

**PUERTO RICAN ENVIRONMENTAL RULE
OF LAW UNDER PROMESA**

ARTICLE

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INTRODUCTION

Natural and cultural resources are an indispensable component of our existence. This relationship is even more intricate in the United States (U.S.) island territory of Puerto Rico, where nature and culture merge to shape the identity of its people. From the coconut-based mask of the *vejigantes*, to the incorporation of the *coquí* call to our music, the island's daily life is dictated by the dance between nature and culture. The protection of natural resources is an essential manifestation of this dance. But the song fades and might be coming to an end considering the environmental threats (e.g. urban sprawl, climate change, sea-level rise, air and water pollution, invasive species) coupled with a serious fiscal crisis and the imposition of an extra-constitutional Oversight Board. The volatile combination is a risk to Puerto Rico's environment, natural resources, culture, communities, and people.

The *Puerto Rico Oversight, Management, and Economic Stability Act* (PROMESA) limits the local government's ability to create and implement policy, establish programs, create budgets, utilize appropriations, provide permits, enact, and enforce statutes, among others.¹ We argue, that with little regard to environmental considerations, PROMESA's primary economic focus has a disproportionate effect over our environment and natural resources.

PROMESA is young, which means that the limits and reaches of its authority are still unknown and untested. This article examines the powers, limits, and effects of PROMESA on Puerto Rico's environmental rule of law and its constitutional environmental mandate. It also explores the interplay between PROMESA and the federal environmental rule of law applicable to Puerto Rico. What does this mean in the context of the use and conservation of Puerto Rico's natural resources? Can PROMESA comply with all existing environmental laws and regulations? Can the Oversight Board sell Puerto Rico's natural and cultural patrimonies? Can we mitigate and adapt to the effects of climate change and sea-level rise under PROMESA? What happens with the Puerto Rico constitutional environmental mandate? Ultimately, does PROMESA translate into a healthier and more sustainable Puerto Rico? We examine some of these questions as well as provide recommendations moving forward.

I. NATURAL RESOURCES MANAGEMENT

Humans and the environment are intrinsically connected. Under this symbiotic relationship, the use and management of natural resources should be responsible and sustainable to avoid disrupting the services that these systems provide us and other organisms. As demonstrated by our current environmental situation, responsible and sustainable use has not been the norm. If anything, current and past measures have helped reduce the rate of environmental degradation but have not significantly addressed issues of conservation, restoration, or sustainability. An in-depth analysis of the effectiveness

¹ Puerto Rico Oversight, Management, and Economic Stability Act (P.R.O.M.E.S.A.), 48 U.S.C. §§ 2101-2241 (2012 & Supp. V 2017).

of such measures is beyond the scope of our work. What is of interest today are the measures, legal frameworks, and policies that governments have taken to address the problem and those I believe we need to take.

Starting in the 1970s, international and national entities began recognizing the connection between human activities and the environment. This environmental awakening led to national and international actions and initiatives including ratification of environmental treaties and protocols, insertion of environmental considerations on constitutions, enactment of environmental laws, and creation of agencies to protect natural resources.² The U.S. federal government spearheaded the environmental movement with legislation such as the *National Environmental Policy Act* (NEPA),³ the *Clean Water Act*,⁴ the *Clean Air Act*,⁵ the *Endangered Species Act*,⁶ and the *Coastal Zone Management Act*,⁷ among others. But the enactment of federal laws only addresses the issue in part since jurisdictional considerations are critical for management under our federalism framework. This is particularly true for natural resources as environmental issues have been at the center of the U.S. Supreme Court federalism jurisprudence.⁸

In the United States, jurisdiction over natural resources is shared among federal, state, tribal, territorial, and local governments.⁹ There are different natural resources management scenarios under U.S. federalism. We provide an oversimplification of such scenarios:

1. A single actor has sole jurisdiction over a natural resource (e.g. federal management of federal lands, or state management of state natural reserves and parks)
2. Multiple actors share jurisdiction over a natural resource (e.g. an ecosystem that extends across state and federal land; water quality standards; fish and wildlife management)
3. An actor with sole jurisdiction over a natural resource delegates management to other actors (e.g. cooperative federalism; good neighbor laws; co-management of territorial natural reserves)

The partition of jurisdiction is driven by the interplay of congressional power to create legislation (U.S. Const. art. I, §8); the constitutional rights reserved to states (U.S. Const.

² ROSALEEN O'GARA ET AL., ENVIRONMENTAL RIGHTS REPORT 2007: HUMAN RIGHTS AND THE ENVIRONMENT, EARTHJUSTICE (2007), <https://earthjustice.org/sites/default/files/library/references/2007-environmental-rights-report.pdf>.

³ National Environmental Policy Act, 42 U.S.C. §§ 4321-4370m-12 (2018).

⁴ Clean Water Act, 33 U.S.C. §§ 1251-1388 (2018).

⁵ Clean Air Act, 42 U.S.C. §§ 7401-7671q (2018).

⁶ Endangered Species Act, 16 U.S.C. §§ 1531-44 (2018).

⁷ Coastal Zone Management Act, 16 U.S.C. §§ 1451-66 (2018).

⁸ Erin Ryan, *Negotiating Environmental Federalism: Dynamic Federalism as A Strategy for Good Governance*, 2017 WIS. L. REV. 17, 20-21 (2017).

⁹ HOLLY DOREMUS ET AL., ENVIRONMENTAL POLICY LAW 161 (6th ed. 2012).

amend. X); the federal supremacy clause (U.S. Const. art. XI, §2); the doctrine of federal enumerated powers, the federal privilege, and immunities clause (U.S. Const. art. IV, §2); the executive powers of the president (U.S. Const. art. 3); the territorial clause for U.S. insular areas like Puerto Rico (U.S. Const. art. IV, §3, cl. 2); individual rights of people and citizens under federal and state/tribal/territorial constitutions; the international commitments of the United States; the level of interest and capacity, and politics.

The U.S. Constitution does not have expressed provisions for natural resources. Nonetheless, some of its jurisdiction do. This keeps adding to the power-push dynamics between federal and subnational governments. The distinction is particularly relevant to our case since Puerto Rico is one of those jurisdictions with an environmental constitutional mandate.

A. Puerto Rico

Puerto Rico is rich in cultural heritage and other natural resources. From a scientific perspective, it is an ecological marvel. Living and nonliving elements of the Island create varied and productive ecosystems such as coral reefs, sandy beaches, sub-tropical forests, mangrove forests, estuaries, and dry forests.¹⁰ As a result, the diversity of species in Puerto Rico is greater than in many other places around the globe.¹¹

Inhabitants of Puerto Rico directly or indirectly interact with those ecosystems. They depend on the Island's natural resources and ecological services for their well-being, livelihoods, economy, and cultural identity.¹² On the other hand, they can alter, pollute, and destroy. Anthropogenic pressure over the Island's ecosystems has varied over time with proven ecological consequences of socioeconomic and land-use changes.¹³

The 2018 Fourth National Climate Assessment reaffirms the fact that the climate in Puerto Rico is changing and is projected to be increasingly variable causing a reduction in freshwater availability, affecting marine resources, disrupting coastal systems, rising temperatures, and incrementing the amount and intensity of extreme events (e.g. flooding, droughts, and hurricanes).¹⁴ This represents a reduction in ecosystem services as well as an increased risk to agriculture, human health, wildlife and socioeconomic development. Readers need not imagine the potential impacts of environmental degradation as the world recently witnessed how Puerto Rico was brutally damaged by Hurricanes Maria and Irma.¹⁵

¹⁰ BIODIVERSIDAD DE PUERTO RICO (Rafael Joglar ed., 2005).

¹¹ Norman Myers et al., *Biodiversity hotspots for conservation priorities*, 403 NATURE 853-58 (2000).

¹² See U.S. GLOBAL CHANGE RESEARCH PROGRAM 2018: IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES: FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME II (Reidmiller, D.R. et al. eds., 2018) [hereinafter "U.S.G.C.R.P."].

¹³ H. Ricardo Grau et al., *The Ecological Consequences of Socioeconomic and Land-Use Changes in Post Agriculture Puerto Rico*, 53 BIOSCIENCE (ISSUE 12) 1159, 1161 (2003).

¹⁴ U.S.G.C.R.P., *supra* note 12, at 544.

¹⁵ See Sheri Fink, *Nearly a Year After Hurricane Maria, Puerto Rico Revises Death Toll to 2,975*, N. Y. TIMES (Aug. 28, 2018) <https://www.nytimes.com/2018/08/28/us/puerto-rico-hurricane-maria-deaths.html>; see also Myrna Rivas Nina, *La Respuesta al Desastre y las Organizaciones sin Fines de Lucro en Puerto Rico*, 49 REV. DE ADM. PÚBLICA 39 (2018).

The makers of Puerto Rico's Constitution understood the critical importance of natural resources. As a result, they introduced a constitutional provision for the: *conservation, development, and use of [the Island's] natural resources for the general welfare of the community [and] to conserve and maintain buildings and places declared by the Legislative Assembly to be of historic or artistic value.*¹⁶

This constitutional provision, approved by the U.S. Congress and adopted by the people of Puerto Rico in 1952, precedes the global environmental awakening and NEPA by almost 20 years. In 1970, Puerto Rico enacted the *Ley de Política Pública Ambiental (Environmental Public Policy Act)*,¹⁷ which has been interpreted by the Puerto Rico Supreme Court to codify the constitutional mandate.¹⁸ To date, this is the principal territorial environmental statute.

From the executive side, Puerto Rico's natural resource management has not been able to escape the era of administrative agency proliferation.¹⁹ Currently, natural resources management is fragmented across multiple territorial agencies including, but not limited to the Department of Natural Resources and the Environment (DRNE), Board of Environmental Quality (BEQ), Planning Board (JP), Department of Agriculture, Puerto Rico Electric Power Authority (PREPA), Puerto Rico Aqueduct and Sewer Authority (PRASA), Department of Health, Land Authority of Puerto Rico, and the Department of Justice, among others.²⁰ In addition, many municipalities have jurisdiction over certain natural resources including land use and waste management.

Similar to other states and territories, there is an extra level of complexity added by federal laws and agencies that operate in Puerto Rico such as the U.S. Fish and Wildlife Service (USFWS), Environmental Protection Agency (EPA), National Park Service (NPS), National Forest Service (FS), U.S. Geological Survey (USGS), U.S. Army Corps of Engineers (USACE), USDA Animal and Plant Health Inspection Service (APHIS), Natural Resources Conservation Service (NRCS), National Oceanic and Atmospheric Administration (NOAA), U.S.

¹⁶ P.R. CONST. art. VI, § 19 (translation provided)

¹⁷ *Ley sobre política pública ambiental del Estado Libre Asociado de Puerto Rico*, Ley Núm. 9 de 18 de junio de 1970, 12 LPRA §§ 1121-42 (Replaced by: *Ley sobre política pública ambiental*, Ley Núm. 416-2004, 12 LPRA §§ 8001-8007f (2014)).

¹⁸ There is debate on whether the statute appropriately codifies the constitutional mandate. See Luis E. Rodríguez Rivera, *Genesis of Puerto Rico's environmental law: study of early Puerto Rico environmental case law*, 67 REV. JUR. UPR 201 (1998); DIANA LÓPEZ-FELICIANO, *EL AMBIENTE Y LAS LEYES EN PUERTO RICO, LO QUE TODOS QUEREMOS SABER* (1999); Luis E. Rodríguez Rivera, *No todo lo que brilla es oro: apuntes sobre el desarrollo de la norma de revisión judicial en la jurisprudencia ambiental a la luz de la constitucionalización de la política pública ambiental puertorriqueña*, 72 REV. JUR. UPR 113 (2003).

