corrupt leader's coterie capture their country's wealth rise in revolt.⁵

² See, e.g., www.heritage.org/constitution/articles/1/essays/68/emoluments-clause; https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/25/the-emoluments-clauses-litigation-part-1-the-constitutions-taxonomy-of-officers-and-offices/?utm_term=.2e68c5c6738

³

<http://carnegieendowment.org/2016/06/30/corruption-violent-extremism-kleptocracy-and-dangers-of-failing-governance-pub-63982>; https://www.buzzfeed.com/maxseddon/eye-popping-excerpts-from-a-report-alleging-corruption-at?utm_term=.ygpa3ZwWO#.ro8G7pdNO

⁴ <http://ti-defence.org/publications/the-big-spin/>

⁵ <http://observer.com/2017/06/ukraine-corruption-petro-poroshenko-vladimir-putin/>

Americans who've had it with economic inequality, perceived social-welfare freeloaders, or big donors steering government decisions support politicians bent on blowing up current political systems. The U.S. may never see an Arab Spring or Maidan Square. But research shows that when distrust of government becomes despair, it can fuel simmering anger, violent provocations or worse.⁶

Slanted American governance did not begin on January 20, 2017. Every administration has seen powerful interests sway agencies -- *on specific issues*. Big-bankers shaping Bush-Obama responses to the 2008 market crash, or Standard Oil controlling the Harding Interior Department to divert Teapot Dome petroleum, come to mind.

Still, the current capture of EPA is notable in scope and potential permanence. It looks like the opening acts of a Honduras scenario. In under ten months the agency (like the Administration, abetted by a compliant Republican Congress⁷) has embraced the **“three S’s” of emergent kleptocracies:**

⁶ <http://www.hup.harvard.edu/catalog.php?isbn=9780674035201>

⁷ See, e.g., <http://www.motherjones.com/politics/2017/12/donald-trumps-holiday-gift-to-america-a-fundamental-crisis/#>

Secrecy. New EPA head Scott Pruitt's first actions included taking down hundreds of agency web pages on air, water and land contamination, not to mention “climate change” – a phrase now banned from EPA's vocabularies.⁸ He ignored decades of EPA practice by refusing to post his daily meeting calendar. When finally made public by court order,⁹ that schedule showed at least 50 appointments with oil, chemical or mining executives during Pruitt's first few months, versus almost no time spent with community representatives or environmental advocacy groups. Those undisclosed meetings were not formalities: soon after them Pruitt reversed fistfuls of Obama-era actions, including proposed limits on a widely-used chemical pesticide with documented developmental effects (chlorpyrifos) and on a huge copper mine (ironically called “the Pebble”) planned for excavation just above America's largest salmon fishery.¹⁰ On the night of December 7, just after

⁸ https://www.washingtonpost.com/outlook/i-worked-on-the-epas-climate-change-website-its-removal-is-a-declaration-of-war/2017/06/22/735f0858-5697-11e7-a204-ad706461fa4f_story.html?utm_term=.b0e3fbc9acee;https://www.salon.com/2017/10/25/trumps-epa-chief-launches-soviet-style-crackdown-on-free-speech/

⁹ https://www.washingtonpost.com/news/energy-environment/wp/2017/10/03/steakhouse-dinners-golf-resort-speeches-calendars-detail-epa-chiefs-close-ties-to-industry/?utm_term=.afe0c0527889

¹⁰ <http://www.esquire.com/news-politics/politics/a12464694/scott-pruitt-epa-pebble-mine/>

his first testimony before Congress that day, he issued a memo that quietly reversed longstanding new-source-review (NSR) policies for fossil-fueled electric plants. The memo basically allowed those plants to decide for themselves whether more stringent limits for new emissions from “major plant modifications” apply. Though the previous NSR policy was affirmed by two federal appellate courts, Pruitt’s testimony did not mention this imminent action.¹¹

Stonewalling has proliferated since Pruitt took office last February.¹² EPA still has not disclosed many former industry lobbyists he may have appointed to help identify and revoke “burdensome regulations” under executive orders issued the first two months of the Trump Administration.¹³ The agency routinely ignores or deflects queries from citizens and Congress, including Republican lawmakers. It has prohibited staff scientists from presenting peer-reviewed results at

¹¹ <https://www.nrdc.org/experts/john-walke/trump-epa-abdicates-law-enforcement-gives-polluters-amnesty>;
https://www.epa.gov/sites/production/files/2017-12/documents/nsr_policy_memo.12.7.17.pdf

¹² <http://www.esquire.com/news-politics/politics/news/a56755/pruitt-epa-changes/>