¹⁹ William Vázquez Irizarry, *La era de los órganos autónomos*, in SELA 2006: EL PODER EJECUTIVO 37-59 (2007).

²⁰ Others include: Administración de Terrenos, Autoridad de Desperdicios Sólidos, Autoridad para el Financiamiento de Facilidades Industriales, Turísticas, Educativas, Médicas y de Control Ambiental (AFICA), Compañía de Parques Nacionales, Compañías para el Desarrollo Integral de la Península de Cantera, Departamento de Recreación y Deportes, Instituto de Cultura Puertorriqueña, Junta Reguladora de Telecomunicaciones de Puerto Rico, Junta Revisora de Permisos y Uso de Terrenos, Departamento de Seguridad Pública, Negociado de la Policía de Puerto Rico, Departamento de Hacienda, Oficina del Inspector General de Permisos, Oficina Estatal de Conservación Histórica (State Historic Preservation Office), Oficina Estatal de Política Pública Energética y Negociado de Energía.

Department of Justice, USDA Rural Development, and the U.S. Coast Guard (USCG).

Even without going through the details of the interaction between the municipal, territorial, and federal agencies and jurisdictional pushes, just by looking at the number of agencies, we can conclude that natural resources management in Puerto Rico is a complex ordeal. Historically, this fragmented approach has resulted in inefficient management of natural resources.

The enactment of PROMESA adds another layer of complexity with significant implications over Puerto Rico's ability to adhere to its constitutional mandate, manage agencies, implement an environmental policy, and protect its natural and cultural resources. This is particularly problematic considering the urgent need for addressing climate change and sea-level rise mitigation and adaptation.

II. PUERTO RICO OVERSIGHT, MANAGEMENT, AND ECONOMIC STABILITY ACT (PROMESA)

Puerto Rico's government is in a serious liquidity challenge.²¹ In 2016, the Island's government was found *insolvent and unable to pay its debts as they become due*.²² Facing insolvency, the government of Puerto Rico enacted the *Puerto Rico Emergency Moratorium and Financial Rehabilitation Act* (also known as "*Quiebra Criolla*") to among other things declare a moratorium on payment and provide for debt restructuring.²³ Nonetheless, the U.S. Supreme Court struck down the act holding that it was preempted by Chapter 9 of the U.S. Bankruptcy Code (even though Puerto Rico was barred from filing under chapter 9).²⁴

As a response to the defeated *Quiebra Criolla* and Puerto Rico's inability to default under Chapter 9 of the U.S. Bankruptcy Code, President Obama signed the *Puerto Rico Oversight, Management, and Economic Stability Act* (PROMESA).²⁵ The act creates a structure for exercising federal oversight over fiscal affairs of Puerto Rico, establishes an Oversight Board with broad budgetary and financial powers over the Island's government, creates a procedure for debt restructuring, and provides for an expedited approval process of *Critical Projects*.²⁶ The inevitable result of such configuration is the disruption of the republican form of government created by a constitution ratified by the people of Puerto Rico and approved by Congress.

21 CONGRESSIONAL RESEARCH SERVICE, THE PUERTO RICO OVERSIGHT, MANAGEMENT, AND ECONOMIC STABILITY ACT (PROMESA); H.R. 5278, S. 2328 (July 1, 2016), <https://fas.org/sgp/crs/row/R44532.pdf>; CONGRESSIONAL RESEARCH SERVICE, PUERTO RICO'S CURRENT FISCAL CHALLENGES (June 3, 2016), <https://fas.org/sgp/crs/row/R44095.pdf>.

22 Walmart Puerto Rico Inc. v. Zaragoza-Gómez, 174 F. Supp.3d 585 (D.P.R. 2016).

23 Ley de moratoria de emergencia y rehabilitación financiera de Puerto Rico, Ley Núm. 21-2016, <http://www.bvirtual.ogp.pr.gov/ogp/Bvirtual/leyesrederencia/PDF/Deuda%20P%C3%BAblica/21-2016/21-2016.pdf>.

24 Puerto Rico v. Franklin California Tax-Free Trust, 136 S.Ct. 1938 (2016).

25 Puerto Rico Oversight, Management, and Economic Stability Act (P.R.O.M.E.S.A.), 48 U.S.C. §§ 2101-2241 (2012 & Supp. V 2017).

26 *Id.*

A. Financial Oversight and Management Board

Under the control of nine non-elected members, Title I of PROMESA establishes the Financial Oversight and Management Board (“Oversight Board” or “Board”),²⁷ to provide a method for a covered territory to achieve fiscal responsibility and access to capital markets.²⁸ The Oversight Board is authorized to oversee territorial instrumentalities,²⁹ and may require them to establish financial plans in addition to budgets.³⁰

B. Fiscal Plans, Budgets, Remedial Actions, and Essential Public Services

Title II of PROMESA establishes the process for the submission, approval, certification, and revision of fiscal plans and budgets for the government of Puerto Rico and its instrumentalities.³¹ Fiscal plans and budgets (territorial and covered instrumentalities) can either be created by (1) the government of Puerto Rico;³² (2) unilaterally by the Oversight Board if fiscal plans do not satisfy the requirements under § 2141(b) of PROMESA or if the Board determines that the Governor has failed to develop or the Legislature has failed to adopt a budget compliant with an approved fiscal plan;³³ or (3) jointly between the Government and the Board.³⁴ The Governor may not submit to the Puerto Rico Legislature a territory budget,³⁵ unless the Oversight Board has certified the territory fiscal plan for that fiscal year.³⁶

In the case of the territory budget, if the Governor, and the Legislature fail to develop and approve a compliant territory budget by the day before the first day of the fiscal year,

27 Note that PROMESA arises from Congress. Although Congress organized the Oversight Board under, and it is finance by, the Puerto Rico government, the government may not exercise control, supervision, or oversight over the Board or its activities nor can it enact, implement, or enforce any statute, resolution, policy, or rule that would impair the purpose of PROMESA, as determined by the Oversight Board. *Id.* § 2128.

28 *Id.* § 2121.

29 *Id.* § 2104(19) (“The term ‘territorial instrumentality’ means any political subdivision, public agency, instrumentality—including any instrumentality that is also a bank—or public corporation of a territory, and this term should be broadly construed to effectuate the purposes of this Act. The term ‘territorial instrumentally’ does not include the Oversight Board.”).

30 Relevant Oversight Board’s powers includes obtaining official data from the territorial and federal government; entering into contracts; enforcing territorial laws prohibiting public sector employees from participating in a strike or lockout; seeking judicial enforcement of its authority; and investigating the disclosure and selling practices in connection with the purchase of bonds issued by a covered territory. For a list of other powers entrusted to the Board see 48 U.S.C. § 2124 (2012 & Supp. V 2017).

31 *Id.* §§ 2141-42. Fiscal plans must provide a method to achieve fiscal responsibility and access to the capital market and, among other things, ensure funding of essential public services and improve fiscal governance, accountability, and internal controls. *Id.* § 2141.

32 *Id.* §§ 2141(c)(2), 2142(c).

33 *Id.* § 2141(d)(2).

34 *Id.* §§ 2141(f), 2142(f).

35 *Id.* § 2104(21) (“The term ‘territory budget’ means a budget for a territorial government submitted, approved, and certified in accordance with 28 U.S.C. § 2142 of this title.”).

36 *Id.* § 2141(c)(1).

the Oversight Board must unilaterally submit a budget that is automatically deemed approved and in force without the intervention of the government of Puerto Rico.³⁷

Note that PROMESA grants the Oversight Board authority to take several actions if they find that there are inconsistencies in revenues, expenditures, or cash flow with an approved budget.³⁸ These actions include advising the territorial government to correct inconsistencies by implementing remedial actions, budget reduction of nondebt expenditures for the government and covered instrumentalities, automatic hiring freeze, a prohibition to enter into contracts, engaging in any financial or other transaction for covered instrumentalities, among others.³⁹ These measures may stop once the governments initiate appropriate measures to reduce expenditures or increase revenues to ensure compliance with the certified budget.⁴⁰

The Oversight Board's power to approve, create, and revise fiscal plans and budgets for the government of Puerto Rico and covered instrumentalities gives them significant control over the administration of the local government. PROMESA unilaterally gives the Oversight Board powers that the constitution bestows to the Puerto Rico Executive and Legislative Branches. Since making budgets is making policy, PROMESA's new fiscal and budgetary extra-constitutional scenario affects the way the government of Puerto Rico manages their natural resources from the allocation of resources, to the management of environmental agencies, to ultimately the implementation and enforcement of environmental laws, regulations, programs, and policies.

i. Essential Public Services

Section 201 of PROMESA mandates that fiscal plans provide a method to achieve fiscal responsibility and access to capital markets while ensuring the *funding of essential public services*. PROMESA does not define the term *essential public service*.

To this date, neither the Government of Puerto Rico nor the Oversight Board has defined what constitutes an essential public service. The fiscal plans currently approved for the Commonwealth and covered territorial instrumentalities do not explicitly define the term either. The rationale behind this is beyond us. We propose, however, that environmental and natural resource conservation and management are essential public services.

Although a strong argument can be made that all environmental and natural resource conservation and management actions are essential, there are environmental public services that require direct attention. The inability to provide those services will cause an immediate impact on human and environmental health. These include water and air quality monitoring and enforcement, water treatment, waste management, environmental emergency prevention and response, food inspection, and pest control (e.g. mosquitoes and rodents). The government's inability to provide these services will result in unnecessary and avoidable human casualties.

³⁷ *Id.* § 2142(e)(3).

³⁸ *Id.* § 2143.

³⁹ *Id.* § 2143(b).

⁴⁰ *Id.* § 2143(e).

In support of our argument, note that PROMESA repeatedly requires compliance with federal environmental, public health, and public safety laws. In this sense, it equates the environment with health and safety. This could provide an indication of congressional intent to guide the definition of essential public services. Following this interpretation, as we will see below, the lack of environmental considerations in the Commonwealth Fiscal Plan forces the conclusion that the plan is not compliant with the intent of PROMESA.

ii. The New Fiscal Plan for Puerto Rico (Commonwealth Fiscal Plan)

Natural resources and environmental issues are directly and indirectly addressed in the New Fiscal Plan for Puerto Rico (“New Fiscal Plan” or “Plan”), prepared by the Governor, and certified by the Oversight Board on October 23, 2018.⁴¹ The Plan creates overall categories with concrete milestones and deadlines. Overall categories include restoring the economic growth of the island through a business, infrastructure, and energy reform. It also establishes fiscal milestones and deadlines for certain governmental agencies. As a result, the New Fiscal Plan leads to a reduction of administrative agencies’ ability to adhere to environmental mandates, compliance, policies, and programs. On the other hand, the New Fiscal Plan could provide for certain more resilient infrastructure and energy production. We discuss some of these categories below.

a. Regulatory Reform and its Constrains

As we listed above, Puerto Rico has numerous local environmental agencies. Some of these agencies have an added level of independence from the central government (e.g. instrumentalities, municipalities, and public corporations). PROMESA has the potential to reach them all.⁴²

Regarding the reduction in environmental compliance, under the New Fiscal Plan, the *easing of doing business reform* entails *easier-to-navigate regulations*, less complex and faster-permitting processes, and other legal and regulatory flexibilities through deregulation and streamlining of certain permits (e.g. construction permits).⁴³ The infrastructure reform also considers revisiting permitting requirements. Under the New Fiscal Plan, these initiatives require creating plans for regulatory reform and the enactment of new legislation.

As we saw above, nothing in PROMESA constrains the fiscal plan from including environmental considerations. As such, the Plan could call for more stringent environmental laws and regulations as well as augmenting implementation and enforcement. It could also call to respect Puerto Rico’s environmental constitutional mandate. But the New Fiscal Plan does not require, nor does it provide any indication, that the new reg-

⁴¹ FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, NEW FISCAL PLAN FOR PUERTO RICO: RESTORING GROWTH AND PROSPERITY, CERTIFIED OCTOBER 23, 2018 (2018) (Note that this fiscal plan builds on past fiscal plans and is updated periodically) [hereinafter “FOMB”].

⁴² *Id.*

⁴³ *Id.* at 50-54.

ulatory reform should include environmental protection provisions. On the contrary, it suggests that regulations, environmental or not, are a burden to conducting business and therefore are not aligned with economic development. The apathy for regulations under PROMESA affects the environment disproportionately.

PROMESA does not provide the Oversight Board with the authority to create legislation. This power is still under the Puerto Rican Legislative Assembly. If new legislation is required for such regulatory reforms, can the Puerto Rican Legislative Assembly enact laws that are contrary to the constitutional environmental mandate just because it must adhere to the fiscal plan? We do not think so. Under Section 4, PROMESA's legal authority has supremacy over territorial law and regulations.⁴⁴ Nonetheless, the act does not provide the Puerto Rican Legislative Assembly with authority to legislate outside the bounds of the Puerto Rican Constitution and its environmental mandate. The Puerto Rican Legislature is still constrained to the high standards of the constitution and its environmental mandate. PROMESA has not altered this. In this sense, since the *Ley de Política Pública Ambiental* and other laws are considered a manifestation of the constitutional mandate to protect the environment, the amount of reform and streamlining required under these laws (e.g. Environmental Impact Statements) is not unlimited. There is a minimum of environmental protection that needs to be maintained per our constitutional mandate. It is unknown what the minimum is, the courts could provide some light on the matter. What is certain is that minimal guarantees cannot be eliminated by the laws created by the government of Puerto Rico no matter how much deregulation the New Fiscal Plan and the Oversight Board command.

b. Renewable Energy and Resilient Infrastructure

The New Fiscal Plan includes provisions related to renewable energy and resilient infrastructure.⁴⁵ These are relevant considering the effect of energy production on greenhouse gas emissions.⁴⁶ The infrastructure reform milestones include identification of resiliency upgrades to existing and new infrastructure as well as prioritizing investment in resilience upgrades. Under the energy and power regulatory reform, the New Fiscal Plan establishes detailed structural and funding reforms for the Puerto Rico Energy Bureau with a specific mandate to *support for and integration of renewables, distributed generation and new energy technologies as appropriate and consistent with the New Fiscal Plan for PREPA*.⁴⁷ Energy reform milestones include a regulatory reform by developing and establishing a regulatory framework as described in *Puerto Rico Law 120-2018*,⁴⁸ and transforming PREPA by improving generation and costs by *switching to low-cost, clean,*

44 48 U.S.C. § 2103 (2012 & Supp. V 2017) (“The provisions of this Chapter shall prevail over any general or specific provisions of the territory law, State Law, or regulation that is inconsistent with this Act.”).

45 FOMB, *supra* note 41.

46 U.S.G.C.R.P., *supra* note 12.

47 FOMB, *supra* note 41, at 57.

48 Ley para transformar el sistema eléctrico de Puerto Rico, Ley Núm. 120-2018, 2018 LPR 952-992.

and resilient F&PP [fuel and purchase power].⁴⁹ Note that the regulatory framework referred to under *Puerto Rico Law 120-2018* considers the sale of PREPA and does not refer explicitly to production of energy through alternative forms of energy. Although the reference to renewable energy is noted, the transition into such technologies is considered but not mandated under the fiscal plan. In addition, environmental monitoring of existing or new technologies is not explicitly required under the regulatory reform either.

Following the lack of specificity and the central role of economic growth, potential benefits under these reforms depend on whether they would be beneficial to the economy at the short end and not if they are environmentally sound, providing long term economic benefits.

c. Environmental Agencies

1. Number, Structure, and Independence

The New Fiscal Plan also establishes administrative milestones for agencies or groups of agencies. From an environmental standpoint, some provisions apply to environmental agencies and non-environmental agencies alike. As an example, it requires government agencies to reduce the use of utilities (e.g. water and electricity).⁵⁰ This provision, as well as other provisions under the plan that could result in environmental benefits, respond to economic and efficiency requirements (e.g. reduce the cost spent on utilities) and are not primarily designed to protect the environment (e.g. reduce the emission of greenhouse gases or conserve water).

The New Fiscal Plan directly impacts environmental agencies.⁵¹ As an initiative for *transforming the government to better serve the Island*, the fiscal plan establishes agency efficiency requirements including *right sizing* the government through agency closure and consolidation. The plan intends to consolidate 114 agencies into no more than 35 agency groupings and independent agencies. Among the agencies proposed for closure, 66% are environmental related agencies. They are the *Model Forest*, the *Culebra Conservation and Development Authority*, the *Company of the Integral Development of Cantera's Peninsula*, and the *Industrial, Tourist, Education, Medical, and Environmental Control Facilities Financing Authority (AFICA)*. The closure of these agencies was proposed by the Governor of Puerto Rico and certified by the Oversight Board.

The New Fiscal Plan also proposes the consolidation of environmental-related agencies by groups. Relevant groupings include:

⁴⁹ FOMB, *supra* note 41, at 59. The New Fiscal Plan does not define F & PP.

⁵⁰ *Id.* at 72 (“The government should also implement energy efficiency initiatives . . . in line with the U.S. federal Energy Management Program (FEMP). Energy efficiency initiatives would include facility & fleet optimization (e.g., recycling), better procurement, and strategic investments, potentially using some federal funds on utility capital expenditure.”).

⁵¹ Some relevant entities were excluded from the fiscal plan including Puerto Rico Water Pollution Control Revolving Fund and the Safe Drinking Water Treatment Revolving Loan Fund.

1. *Environmental Grouping* - Department of Natural Resources and the Environment (DRNE), the Environmental Quality Board, the Natural Resources Administration, and the Solid Waste Authority.⁵²
2. *Agricultural Grouping* - Department of Agriculture, Agriculture Enterprise Development Administration, and the Farm Insurance Corporation.
3. *Land Grouping* - Land Administration and the Land Authority
4. *Economic Development Grouping* - Department of Economic Development and Commerce (DDEC), PR Industrial Development Company, PR Trade and Export Company, Office of Industrial Tax Exemption, State Office of Energy Policy, Commonwealth of Puerto Rico Regional Center Corporation, Local Redevelopment Authority for Roosevelt Roads, PR Tourism Company, Permits Management Office, and the Planning Board.⁵³

Some of these reorganizations, like the *Environmental Grouping* and the *Economic Development Grouping*, have already been implemented through legislation.⁵⁴

The consolidations of agencies speak to the priorities and conceptualization of environmental issues. Under the Plan, the concept of environmental protection, land use, and permitting are fragmented as they are placed under different groupings. This lack of coordination will affect the Island's natural resources since it disintegrates essential components of environmental planning.

The *Economic Development Grouping* is noteworthy since it includes many economic oriented agencies, as well as the Office of Energy Policy, the Permits Management Office, and the Planning Board. Under the Plan, these agencies are viewed as economic oriented and not environmentally oriented. The Fiscal Plan considers that the *Economic Development Grouping* is critical in the aftermath of Hurricanes Irma and Maria as to increase participation in the job market and attracting new business to the island. Although the hurricanes are mentioned, there is no consideration for infrastructure planning, reduction of vulnerability, resilience, and mitigation under this grouping. This is unnerving considering that the Permits Management Office and the Planning Board have crucial authority and responsibility for the permit process and the territorial land-use plan. This is a testament to the nature of the grouping and its impacts on the agency's overall independence.

The *Economic Development Grouping* drastically affects the independence of the Office of Energy Policy, the Permits Management Office, and the Planning Board as it

52 Note that the Plan specifically requires the *Environmental Grouping* for a reduction in solid waste generation and administrative expenses spending. No other agency grouping has this requirement.

53 FOMB, *supra* note 41, at 97-102.

54 Plan de reorganización del Departamento de Recursos Naturales y Ambientales, Ley Núm. 171-2018, 2018 LPR 1600; Ley de Ejecución del plan de reorganización del Departamento de Desarrollo Económico y Comercio, Ley Núm. 141-2018, 2018 LPR 1097; Plan de reorganización de la oficina del Bosque Modelo, Ley Núm. 131-2018, 2018 LPR 1056 (eliminates the Model Forest Office).

changes the reporting structure of the heads of those agencies. Changes in the reporting structure reduce inheritance over agency affairs such as staffing, priorities in programs and policies, budget development, and budget allocation. A call from the new head of the department to shift, reassign, or reduce the staff of an already understaffed and overworked Permits Management Office and the Planning Board, will significantly reduce the effectiveness of these agencies and the services they render the public. The new reporting structures also reduce the visibility and access of the buried agencies to power structures (e.g. Governor, Office of Management and Budget, Legislative Assembly, media).

Finally, the reduction of independence, critically increases the possibility of undue, unwanted, and illegal interference on environmental compliance, permitting, zoning regulations, and other relevant administrative adjudication inherent and necessary to environmental laws and regulations. The lack of independence is particularly worrisome for the Permits Management Office and the Environmental Quality Board due to their role in evaluating environmental compliance documents such as Environmental Impact Statements required under the *Ley de Política Pública Ambiental*. Considering the view that regulations are not in accordance with economic development, this interference is not implausible. Some might say it is almost certain.

2. Budget, Staffing, and Operations

Beyond structural changes, the New Fiscal Plan establishes savings targets for each agency grouping. These are significant as they require savings of millions of dollars.⁵⁵ Per the Plan, they are achieved with the consolidation of services, reduction of utility costs, and savings in personnel, non-salary compensation, and non-personnel cost, among other things. The New Fiscal Plan requires the continuation of a government-wide hiring freeze, reduction in employee benefits, reduction on healthcare benefits, and pension benefits.

These savings will put constraints on normal operations of environmental agencies and the services they provide to the public such as monitoring, response, permitting, evaluation, research, environmental remediation, conservation, enforcement, and restoration, among others. This is mostly caused by a reduction of personnel as a result of direct personnel reduction actions (e.g. RIF), the continuation of the hiring freeze, and a lessening of employee retention capacity (triggered by a reduction in employee benefits coupled with an increase in workload). This is particularly true for natural resource management professionals as they are highly skilled, usually from science, technology, engineering, and mathematics (STEM) fields, and could find more profitable jobs outside government. The void created by the lack of expertise in the agencies translates into near-term and long-term natural resource mismanagement, and significant environmental and economic loss. Long-term retention and sustainability are also hindered by the Plan's reduction in appropriations to the University of Puerto Rico, which is the largest STEM institution on the island.⁵⁶

⁵⁵ By FY 2023 reduction (in millions) by sector are Agriculture 11.8, Environment 27.7, and Land 4.6. FOMB, *supra* note 41, at 101.