¹³ <https://www.bna.com/few-agencies-willing-n57982087134/>

public conferences.¹⁴ Its front-office staff reportedly have been instructed not to answer any questions “from outside” in writing. The most-quoted phrase in current environmental press coverage may be “EPA spokespeople did not respond” – except when, in an extraordinary development, they’ve actively attacked journalists or sought to smear internal critics.¹⁵

Stealing. Using official position for personal benefit is Constitutional anathema. Yet Pruitt apparently believes EPA is both his personal property and a hostile occupied colony. One of his first acts was redesigning EPA’s letterhead in ways that suggest the Administrator’s office is the agency, not one among multiple branches whose missions it’s charged with coordinating and advancing.¹⁶ He already is under investigation for apparently spending tens of thousands

¹⁴ <https://www.salon.com/2017/10/25/trumps-epa-chief-launches-soviet-style-crackdown-on-free-speech/>

¹⁵ http://www.slate.com/articles/health_and_science/science/2017/02/leaked_emails_show_what_is_wrong_at_the_epa.html ;
https://www.washingtonpost.com/news/powerpost/wp/2017/08/01/epa-doing-the-right-thing-is-not-possible-under-trump-says-resigning-official/?utm_term=.31aebb103b91

¹⁶ See examples, end of this article. Until 20 Jan. 2017, the vast bulk of EPA guidance was issued by EPA program offices (e.g., “Office of Water”), with the office’s name located small-font page right where “The Administrator” appears in the left letter. After Pruitt took office, sparse EPA guidance mostly has appeared as ‘direct from the Administrator’ per the example letter on the right.

of taxpayer dollars on unnecessary charter flights while using much of this travel for non-EPA activities.¹⁷ He is the only EPA head ever to demand (and receive) a squad of round-the-clock bodyguards, assertedly in response to “personal threats” from the ‘left’ that seem less concerning than those made from the ‘right’ to previous Administrators.¹⁸ Rather than pursue hazardous-waste dumping, more than a dozen veteran EPA enforcement staff now spend their days as his security escorts.¹⁹

But such personal benefits pale beside apparent gifts to industries that Congress has long charged EPA with overseeing on behalf of American citizens. Almost every major modern program protecting U.S. air, water and soil has been slated for “streamlining” or outright repeal. Beyond the 2015 Obama Clean Power Plan (“CPP”) to cut existing-power-plant carbon dioxide emissions along with emissions of cancer-causing fine pollutants, the new EPA’s announced targets have included Bush-II Renewable Fuel Standards that

require refiners to blend increasing volumes of zero-emitting fuels into vehicle gasoline; end-stage rules to cut car and truck tailpipe emissions that were negotiated in path-breaking triangular discussions with the auto and oil industries (2009-2015); hazardous-waste-site remediation funds; decades-old Chesapeake Bay and Great Lakes restoration programs; and the 2016 Waters of the U.S. (“WOTUS”) Rule meant to protect most surviving wetlands from pollution-causing development.²⁰ Revoking just CPP and WOTUS alone could allow affected businesses to avoid some \$50 billion in estimated compliance expenditures while costing people and the economy several times that estimate in terms of cancer, asthma attacks, flood damage and lost workdays.²¹

Sabotage. As in Honduras, the Pruitt EPA is being hollowed out. It remains the only Cabinet agency

¹⁷ <http://www.foxnews.com/politics/2017/10/06/epa-watchdog-widens-pruitt-travel-investigation.html>;
<http://www.cnn.com/2017/10/05/politics/pruitt-work-meeting-schedule/index.html>

¹⁸ <https://www.bloomberg.com/news/articles/2017-10-26/epa-chief-says-threats-to-family-prompt-boost-in-his-security>

¹⁹ <https://www.commondreams.org/news/2017/09/20/in-stead-protecting-earth-epa-agents-now-forced-serve-pruitt-bodyguards>

²⁰ <http://www.latimes.com/opinion/editorials/la-ed-trump-epa-environment-pruitt-20170905-story.html> ;
https://www.washingtonpost.com/news/energy-environment/wp/2017/07/25/pruitt-says-epa-will-create-top-10-list-for-superfund-cleanup/?utm_term=.97a5aed8ec00;
<http://talkingpointsmemo.com/news/pruitt-superfund-task-force-no-records>

²¹ https://www.washingtonpost.com/national/health-science/at-epa-a-fight-over-numbers-in-water-protection-rule-reveals-a-shift-in-ideology/2017/10/05/892701ac-a93c-11e7-b3aa-c0e2e1d41e38_story.html?utm_term=.0afff3c8ade8;
<https://www.theregreview.org/2017/10/17/shapiro-clean-power-plan-undermines-analysis/>. “Affected businesses include golf courses like those owned by the President, notorious sources of fertilizer-contaminated runoff to streams and pools.