⁵⁶ This contrast the New Fiscal Plan intent to reform the Department of Education to increase opportunities for STEM education.

The void in personnel and services is being filled by certain non-governmental, private, and academic entities. As an example, the Department of Natural Resources and the Environment's lack of capacity for coral reef monitoring and restoration is being filled by multiple academic or community-based organizations such as the *Sociedad Ambiente Marino*.⁵⁷ Nonetheless, the governmental need is enormous: the non-governmental entities' resources are slim. This is especially true for nonprofit organizations, some of which receive governmental assistance (funding or in-kind) and can be affected by budget and staff reduction. Who will provide the services? Who will provide the expertise? Under this bottleneck formula, only actors with enough economic capacity will remain able to fill the gaps created by a reduction in agencies services and capable personnel opening the doors for a *regulatory capture* in detriment of the environmental public interest.⁵⁸

d. Municipalities, Legislative Branch, and Judicial Branch

The New Fiscal Plan requires a reduction in appropriations to municipalities, the Puerto Rico Legislative Branch, and the General Court of Justice. This will have direct and indirect impacts on natural resource management and conservation.

Reduction of appropriations to municipalities will have negative effects on environmental oriented services provided by some municipalities such as waste management, environmental monitoring, pest control, and permitting. In addition, reduction in appropriations to the Legislative Branch reduces their ability to carry their constitutional mandate through investigation, oversight of environmental agencies, hosting hearings and other forms of public participation, creating agencies and programs, and formulating laws and policy.

As we exposed above, the New Fiscal Plan has negative effects on environmental agencies by reducing the quantity and quality of services they provide. This includes complying with their environmental ministerial duties and adjudications. As an agency amasses unresolved adjudications and fails to comply with their ministerial duties, an increase in judicial complaints is reasonably expected. If the number of suits increases but the budget is reduced, the court's ability to promptly decide environmental controversies, crimes, penalties, and constitutionality of statutes, regulations, and actions will be reduced. This is significant as we consider that many times environmental cases require prompt judicial intervention to avoid irreparable harm because the type of remedies for environmental conflicts are very limited or nonexistent (e.g. injunctive relief to prohibit deforestation). This is another example of how PROMESA affects the environmental rule of law disproportionately.

In addition, an overloaded judicial system could be less prone to expand its current restrictive standing requirements for environmental cases.⁵⁹ On the contrary, standing requirements might become more restrictive.

57 See the organization's website for more information on their environmental efforts <http://sampr.org/en/>.

58 Michael Levine & Jennifer Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 JOURNAL OF LAW, ECONOMICS, AND ORGANIZATION (1990).

59 For a broader look on the standing requirements for environmental cases see *Fundación Surfrider v. ARPE*, 178 DPR 563 (2010).

C. Covered Instrumentalities Fiscal Plans

Not all governmental agencies are considered under the New Fiscal Plan. As mentioned above, PROMESA provides the Oversight Board the authority to request singular fiscal plans and budgets for instrumentalities at their discretion. Most environmental agencies are covered under the New Fiscal Plan, but a handful of environmental-related agencies are currently under a *covered territorial instrumentalities* fiscal plan.⁶⁰ They are the Puerto Rico Electric Power Authority (PREPA), Puerto Rico Aqueduct and Sewer Authority (PRASA), and the University of Puerto Rico (UPR).⁶¹

i. Puerto Rico Electric Power Authority (PREPA) Fiscal Plan⁶²

Contrary to the New Fiscal Plan, PREPA's Fiscal Plan intends to transform the energy sector while addressing and maintaining environmental compliance.⁶³ The document recognizes PREPA's historical challenges to achieve compliance with environmental regulations (e.g. Mercury and Air Toxic Standards (MATS) under the EPA's emission limits) and requires ensuring sustainability and achieving environmental compliance as an element of the plan. Some measures to comply with environmental standards such as fuel switching to comply with MATS is considered in the PREPA plan even if it represents an additional cost. The plan also considers the use of new energy technologies to achieve reliability and environmental compliance criteria such as solar, wind, and other renewables.

The near-term transformation intends to increase generation from renewable energy and natural gas.⁶⁴ Long-term, PREPA should meet 100% renewable target by 2050.⁶⁵ Currently, only 4% of PREPA's generation capacity comes from renewables compared to the national average of 15%.⁶⁶ Per the plan, a major driver of transformation includes accelerated large-scale renewable energy and storage procurement.⁶⁷ The environmental benefits of renewables under the plan could be offset by the plan's significant increase in natural gas use as this form of fuel contributes greatly to greenhouse gases.⁶⁸ The reason-

60 48 U.S.C. § 2104(7) (2012 & Supp. V 2017).

61 The definition of *territorial instrumentality* includes *any political subdivision*. This leaves the door open for creating fiscal plans for municipalities and cities. This could affect the municipalities' ability to provide essential services such as waste management. Recently, the Oversight Board has shown interest to consider municipalities as a *covered territorial instrumentality* which will subject them to submit to the fiscal plan and budget approval process that the Government of Puerto Rico is currently under. See Gloria Ruiz Kuilan & Joanisabel González, *La Junta aprueba un plan piloto para que municipios presenten un plan fiscal*, EL NUEVO DÍA (May 9, 2019), <https://www.elnuevodia.com/noticias/locales/notas/la-junta-aprueba-un-plan-piloto-para-que-municipios-presenten-un-plan-fiscal/>.

62 FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, 2019 FISCAL PLAN FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY, CERTIFIED JUNE 27, 2019 (2019) (Note that this fiscal plan builds on past fiscal plans and is updated periodically) [hereinafter "FOMB PREPA"].

63 *Id.*

64 *Id.* at 12.

65 *Id.*

66 *Id.* at 30.

67 *Id.* at 78.

68 *Id.*

ability and effectiveness of PREPA's renewable initiatives under the plan are beyond the scope and expertise of this author.

ii. Puerto Rico Aqueduct and Sewer Authority (PRASA) Fiscal Plan⁶⁹

The PRASA fiscal plan also requires fiscal sustainability and environmental compliance. The objectives of the fiscal plan include the provision of a safe and reliable supply of drinking water and waste treatment compliant with federal environmental regulations to safeguard the health of the population and the environment while avoiding penalties and criminal charges.⁷⁰ This objective expressly considers “*federal environmental regulations*” and does not expressly consider local laws and regulations.⁷¹ For implementation of the objective, PRASA considers the Capital Improvement Program oriented towards water quality, reduction of non-revenue water, and system resiliency and anti-fragility improvement to address potential threats affecting the water infrastructure.⁷² Fortunately, the plan explicitly considers climate change as one of those threats.

Long term vision for the plan includes 100% compliance with EPA's National Primary Standards (water) and 98% compliance with EPA's National Pollutant Discharge Elimination System (wastewater) under the Safe Water Drinking Act. Correctly, the plan considers that long term sustainability includes environmental considerations such as the impact of extreme weather events on water infrastructure and environmental compliance.⁷³

iii. University of Puerto Rico (UPR) Fiscal Plan⁷⁴

The UPR fiscal plan imposes a massive appropriation cut to the primary higher learning institution on the Island.⁷⁵ As we mentioned before, the ripple effect of the cuts will impact the availability and quality of education. Budgetary constraints will force a reduction in professorate retention and recruitment; reduce the number of course offerings; reduce research and teaching assistantships; reduced the number of support services; educational materials; and additional opportunities offered to students and the public. The increase in tuition per the UPR Plan will reduce the number of students, threatens their ability to stay enrolled, and reduce their opportunity to seek opportunities beyond the university (e.g. a student cannot apply to internships because they have to work to support themselves). It would also prevent students from certain disadvantaged socioeco-

69 FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, THE REVISED FISCAL PLAN FOR PUERTO RICO AQUEDUCT AND SEWER AUTHORITY (PRASA), CERTIFIED AUGUST 1, 2019 (2019) (Note that this fiscal plan builds on past fiscal plans and is updated periodically) [hereinafter “FOMB PRASA”].

70 *Id.*

71 *Id.* at 113.

72 *Id.* at 14.

73 *Id.* at 66-69.

74 FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, FISCAL PLAN FOR THE UNIVERSITY OF PUERTO RICO, CERTIFIED JUNE 5, 2019 (2019) (Note that this fiscal plan builds on past fiscal plans and is updated periodically) [hereinafter “FOMB UPR”].

75 *Id.* at 11.

conomic sectors to apply for natural resources and STEM programs (e.g. ecology, botany) as they might seek short-term and more profitable programs (e.g. nursing).

The UPR Plan disturbs the near-term and long-term availability of natural resource professionals for both the public and private sectors. The budgetary asphyxiation of the University also reduces the amount of scientific research, publications, public education, and outreach. Without any doubt, the reduction of knowledge capital triggered by the UPR Fiscal Plan will have serious negative consequences for environmental management.

D. Oversight Board's Power to Ensure Fiscal and Budgetary Compliance

PROMESA provides the Oversight Board with several tools to ensure compliance with certified fiscal plans and budgets. These tools range from information requirements to the suspension of constitutionally enacted laws. These mechanisms could advance natural resource management by assuring that the agencies adhere to environmental standards under the fiscal plans (e.g. example environmental compliance for PREPA and PRASA). Unfortunately, most of the provisions on the fiscal plans are economic, only discussing environmental issues in monetary terms (e.g. avoiding paying EPA's penalties, reducing utility costs, reducing waste management costs).

i. Unilateral Budget Reduction and Increase Revenues [Section 203(b)]

Upon inconsistencies of governmental revenues with projected revenues on a certified budget, the Oversight Board can *advise the territorial government to correct the inconsistencies by implementing remedial actions* and to set a deadline for compliance with their requirements.⁷⁶ It is unclear if the *remedial actions* are suggested by the Oversight Boards, the government, or both. Regardless, if these *remedial actions* are not implemented, PROMESA mandates the Oversight Board to unilaterally make appropriate reductions in nondebt expenditures for the territorial government as well as make reductions in nondebt expenditures and hiring freezes for covered instrumentalities. It also prohibits covered instrumentalities from entering into certain previously approved contracts or financial obligation.

As we stated above, this alters the operation of environmental agencies and thus the services and protections that they are legally mandated to provide. In addition, prohibiting covered instrumentalities from entering contracts or financial obligations drastically affects their ability to respond to environmental emergencies. The inability to respond could cause environmental and human harm as well as financial and criminal penalties for non-compliance with local and federal environmental laws and regulations.

a. Mining and Sale of Property with Natural and Cultural Significance

In addition, the government or covered instrumentalities could trigger the termination of the budget reduction by initiating appropriate measures to reduce expenditure

⁷⁶ Puerto Rico Oversight, Management, and Economic Stability Act (P.R.O.M.E.S.A.), 48 U.S.C. § 2143(b)(1)(B) (2012 & Supp. V 2017).

or increase revenues. PROMESA does not provide a specific mechanism to increase revenues. Revenue increases could voluntarily be initiated by the Puerto Rico government or can be part of the remedial actions required by the Oversight Board.

A reduction of costs for environmental services provided by the government could translate into less monitoring, conservation, implementation of programs, enforcement of laws, staff, education, contributions to NGOs, research, and other services. On the other hand, their ability to increase revenues (besides PRASA, PREPA, and the UPR) is very limited.