under what amounts to an ongoing hiring freeze. It is reducing remaining professional staff by some 30% overall, to 1980s Reagan-era levels. It has cut agency professionals out of decision-making -- even out of traditional access to the Administrator's suite.²² Between February and October 2017 over 700 mostly senior professional staff -- including some 200 scientists -- already had departed by resignation or retirement. Most of EPA's assistant-administrator-level positions continue to lack even a nominee.²³

In a tactic recently described by one law professor as "Trying to win the game before anyone can play,"²⁴ EPA also has tried to nullify rules that *already are in effect*, without allowing public comment: at the behest of complaining businesses it has issued a clutch of "midnight stays" that seek indefinitely to suspend mandated compliance, asserting that "new information" has come to light. This information typically has involved "recently identified" regulatory costs to industry, not new public health

data. To date courts have blocked these efforts, finding EPA's justifications "misleading" -- a.k.a., made up.²⁵ But enforcement has slumped compared to similar periods under other Republican or Democratic EPAs, and nullifications by regular rulemaking already are in the works.²⁶

The environmental devastation potentially caused by the only other such assault on EPA, during the first Reagan Administration, has been well documented.²⁷ That damage was contained through robust oversight by a Democratic Congress, public backlash against environmental rollbacks, and recognition even by Reagan appointees that data were needed to justify cancelling rules. The Pruitt EPA has not felt or been so hampered. As one staffer privately noted to the author, "Even rules that clearly help industry -- we send them up, and they disappear. [Pruitt's] people just don't believe any [environmental] rule can have benefits."

EPA rules avert real human loss and suffering. While no rule is perfect

²² <https://www.vox.com/energy-and-environment/2017/10/2/16395370/epa-secret-phone-booth>

²³ https://www.nytimes.com/2017/12/22/climate/epa-buyouts-pruitt.html?_r=0; see also *EPA Alumni Transition Update No. 49* (12/23/17), <https://www.epaalumni.com/transition-news>

²⁴ Author's notes from <https://www.eli.org/events/how-agencies-reverse-policy-stays-remands-and-reconsideration>

²⁵ E.g., https://www.americanbar.org/content/dam/aba/administrative/environment_energy_resources/resources/201707-clean-air-council-v-pruitt.authcheckdam.pdf

²⁶ <http://thehill.com/policy/energy-environment/346058-penalties-assessed-by-epa-decline-under-trump-study-finds>; https://www.nytimes.com/2017/12/10/us/politics/pollution-epa-regulations.html?_r=0

²⁷ E.g., <https://www.osti.gov/scitech/biblio/6063575>

and all regulatory systems require vigilance because they tend towards self-sustaining equilibria, there can be little serious doubt that whatever their flaws such rules have protected children from toxic air, preserved clean drinking water, and reduced contaminated soil effects or Appalachian mountaintops freely being bulldozed into streams.

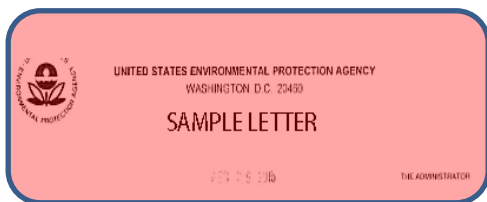
Americans have less experience than (say) Hondurans in resisting wholesale subversion of government agencies charged with protecting the public. They have no 21st-century experience assessing or dealing with “flood the field” tactics that seem like a fire-hose blast of daily environmental atrocities, while those actions’ identifiers are attacked for spreading “fake news.”²⁸ But lessons from the Reagan era (and other eras²⁹) offer suggestions: Build unlikely alliances. Call out each instance. Demand Inspector General and Congressional hearings. Sue, or support organizations that will. Whatever the political hue of the state citizens may hail from, whoever they may have voted for, our democratic

and environmental protection heritage seem to ask no less.

Michael Levin, an environmental lawyer and solar energy developer based in Washington DC, was EPA’s National Regulatory Reform Director from 1979 to 1988 under five Democratic and Republican Administrators. This article was developed in consultation with Sarah Chayes, Senior Fellow for Democracy and Rule of Law at the Carnegie Endowment for International Peace (Washington DC) and author of *When Corruption is the Operating System: The Case of Honduras* (Carnegie, 2017) and *Thieves of State: Why Corruption Threatens Global Security* (Norton, 2015). It does not address developments at the U.S. Interior Department or other federal agencies. The views here are solely the author’s.