Nonetheless, there are aspects of natural resources that could render profit from such an increase in quantity and/or price of permits for mining and extraction as well as leases and sale of public lands, waters, and historical property. The sale of such assets with natural and cultural significance is not unimaginable. Although not triggered by the termination of measures under Section 203 of PROMESA, in 2018, the Puerto Rico Industrial Development Company (PRIDCO) listed two public offshore keys for sale. This immediately created national outrage.⁷⁷ But, not all-natural and cultural sites under similar circumstances will get the same media attention. Although PRIDCO rescinded its action, the possibility of selling or renting a property with natural and cultural significance to achieve targets set up by the fiscal plan is still on the table.⁷⁸ The sale or rent of such properties could also be a potential remedial action imposed by the Oversight Board to comply under the budgetary inconsistencies of Section 203.⁷⁹

Other nations (e.g. Greece) have faced similar financial problems and have worked to conserve their natural and cultural assets. In addition to the moral argument of Greece, there is precedent under the U.S. Bankruptcy laws that considers the sale of certain cultural assets held under public trust, charitable trust, and various gifts restrictions.⁸⁰ In Detroit's bankruptcy case, the Detroit Institute of Art (DIA) was the city's most valuable assets. As such, creditors wanted Detroit to sell the collection to recover the full value of their debts. Recognizing the cultural value of the DIA, the court found a way to preserve the DIA's art and pay the creditors.⁸¹ This, however, required contributions from philanthropic and charitable foundations. Some have even suggested that the mechanism

77 Primera Hora, *Cámara exige explicaciones sobre alegada venta de Icacos*, PRIMERA HORA (May 8, 2018), <https://www.primerahora.com/noticias/puerto-rico/nota/camaraexigeexplicacionessobrealegadaventadeicacos-1281653/>.

78 Héctor Feliciano, *En riesgo el patrimonio puertorriqueño*, EL NUEVO DÍA, 9 de febrero de 2019, at 26-27; Héctor Feliciano, *Ausente una defensa clara de los patrimonios culturales y naturales*, EL NUEVO DÍA, 10 de febrero de 2019, at 34-35.

79 Note that in *Sierra Club v. Junta de Planificación*, 2019 TSPR 210, the Puerto Rico Supreme Court reversed a lower court decision and reestablish numerous natural reserves. The court found that the Puerto Rico Planning Board violated the *Uniform Administrative Procedure Act of the Government of Puerto Rico* (3 LPRA §§ 9601-9713 (2011 & Supl. 2018)).

80 Randy Kennedy, 'Great Bargain' Saves the Detroit Institute of Arts', N. Y. TIMES (Nov. 7, 2014), <https://www.nytimes.com/2014/11/08/arts/design/grand-bargain-saves-the-detroit-institute-of-arts.html>.

81 *In re City of Detroit*, 524 B.R. 147 (Bankr. E.D. Mich. 2014); Brian L. Frye, *Art & the "Public Trust" in Municipal Bankruptcy*, 93 U. DET. MERCY L. REV. 629 (2016).

found in Detroit could be replicated to other cities under fiscal crisis.⁸² The applicability in Puerto Rico is still to be seen as the sale of these assets is still, although looming, a hypothetical and the intervention of philanthropic and charitable entities on the island might be limited.

ii. Submission of Legislative Acts to the Oversight Board

Section 204(a) of PROMESA mandates the Governor of Puerto Rico to submit any newly enacted law to the Oversight Board no later than seven business days from its enactment.⁸³ With the submission, the Governor shall include a formal estimate of the impact, if any, that the law will have on expenditures and revenues, as well as a certification on whether the law is, or not, significantly inconsistent with the fiscal plan.⁸⁴ If the newly enacted law is certified as *significantly inconsistent* with the fiscal plan, the Oversight Board shall direct the government to: (1) correct the law to eliminate the inconsistency and (2) provide an explanation for the inconsistency which the Oversight Board finds reasonable and appropriate.⁸⁵ If the government fails to comply with these directions, the Oversight Board can: (1) take *such actions* as it considers necessary, consistent with [PROMESA] to ensure that the enactment or enforcement of the law will not adversely affect the territorial government's compliance with the Fiscal Plan.⁸⁶ This includes: (i) preventing the enforcement of the law or (ii) preventing the application of the law.⁸⁷

Moreover, PROMESA provides the Oversight Board the authority to *suspend* newly constitutionally enacted laws that are certified as either, *significantly inconsistent*, not corrected, or explained.⁸⁸ We use the term *suspend* because the laws are prevented from being applied or enforced, but not technically repealed. In theory, they should come into effect once the Oversight Board is terminated. Similarly, it is unclear if the Oversight Board has the authority to rescind their suspension determination since PROMESA is silent to that matter.

The act does not provide an indication of what *such actions* refer to. Is the suspension of local laws the minimum or maximum power that is provided to the Oversight Board under this section? Although it is not clear, we could argue that suspension is the upper limit of the Oversight Board's authority, as the only other two possibilities above suspension are the repeal or unilateral correction of the newly enacted statute

⁸² Peter Saunders, *Detroit's "Grand Bargain": A model for Others?*, FORBES (May 7, 2016) <https://www.forbes.com/sites/petesaunders1/2016/05/07/detroits-grand-bargain-a-model-for-others/#1ba6970855fa>; Howard Husock, Report: *The Pension Grand Bargain: A new Reform Model for Cities* (April 2016).

⁸³ Puerto Rico Oversight, Management, and Economic Stability Act (P.R.O.M.E.S.A.), 48 U.S.C. §§ 2144(a)(1) (2012 & Supp. V 2017).

⁸⁴ *Id.* § 2144(a)(2).

⁸⁵ *Id.* § 2144(a)(2)(B).

⁸⁶ *Id.* § 2144(a)(4)(B).

⁸⁷ *Id.* § 2144(a)(5).

⁸⁸ *Id.* § 2144(a)(4)(B).

by the Oversight Board.⁸⁹ However, these two powers are not explicitly provided to the Oversight Board since nothing in PROMESA gives it the authority to create legislation.⁹⁰

The suspension authority given to the Oversight Board creates another disruption to the local legislative power conferred to the Government of Puerto Rico under its constitution. This disruption can impact environmental and natural resource legislation disproportionately since some aspects of their management requires continuous investment and policy innovation. In like manner, the creation of laws that allow for additional regulations could be interpreted as interfering with the deregulatory spirit of the fiscal plans certified by the Oversight Board.

On environmental matters, the Puerto Rico Legislative Assembly recently enacted a new climate change law.⁹¹ This act aims to address climate change and its impact on the Island. It establishes, among other things, a system to create greenhouse emission limits to certain sectors and sets new targets for renewable energy production. In addition, the Government of Puerto Rico enacted legislation to amend the *Ban on the Deposit and Disposal of Coal Ash or Coal Combustion Residuals in Puerto Rico Act*,⁹² restricting the use and deposition of coal ash combustion residuals in the island.⁹³ The Oversight Board has not used its suspension authority in any of these statutes. Hopefully, this will set the environmental tone of the Oversight Board moving forward.⁹⁴

Note that the ability of the Oversight Board to take the measures is triggered by a certification that the newly enacted law is substantially inconsistent with a fiscal plan. However, this certification authority is vested on an *appropriate entity of the territorial government with expertise in budgets and financial management* and not on the Oversight Board.⁹⁵ Under Section 204(a), the Oversight Board does not have explicit authority to verify if the certification provided by the government is correct or used a reasonable analysis.⁹⁶ The Oversight Board only has explicit authority when a certification plan is not submitted or is submitted as *significantly inconsistent*.⁹⁷ In theory, if all newly enacted laws are sent during the term with: (i) an estimate of impacts on expenditures and revenues, and (ii) a certification that is not significantly inconsistent with the fiscal plan, then

89 *Id.* § 2144(a).

90 Even if it did, there are U.S. constitutional arguments that could make such delegation of legislative power to an agency a violation of the separation of powers.

91 Ley de mitigación, adaptación y resiliencia al cambio climático de Puerto Rico, Ley Núm. 33-2019, <http://www.bvirtual.ogp.pr.gov/ogp/Bvirtual/leyesreferencia/PDF/2019/0033-2019.pdf>.

92 *Ban on the Deposit and Disposal of Coal Ash or Coal Combustion Residuals in Puerto Rico Act*, Law No. 40-2017, 12 LPRR §§ 8191-95 (2014 & Supp. 2018).

93 Para enmendar el artículo 2, añadir un nuevo artículo 2-A y enmendar el artículo 3 de la Ley Núm. 40 de 2017, Ley para prohibir el depósito y la disposición de cenizas de carbón o residuos de combustión de carbón en Puerto Rico, Ley Núm. 5-2020.

94 Note that the new Climate Change Law was stripped of its tax incentive provisions by the Legislative Assembly before its approval. See bill P. de la S. 773. In addition, the language of act 33-2019 mandates the creation of a climate change plan that requires approval by the Legislative Assembly and the Governor. Under this process, the enactment of the plan is again vulnerable to the suspension power of the Oversight Board.

95 Puerto Rico Oversight, Management, and Economic Stability Act (P.R.O.M.E.S.A.), 48 U.S.C. §§ 2144(a)(2) (2012 & Supp. V 2017).

96 *Id.* § 2144(a).

97 *Id.*

the Oversight Board does not have authority over the newly enacted law under Section 204(a).⁹⁸ This new legislative piece should stand, even if the analysis behind the certification is flawed.⁹⁹

An important question remains: if the Oversight Board suspends a law, what happens with the newly enacted statute between its enactment date and suspension date? PROMESA does not specify. On one hand, the act could be enforceable until suspended. The disruption of the constitutional process to enact laws by the Government of Puerto Rico cannot be violated by a mere interpretation of PROMESA. If anything, this would require the explicit direction from Congress. If Congress wanted the local legislation to not enter into force, it would have provided the Oversight Board with such powers before the local legislation was enacted. Equally important, although PROMESA allows for a preliminary review of local legislation, this is a voluntary, and not mandatory. A suspension of a legislative piece before the Oversight Board has jurisdiction over the newly enacted act could be considered *ultra vires*. It could also violate the U.S. Constitution, as it would be amending the *Puerto Rico Federal Relations Act of 1950* outside of the constitutional framework to make and amend laws.¹⁰⁰ Even within the U.S. Territorial Clause, the separation of power at the federal level cannot be violated.¹⁰¹ On the other hand, Section 108 of PROMESA states that neither the Governor nor the Legislature may *enact, implement, or enforce any statute, resolution, policy or rule that would impair or defeat the purposes of . . . [PROMESA], as determined by the Oversight Board*.¹⁰² If the Oversight Board determines that the act in question would impair or defeat the purpose of PROMESA, neither the Governor nor the Legislature had the authority to enact it. Under this interpretation, the act could not be suspended, as it could be considered null.

The second scenario provides the Oversight Board with disproportionate and unprecedented veto power over local legislation. This is particularly true since Section 108 is not limited to the purpose of a fiscal plan, but rather PROMESA entirely.¹⁰³ Utilizing Section 108 would require establishing that a *significant inconsistency* in the fiscal plan equates to the *impairment and defeat* of PROMESA. This is not an automatic assumption, as the difference in the degree of impacts is apparent. We reason that Section 108 does not apply to the fiscal plan's compliance since Congress already established a mechanism for the suspension of legislation under Section 204(a).¹⁰⁴ Within PROMESA, fiscal plans are a

98 *Id.*

99 Note that certifying false or misleading information is penalized under Section 104(l) of PROMESA 48 U.S.C. § 2124(l) (2012 & Supp. V 2017).

100 To Provide for the Organization of a Constitutional Government by the People of Puerto Rico, Pub. L. No. 81-600, 64 Stat. 319 (1950).

101 U.S. CONST. art. IV, § 3.

102 48 U.S.C. § 2128(a) (2012 & Supp. V 2017).

103 *Id.* § 2128.

104 However, if Section 108, 48 U.S.C. § 2128 (2012 & Supp. V 2017), could be used to ensure fiscal plan compliance, we argue that it could be challenged by looking at: (1) the purpose that the plan wants to achieve; (2) the degree of impairment; (3) the public policy interest behind the local regulation; (4) analysis of alternatives to achieve the desire public policy interest; and (5) balance it with the legitimate constitutional authority of the government of Puerto Rico to enact its own laws. *Id.*

single tool in a crowded toolbox. A reasonable interpretation of Section 108 shows that it is reserved for local legislation that intends to create a systematic *impairment* or *defeat* of PROMESA, rather than a *significant inconsistency* of a single component as described by Section 204(a). We argue that not complying with a fiscal plan does not meet that criteria.

iii. Contracts, Rules, Regulations, and Executive Orders

Section 204(b) of PROMESA,¹⁰⁵ authorizes the Oversight Board to require prior approval of certain contracts to ensure that the proposed contracts promote market competition and are not inconsistent with the fiscal plan.¹⁰⁶ Although this seems to be an extra bureaucratic step that would increase the time it takes to create contracts, Congress [acted under the assumption] that this would turn the process more efficient. The requirement of PROMESA and the intent of Congress are unreconcilable. Requiring the approval of the Oversight Board for certain contracts hinders the administration of environmental agencies and therefore natural resource management. This could be particularly true for contracts needed to address environmental emergencies. Likewise, the provisions that apply to contracts also apply to: (1) rules, (2) regulations, (3) proposed or issued executive orders, (4) secretarial orders, and (5) an order of a director of any other agency of the territorial government.¹⁰⁷

If these documents failed to comply with the policies of the Oversight Board, as authorized under the same section, the Board may *take such actions as it considers necessary, to ensure that such contract, rule, executive order, or regulation will not adversely affect the territorial government's compliance with the Fiscal plan*. This includes, preventing their execution, or their enforcement.¹⁰⁸

This power mirrors those under the authority to suspend newly enacted laws under Section 204(a),¹⁰⁹ but it does not require a certification of substantial incompatibility of the government to trigger the authority of the Oversight Board.¹¹⁰ Beyond the obvious interference over the administration of government agencies, this authority provides an unprecedented power over these agencies by being able to suspend the validity of their regulations. Again, this could disproportionately affect environmental regulations since agencies could formulate regulations thinking of the Board's *veto* authority or the Oversight Board could suspend environmental regulations to promote economic development in certain sectors. The Oversight Board has already used this authority to declare the invalidity of a regulation under procedural bases when the Government of Puerto Rico

¹⁰⁵ *Id.* § 2144(b).

¹⁰⁶ This provision does not apply to already existing contracts, rules, regulations, and executive orders.

¹⁰⁷ 48 U.S.C. § 2144(b)(2) (2012 & Supp. V 2017).

¹⁰⁸ *Id.* § 2144(b)(5).

¹⁰⁹ *Id.* § 2144(a).

¹¹⁰ *Id.* § 2144(b).

did not submit a regulation for the Oversight Board's consideration after its enactment.¹¹¹ Once the Government complied with the notification requirements to the Oversight Board, the suspension was lifted.¹¹²

Conversely, since the establishment of PROMESA, some administrative agencies have approved and issued regulations without the interference of the Oversight Board. One of these instances was the Department of Natural Resources and the Environment issuance of Regulation 8809 for the Management and Conservation of Coral Reefs.¹¹³ To this date, the regulation has not been suspended from execution or enforcement. Another example is the Planning Board's review of its regulation for the Issuance of Permits for the Development, Use of Land, Economic Exploitation, and Business Management of Puerto Rico.¹¹⁴ Although these Planning Board regulations have a central role in the economic development of the island, no review of this regulation has been required by the Oversight Board.

iv. Reprogramming of Funds

Under PROMESA, the Governor is required to submit a request to the Oversight Board to reprogram funds under an approved budget.¹¹⁵ Prior to the reprogramming authorization, the Oversight Board must certify that this reprogramming is not inconsistent with the fiscal plan. Although not in the context of natural resources, the Oversight Board has already rejected reprogramming requests from the Government of Puerto Rico.¹¹⁶ Since most environmental agencies are under the Commonwealth's Fiscal Plan, this could impact their current and future operations.

E. Recommendations by the Oversight Board

The Oversight Board is authorized to submit recommendations to the Governor or the Legislature on actions that the territorial government may take to ensure compliance with the fiscal plans or promote financial stability, economic growth, management re-

¹¹¹ Miladys Soto, *Junta Declara Nulo un Reglamento de Procurador del Paciente por Falta de Información*, METRO (Feb. 5, 2019), <https://www.metro.pr/pr/noticias/2019/02/05/junta-declara-nulo-un-reglamento-de-procurador-del-paciente-por-falta-de-informacion.html>; Letter of Noncompliance of Act 47 with the Fiscal Plan, from Natalie Jaresko, Exec. Director, Financial Oversight and Management Board for Puerto Rico, to Hon. Ricardo Rosselló, Governor of Puerto Rico (Feb. 2, 2019), https://drive.google.com/file/d/1_NvNNI8qbmAoxM3EKCW-jPcK3iE5rdwR7/view.

¹¹² Miladys Soto, *Gobernador Anuncia que la Junta Aprobó el Reglamento del Procurador del Paciente*, METRO (Feb. 26, 2019), <https://www.metro.pr/pr/noticias/2019/02/26/gobernador-anuncia-que-la-junta-aprobo-el-reglamento-del-procurador-del-paciente.html>.

¹¹³ DRNA, *Reglamento de arrecifes de coral*, No. 8809 (Sept. 9, 2016), <http://www.drna.pr.gov/reglamentos/reglamento-8809-reglamento-de-arrecifes-de-coral/>.

¹¹⁴ Planning Board, *Reglamento Conjunto Para la Evaluación y Expedición de Permisos Relacionados al Desarrollo, Uso de Terrenos y Operación de Negocios*, No. 9081 (June 7, 2019), <https://jp.pr.gov/Reglamentos/Reglamento-Conjunto-2019>.

¹¹⁵ 48 U.S.C. § 2144(c) (2012 & Supp. V 2017).

¹¹⁶ Laura Isabel González, *Junta rechaza reasignación departidas presupuestarias*, EL VOCERO (Feb. 19, 2019), https://www.elvocero.com/gobierno/junta-rechaza-reasignaci-n-de-partidas-presupuestarias/article_8aefc980-3462-1e9-8a71-8b3f8aeb6190.html.

sponsibility, and service delivery efficiency.¹¹⁷ These recommendations are not binding, as the government has the option to adopt or reject them. Although PROMESA provides some areas that the Oversight Board could provide recommendations, the list is not exhaustive. Some of the explicit provisions include: (1) recommendations for structural changes in administrative agencies, (2) modifications or transfer of services, (3) management of financial affairs, among others.¹¹⁸ All of the aforementioned recommendations affect the operations of environmental agencies and their ability to render services. They also explicitly allow the Oversight Board to recommend the establishment of different alternatives to fulfill its financial obligations, such as the privatization and commercialization of governmental entities.

The broad powers given to the Oversight Board for recommendations lead to the question of what impedes the Oversight Board from recommending the sale of significant natural and cultural heritages? Under PROMESA, the Oversight Board has no impediment. Although these recommendations are not binding, their compliance could be used as a negotiation tool by the Oversight Board. Recently, under the recommendation of the Oversight Board,¹¹⁹ the government has begun a process to privatize the Puerto Rico Public Broadcasting Corporation (WIPR).¹²⁰ The Oversight Board has also refused to provide additional funding to WIPR, amid WIPR's principal role on COVID-19 pandemic outreach and education, if the government of Puerto Rico does not enact a law to privatize said public corporation.¹²¹

F. *Intervention in Litigation*

The Oversight Board is authorized to intervene in any litigation filed against the territorial government and seek injunctive relief, including a stay in the litigation.¹²² As could be expected, this does not exclude natural resource litigation. As the ability of administrative agencies to fulfill their mandate is eroded by budgetary constraints, the number of environmental-related litigation is expected to increase. This is particularly true for agency compliance with environmental laws and regulations.

117 48 U.S.C. § 2145(a) (2012 & Supp. V 2017).

118 *Id.*

119 Letter of recommendation to sell the Public Broadcasting Corporation of Puerto Rico, from José Carrión, Member, Financial Oversight and Management Board for Puerto Rico, to: Hon. Ricardo Rosselló, Governor of Puerto Rico; Hon. Thomas Rivera, President of the Senate of Puerto Rico; Hon. Carlos Méndez, Speaker of the House of Representatives of Puerto Rico (Jan. 11, 2019), https://drive.google.com/file/d/ia_9oF4knVM-mZ3iGOBvTbZGjmAL9yHnfz/view.

120 Génesis Ibarra Vázquez, *Encaminan privatización de WIPR*, EL VOCERO (Apr. 12, 2019), https://www.el-vocero.com/gobierno/encaminan-privatizaci-n-de-wipr/article_65d2b9ea-5cd1-11e9-983c-3779b803oofc.html. This action may affect the public environmental and cultural education, as some WIPR programs such as *Animaleando*, *Cultura 2.1*, *Isla y Vuelta*, *Manos a la Tierra*, and *Cuentos de mi Geografía*, could be impacted under new ownership.

121 Letter for reprogramming of funds and legislation for Public Broadcasting Corporation of Puerto Rico, from the Fiscal Oversight and Management Board for Puerto Rico, to: Iris Santos, Executive Director OMB; Ralph Pagan, President of WIPR Board of Directors; and Eric Delgado, President of WIPR (Apr. 27, 2020), <https://drive.google.com/file/d/1oN59eh4JAmU3RFTk6UJrcax9Rzfhpj7H/view>.

122 48 U.S.C § 2152 (2012 & Supp. V 2017).

As an example, the Puerto Rico Court of Appeals issued, *sua sponte*, an automatic stay on litigation under PROMESA on a writ of mandamus granted by the Puerto Rico Court of First Instance.¹²³ This writ orders the Puerto Rico Planning Board, the Department of Natural Resources and the Environment, and the Land Authority to perform a ministerial duty imposed under Puerto Rico Law 314-1998 to wit the constitution of a natural reserve that protects all 7,000 acres that form Caño Tiburones.¹²⁴ The Court of Appeals undertook this course of action in spite of the fact that there is no claim of money damages in the litigation and the principal controversy centered on whether or not the defendants had a ministerial duty to comply with a statute requiring the creation of a natural reserve protecting Caño Tiburones. Because a natural reserve already protects part of Caño Tiburones, all that remains is for defendants to correct said natural reserve's boundaries which are within the administrative capabilities of the agencies and would not require significant expenditure.¹²⁵ A stay in these, and other related litigation, may cause irreparable environmental harm. This will not only affect human and environmental health but also raises issues of environmental justice.