²⁸ https://www.buzzfeed.com/danvergano/epa-media-misfires?utm_term=.rmLZp0JXG#.ad7LG23Kn

²⁹ E.g., <http://inthesetimes.com/article/19658/20-lessons-from-the-20th-century-on-how-to-survive-in-trumps-america> ; https://www.salon.com/2017/12/19/frightening-ways-trumps-america-mirrors-hitlers-germany_partner ; <http://www.motherjones.com/politics/2017/12/donald-trumps-holiday-gift-to-america-a-fundamental-crisis/>



Dear Governor:

There is no higher priority for the U.S. Environmental Protection Agency (EPA) than protecting public health and ensuring the safety of our nation's drinking water. Under the Safe Drinking Water Act (SDWA), 48 States and most other states have the primary responsibility for the implementation and enforcement of drinking water regulations, while EPA is tasked with oversight of state efforts. Recent events in Flint, Michigan and other U.S. cities, have led to important discussions about the safety of our nation's drinking water supplies, which is why I am writing to you today.

I am asking you to join me in taking action to strengthen protection of our nation's drinking water, which is a shared responsibility involving state, tribal, local and federal governments, system owners and operators, consumers and other stakeholders. We must work together to address the broad set of challenges and opportunities we face – including in the areas of infrastructure finance and investment, science, technology, legacy and emerging contaminants, regulatory oversight, risk assessment and public engagement and education.

As part of the EPA's immediate effort to properly oversee state implementation of the Lead and Copper Rule, my staff will be meeting with every state drinking water program across the country to ensure that states are taking appropriate actions to identify and address lead action level exceedances and fully implementing and enforcing this important rule. I ask that you encourage your state agency to give this effort the highest priority, consistent with our shared commitment and partnership to address lead risks.

In the near-term, I also ask for your leadership in taking action to enhance public transparency and accountability in the implementation of the Lead and Copper Rule to assure the public that all levels of government are working together to address lead risks. By separate letter, the EPA's Office of Water has written to the head of your state primary agency detailing our requests and recommendations. In that letter we urge enhanced efforts to provide the public with better and quicker information on risks associated with lead in drinking water and how to abate them. We also ask states to promptly inform residents of lead sample results from their homes, as well as the general public where systems are experiencing high lead levels. And we point out the tremendous value of using public websites to disclose state lead sampling protocols and guidance, lead sampling results, and water system inventories of lead service lines. This is the most effective approach to assure the public that we are doing everything we can to work together to address lead risk, and I would ask your support to take these steps quickly.

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SUBJECT: Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements

The U.S. Environmental Protection Agency, in partnership with the states, serves a vital role in protecting human health and the environment. When conducting Agency action to achieve these objectives, the EPA must strive to promote transparency and public participation to provide the American public with due process, accountability, and a sense of fair-dealing.

It has been reported, however, that EPA has previously sought to resolve lawsuits filed against it through consent decrees and settlement agreements that appeared to be the result of collusion with outside groups. In some instances, EPA may have taken actions that had the effect of creating Agency priorities and rules outside the normal administrative process. When negotiating these agreements, EPA excluded intervenors, interested stakeholders, and affected states from those discussions. The days of this regulation through litigation, or "sue and settle," are terminated. EPA will not resolve litigation through backroom deals with any type of special interest group.

To promote transparency and public participation in the consent decree and settlement agreement process involving lawsuits against EPA, the Agency shall follow the procedures set forth below:

1. EPA's Office of General Counsel shall publish online a notice of intent to sue the Agency within fifteen days of receiving the notice from the potential litigant(s).
2. When EPA receives actual notice of a complaint or a petition for review regarding an environmental law, regulation, or rule in which the Agency is a defendant or respondent in federal court, the Office of General Counsel shall publish online that complaint or petition for review within fifteen days of receiving service of the complaint or petition for review.
3. EPA shall directly notify any affected states and/or regulated entities of a complaint or petition for review within fifteen days of receiving service of the complaint or petition for review. It shall be the policy of the Agency to take any and all appropriate steps to achieve the participation of affected states and/or regulated entities in the consent decree and settlement agreement negotiation process. Accordingly, EPA shall seek to receive the concurrence of any affected states and/or regulated entities before entering into a consent decree or settlement agreement.
4. Within thirty days of this directive, EPA shall publish online a searchable, categorized list of the consent decrees and settlement agreements that continue to govern Agency actions, providing a brief description of the terms of each consent decree and settlement agreement, including attorney's fees and costs paid. EPA shall update this list by publishing any new final consent decree or settlement agreement within fifteen days of its execution.

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Traditional Administrator letterhead, 29 Feb. 2016.

New letterhead format, 16 Oct. 2017.