Additionally, environmental laws require oversight from governmental and non-governmental actors as the impact is spread across all socioeconomic classes. Studies have shown that stable and healthy societies require a secure justice system as they relate to environmental issues including, access to justice, fair and efficient adjudication, and effective remedies.¹²⁶ Between forty to sixty percent of civil wars over the past sixty years have been associated with natural resources.¹²⁷ Although we do not anticipate a civil war to occur in Puerto Rico, it does speak to the nature and importance of ventilating environmental issues in the judicial system, and the harm a stay on environmental litigation could cause. Continued intervention and stays on environmental cases could also lead to negligent and illegal actions or inactions by the government as they can shield behind the Oversight Board's determination to give a stay to litigation.

Although this analysis applies mostly to territorial laws and regulations, PROMESA is explicitly considers that the act may not be construed to permit the discharge of obligations arising under federal policies or regulatory laws. This includes laws relating to the environment or territorial laws implementing such federal legal provisions.¹²⁸ Among the issues affected by these provisions are: (i) compliance obligations, requirements under

¹²³ Cruz Nazario v. Guerrero Pérez, KLAN 2018-01001, 2019 PR App. WL 3225844 (TA PR Feb. 28, 2019).

¹²⁴ Ley de la reserva natural del Caño o Ciénaga Tiburones y para declarar la política pública sobre los humedales en Puerto Rico, Ley Núm. 314-1998, 12 LPRR § 5002 (2014).

¹²⁵ Note that Plaintiffs could request a relief from stay based on the (1) connection between the stayed action and the bankruptcy case; (2) whether litigation in another forum would prejudice the interests of other creditors; (3) whether relief would result in a partial or complete resolution of the issues; (4) the interests of judicial economy and the expeditious and economical resolution of the litigation; and (5) the impact of the stay on the parties and the balance of harms. See *In re Sonnax Industries, Inc.*, 907 F.2d 1280, 1286 (2d. Cir. 1990); *Goya Foods v. Ulpiano Unanue-Casal*, 159 B.R. 90, 95-96 (D.P.R. 1993).

¹²⁶ U.N. ENVIRONMENT PROGRAMME, ENVIRONMENTAL RULE OF LAW: FIRST GLOBAL REPORT (2019).

¹²⁷ U.N. ENVIRONMENT PROGRAMME, FROM CONFLICT TO PEACEBUILDING: THE ROLE OF NATURAL RESOURCES AND THE ENVIRONMENT (2009).

¹²⁸ Puerto Rico, Oversight, Management, and Economic Stability Act (P.R.O.M.E.S.A.), 48 U.S.C. § 2164(h) (2012 & Supp. V 2017).

consent decrees or judicial orders, and (ii) obligations to pay associated administrative, civil, or other penalties.¹²⁹

III. EXPLICIT ENVIRONMENTAL CONSIDERATIONS UNDER PROMESA

Beyond the potential indirect implications over the environment, PROMESA contains explicit environmental considerations. These includes compliance with federal laws,¹³⁰ public safety,¹³¹ and infrastructure.¹³² We discuss the first two in this section. Infrastructure is discussed in the next section.

In multiple instances, PROMESA is explicit in that it does not authorize the violation of federal environmental laws, regulations, and requirements as well as territorial laws, requirements, and programs implementing federally authorized or delegated programs protecting the environment of a person.¹³³ PROMESA does mention that there could be exceptions provided under the act, but we could not find any explicit exceptions for environmental compliance.

In general, PROMESA requires compliance with federal laws, environmental or not.¹³⁴ This means that while implementing PROMESA, environmental considerations under federal laws and regulations must be addressed and cannot be forgone to achieve economic and fiscal benefits. This is a significant protection of environmental interests since there are a plethora of federal statutes that apply locally. Some statutes include environment analysis and compliance for certain federal actions including:

1. Funding (e.g. National Environmental Policy Act)¹³⁵
2. Water and air quality (e.g. Federal Water Pollution Control Act,¹³⁶ and the Clean Air Act)¹³⁷
3. Biodiversity conservation and invasive species management (e.g. Endangered Species Act,¹³⁸ Marine Mammal Protection Act,¹³⁹ Lacey

¹²⁹ *Id.*

¹³⁰ Section 7 states: *Except as otherwise provided in this Act, nothing in this Act shall be construed as impairing or in any manner relieving a territorial government, or any territorial instrumentality thereof, from compliance with Federal laws or requirements or territorial laws and requirements implementing a federally authorized or federally delegated program protecting the health, safety, and environment of persons in such territory.* *Id.* § 2106. Note that PROMESA does not define the term “persons”.

¹³¹ Section 304(h) states: *This Act may not be construed to permit the discharge of obligations arising under Federal police or regulatory laws, including laws relating to the environment, public health or safety, or territorial laws implementing such Federal legal provisions. This includes compliance obligations, requirements under consent decrees or judicial orders, and obligations to pay associated administrative, civil, or other penalties.* *Id.* § 2164(h).

¹³² *Id.* §§ 2211-17 (Subchapter V-Puerto Rico Infrastructure and Revitalization).

¹³³ *Id.* §§ 2106, 2144.

¹³⁴ *Id.*

¹³⁵ National Environmental Policy Act, 42 U.S.C. §§ 9601-57 (2018).

¹³⁶ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1388 (2018).

¹³⁷ Clean Air Act, 22 U.S.C. § 1928 (2018).

¹³⁸ Endangered Species Act, 16 U.S.C. §§ 1531-44 (2018).

¹³⁹ Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1423 (2018).

- Act,¹⁴⁰ Pittman-Robertson Federal Aid in Wildlife Restoration Act,¹⁴¹ Plant Protection Act)¹⁴²
4. Livestock health (e.g. Animal Health Protection Act)¹⁴³
 5. Mosquito control (e.g. Public Health Security and Bioterrorism Preparedness and Response Act)¹⁴⁴
 6. Registration, distribution, sale and use of pesticides (e.g. Federal Insecticide Fungicide and Rodenticide Act)¹⁴⁵
 7. Hazardous and non-hazardous solid waste management (e.g. Resource Conservation and Recovery Act)¹⁴⁶
 8. Hazardous waste release and cleanup (e.g. Comprehensive Environmental Response Compensation and Liability Act)¹⁴⁷
 9. Preservation of historic places (e.g. National Historic Preservation Act)¹⁴⁸
 10. Conservation of fisheries and other marine resources (e.g. Magnuson-Stevens Fishery Conservation and Management Act,¹⁴⁹ Coastal Zone Management Act,¹⁵⁰ and Coral Reef Conservation Act)¹⁵¹
 11. Organic/enabling acts of federal agencies,¹⁵² that allow implementation and enforcement of applicable laws, regulations, policies, and programs

This coverage is significantly broader than the compliance requirements on the PRE-PA (air quality) and PRASA's (water quality) fiscal plans.

Although available federal laws are numerous, there are statutory and jurisdictional constraints that limit their applicability.¹⁵³ Contrary to the general authority of states and territories, the federal government is one of enumerated powers. As such, federal author-

¹⁴⁰ Lacey Act, 16 U.S.C. §§ 3371-78 (2018).

¹⁴¹ Pittman-Robertson Federal Aid in Wildlife Restoration Act, 16 U.S.C. § 669 (2018).

¹⁴² Plant Protection Act, 7 U.S.C. §§ 7701-86 (2018).

¹⁴³ Animal Health Protection Act, 7 U.S.C. §§ 8301-22 (2018).

¹⁴⁴ Public Health Security and Bioterrorism Preparedness and Response Act, 42 U.S.C. §§ 201-532 (2018).

¹⁴⁵ Federal Insecticide Fungicide and Rodenticide Act, 7 U.S.C. §§ 121-136 (2018).

¹⁴⁶ Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-92 (2018).

¹⁴⁷ Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (2018).

¹⁴⁸ National Historic Preservation Act, 54 U.S.C. §§ 100101-323301 (2018).

¹⁴⁹ Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-91 (2018).

¹⁵⁰ Coastal Zone Management Act, 16 U.S.C. §§ 1451-66 (2018).

¹⁵¹ Coral Reef Conservation Act, 16 U.S.C. §§ 6401-09 (2018).

¹⁵² *E.g.*, water quality monitoring by the U.S. Geological Service, enforcement authority under the U.S. Coast Guard, refuge and wildlife conservation under the U.S. Fish and Wildlife Service (USFWS), marine debris prevention and management under the National Oceanic and Atmospheric Administration, and soil conservation under the Natural Resources Conservation Service.

¹⁵³ *E.g.*, the Magnuson-Stevens Fishery Conservation and Management Act would consider regulation of marine fish but not freshwater fish on in-land territorial waters, such as lakes.

ity is stronger on federal lands and waters,¹⁵⁴ as well as when an activity has been federal preempted.¹⁵⁵ On the other hand, as you retreat from federal lands, waters, and preempted activities, federal authority is reduced while states and territorial authority increases. The jurisdictional distinction is not always obvious as many natural resources are in a midpoint between territorial and federal jurisdiction. From a scientific and ecological perspective, these legal jurisdictions are irrelevant as ecosystems, species, natural resources, and pollutants move freely without regard to federalism. Thus, addressing environmental issues requires a holistic approach, since activities under federal jurisdiction are affected by activities on territorial jurisdiction (and vice versa).

Uncoordinated initiatives between these authorities can lead to duplicative, ineffective, and sometimes conflicting policies and programs. As a solution, the federal and state/territorial governments cooperate to manage natural resources. Under the concept of *Cooperative Federalism*, both levels of government play a role in managing such resources.¹⁵⁶ Under this system, the federal government shares responsibility with states/territories and allows them, within limits established by federal minimum standards, to enact programs structured to meet their own particular needs.¹⁵⁷ Since Roosevelt's *New Deal*, *Cooperative Federalism* is manifested through congressional and administrative effort to induce states and territories to participate in a coordinated federal program.¹⁵⁸ *Cooperative Federalism* is amply used in the environmental field and is characterized by additional approaches such as: (1) placed-based collaborations;(2) state favoritism in federal processes, and (3) federal deference to state process.¹⁵⁹

Cooperative Federalism is recognized by PROMESA as it requires compliance with territorial laws or requirements implementing federally authorized or federally delegated programs protecting the environment of persons.¹⁶⁰ Expressly, PROMESA requires that development, implementation, and compliance mechanisms for the fiscal plans as well as other actions under PROMESA taken by the Oversight Board, cannot impede territorial actions taken:

1. To implement federally authorized or federally delegated programs
2. To comply with court-issued decree or injunction, or administrative

¹⁵⁴ 16 U.S.C. § 670 (*E.g.*, El Morro National Monument under the U.S. National Park System, the wildlife refuges in Lajas, Vieques, and Culebra under the USFWS National Wildlife Refuge System, El Yunque National Forest under the U.S. Department of Agriculture National Forest System, and conservation programs on military installations).

¹⁵⁵ *E.g.*, navigable water under the U.S. Army Corps of Engineers, vessel ballast water regulations, animal and plan inspection at border entry points.

¹⁵⁶ Robert L. Fischman, *Cooperative Federalism and Natural Resources*, N.Y.U. ENVIRONMENTAL LAW JOURNAL 179-231 (2005).

¹⁵⁷ *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981); see also definition by Stephen Michael Sheppard in THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (2012).

¹⁵⁸ Fischman, *supra* note 156.

¹⁵⁹ *Id.* at 182.

¹⁶⁰ Puerto Rico Oversight, Management, and Economic Stability Act (P.R.O.M.E.S.A.), 48 U.S.C. § 2106 (2012 & Supp. V 2017).

order or settlement with a federal agency, with respects to a federal program

3. To implement territorial laws, which are consistent with a certified fiscal plan, that executes federal requirements and standards
4. Preserve and maintain federally funded mass transportation assets.¹⁶¹

In this regard, territorial environmental laws or requirements implementing federally authorized or federally delegated programs must be shielded from fiscal austerity measure, budget reduction, program right-sizing, legislation suspension, regulation nullification, litigation automatics stays, lack of enforcement of litigation remedies, and other actions under PROMESA.

Congressional protection is given by PROMESA to those *federally authorized or federally delegated* but the act does not define or sets parameters to consider what has been federally authorized or delegated. In our appreciation they must include:

1. Federal statutes and/or regulations explicitly delegating federal authority to states and territories;¹⁶²
2. Federal statutes and/or regulations authorizing funding or in-kind contributions to state and territorial programs;
3. Federal statutes and/or regulations explicitly authorizing federal agencies to establish programs or aiding states and territories;¹⁶³
4. Federal statutes authorizing states and territories to create laws, regulations, and programs to voluntarily adhere to a federal program or policy;¹⁶⁴
5. Federal statutes and/or regulations allowing states and territories to create standards or programs on a federally preempted field;¹⁶⁵
6. Federal statutes and/or regulations authorizing federal assistance to charitable, non-profit corporations, and other similar entities that have programs with or aid states and territories;¹⁶⁶
7. Federal statutes and/or regulations explicitly creating programs in cooperation with states and territories;¹⁶⁷
8. Federal statutes and/or regulations requiring any sort of state or territorial funding or in-kind contribution for its implementation;
9. Interstate compacts authorized by Congress;

¹⁶¹ *Id.* § 2144(d).

¹⁶² 43 U.S.C. § 1331 (2018).

¹⁶³ 16 U.S.C. § 1201 (2018) (*E.g.*, control and elimination of sea nettle jellyfish, seaweed, and other such pests in coastal waters).

¹⁶⁴ 16 U.S.C. § 1451 (2018).

¹⁶⁵ 7 U.S.C. § 7756 (2018).

¹⁶⁶ 16 U.S.C. § 3701 (2018).

¹⁶⁷ 33 U.S.C. § 1123 (2018); 7 U.S.C. § 301 (2018); 51 U.S.C. § 40301 (2018).

10. International or regional commitments officially recognized under federal executive and/or legislative authority;¹⁶⁸
11. International customary obligations observed by the United States;¹⁶⁹
12. Executive Orders and other Presidential actions that provide authorization, suspends, trigger assistance, delegates authority, or extends federal laws and programs to states and territories;
13. Federal agencies' actions to establish any type of partnership or program with states and territories. This includes but is not limited to, memorandum of understandings, agreements, contracts, co-management, and mechanisms to exchange employees;
14. Territorial laws, regulations, and/or policies to implement all the aforementioned;
15. Territorial laws, regulations, and/or policies that promote public policies recognized by Congress, the President, and federal agencies;
16. Territorial laws, regulations, policies and/or actions authorizing federal agencies to enter or perform actions under territorial jurisdiction;
17. Territorial laws, regulations, policies, and/or actions that are designed to comply with a federal court mandate under federal laws and regulation.
18. Territorial laws, regulation, policies and/or actions that are designed to comply with a court mandate under federal laws and/or regulation;
19. State and territorial mechanisms that allow staff to participate in intergovernmental working entities, Federal Advisory Committees, or any other similar federal entity.

Many territorial laws and regulations explicitly mention their connection to federal laws and regulations,¹⁷⁰ including the *Ley de Política Pública Ambiental*.¹⁷¹ Likewise, many others provide an explicit connection to federal environmental laws and regulations. Nonetheless, explicit recognition is not a requirement as territorial laws and regulations can be adhering, complementing, or following federal laws, and policies without written recognition. We understand that these must be shielded as well.

Although this list is extensive, the certified fiscal plans and budgets do not reflect these requirements under PROMESA. It is unclear if these determinations belong to the Puerto Rican agencies while implementing the financial plans and utilizing the certified

¹⁶⁸ *E.g.*, United Nations Framework Convention on Climate Change (UNFCCC).

¹⁶⁹ *E.g.*, United States Convention of the Law of the Sea.

¹⁷⁰ Ley para la protección de cuencas hidrográficas y previsión de inundaciones, Ley Núm. 47 de 6 de junio de 1963, 12 LPRA § 251 (2014); Ley para proteger la pureza de las aguas potables de Puerto Rico, Ley Núm. 5 de 21 de julio de 1977, 12 LPRA § 406 (2014); Ley para el fomento de la reducción de los desperdicios peligrosos en Puerto Rico, Ley Núm. 10-1995, 12 LPRA § 1321(a) (2104); Ley sobre política pública ambiental, 12 LPRA § 8004a (2014) (*E.g.*, watershed protection, safe drinking water, hazardous waste management, environmental emergencies).

¹⁷¹ 12 LPRA § 8001.

budget. What is clear is that if these considerations are not taken and the relevant laws, programs, and initiatives are not shielded, it would violate the congressional mandate under PROMESA.

Moving forward, the Puerto Rican government should include explicit recognition of federal environmental laws, regulations, and programs whenever acting as authorized or in accordance with them. In addition, citizens should be vigilant to ensure that territorial environmental ordinances that are associated directly or indirectly with federal laws are not affected by the actions of the Government of Puerto Rico, the courts, and the Oversight Board while implementing PROMESA.

An additional and important consideration is the fact that the term *federal laws* under these sections includes the procedures and safeguards provided under the federal Administrative Procedure Act (APA).¹⁷² APA is an essential tool for navigating environmental laws, regulations, and other related agency actions.

The fact that PROMESA protects these federal and relevant territorial laws does provide a significant level of environmental protection. Nonetheless, not all territorial laws, regulations, policies, and programs are connected to a federal initiative. The lack of federal nexus makes them vulnerable.

IV. TITLE V – PUERTO RICO INFRASTRUCTURE REVITALIZATION

Under Title V,¹⁷³ PROMESA provides for an expedited process to approve *Critical Projects*. The *Revitalization Coordinator* (Coordinator) is created under the Oversight Board.¹⁷⁴ The Coordinator should have substantial knowledge and expertise in infrastructure planning, predevelopment, financing, development, operations, engineering, and others.¹⁷⁵ However, no consideration is given to knowledge and expertise in environmental law. This official has the authority to evaluate *Critical Projects* and provide a recommendation to the Governor and the Oversight Board on whether they should or should not allow an expedited approval. Under PROMESA, *Critical Project* means a:

[P]roject identified under the provisions of [Title V of PROMESA] and intimately related to addressing an emergency whose approval, consideration, permitting, and implementation shall be expedited and streamlined according to the statutory process provided by [Puerto Rico Act 76-2000], or otherwise adopted pursuant to [Title V of PROMESA].¹⁷⁶

Note that these projects should respond to an emergency as defined by PROMESA. In this context emergency means any:

¹⁷² 5 U.S.C. § 551 (2018).

¹⁷³ Puerto Rico Oversight, Management, and Economic Stability Act (P.R.O.M.E.S.A.), 48 U.S.C. §§ 2211-16 (2012 & Supp. V 2017).

¹⁷⁴ For additional analysis of Title V see Hiram López Rodríguez, *El Título V de P.R.O.M.E.S.A. y su impacto en la agenda de reconstrucción de Puerto Rico*, 87 REV. JUR. UPR 885 (2018).

¹⁷⁵ 48 U.S.C. § 2212 (2012 & Supp. V 2017).

¹⁷⁶ *Id.* § 2211(2).

[E]vent or grave problem of deterioration in the physical infrastructure for the rendering of essential services to the people, or that endangers the life, public health, or safety of the population or of a *sensitive ecosystem*, or as otherwise defined by section 1 of Act 76 (3 L.P.R.A. 1931). This shall include problems in the physical infrastructure for energy, water, sewer, solid waste, highways or roads, ports, telecommunications, and other similar infrastructure.¹⁷⁷

We should emphasize that PROMESA includes worsening in the physical infrastructure that endangers the safety of a *sensitive ecosystem* as a potential emergency that would require an expedited permit. Submission of this type of project, or any other project, for the consideration of the Coordinator, requires submittal of information including the environmental and economic benefits provided by the project.¹⁷⁸ It also may require an analysis of the project benefits towards reducing energy consumption and reliance on oil for electric generation, among other requirements.¹⁷⁹ These are not necessarily useful.¹⁸⁰

In discussion with the Governor of Puerto Rico and relevant agencies, the Coordinator shall create a Critical Project Report that among other things analyzes how well the submitted project fits the *emergency* and *Critical Projects* definition, states whether the Governor approves or disapproves the project and whether the Coordinator considers that the project should be deemed a *Critical Project*.¹⁸¹ Fortunately, *if the [Puerto Rico] Planning Board determines the project is inconsistent with relevant Land-Use Plans, then the project will be deemed ineligible for Critical Project designation*.¹⁸² This provides consistency with the public policy of the government of Puerto Rico stated under its Land-Use Plans. However, it is unclear how a requalification or rezoning consideration under the Land-Use Plan by the project petitioners would affect the determination of eligibility.

As required by PROMESA, the Critical Project Reports must be made public following their completion and allow a period of 30 days for the submission of comments specifically on matters relating to the designation of the project.¹⁸³ The Coordinator is required to respond to those comments within 30 days.¹⁸⁴ No indication is given by PROMESA regarding whether such comments can be used to amend the *Critical Project* designation

¹⁷⁷ *Id.* § 2211(5) (emphasized).

¹⁷⁸ *Id.* § 2213(d).

¹⁷⁹ *Id.* § 2213(F)(i).

¹⁸⁰ At first sight, these provisions seem valuable, but a close examination reveals that although they require an analysis of the environmental *benefits*, they do not consider the *negative* environmental impacts. At the same time, they favor the diversification and conversion of fuel sources for an electric generation “from oil to natural gas and renewables.” The idea of reduction of converting energy generation from oil to renewables provides significant environmental benefits. These benefits, however, are not shared with the conversion to natural gas since they are both unsustainable fossil fuels that contribute to air pollution, health degradation, and abundant greenhouse gas emissions. From an environmental impact perspective, PROMESA incorrectly groups natural gas and renewables.

¹⁸¹ 48 U.S.C. § 2213 (2012 & Supp. V 2017).

¹⁸² *Id.* § 2213(c).

¹⁸³ *Id.* § 2213(b)(2).

¹⁸⁴ *Id.*

since the act only states that after the Coordinator has responded to the comments they must submit the Critical Project Report to the Oversight Board within 5 days.¹⁸⁵ Note that the comments provided by the public are not an official part of the report.

The Oversight Board has the final authority to approve projects as a *Critical Project* by a majority vote. If approved, it will be granted an *Expedited Permitting Process*. Under PROMESA, this means *Puerto Rico Agency's alternate procedures, conditions, and terms mirroring those established under [Puerto Rico Law 76-2000] (3 L.P.R.A. 1932) and pursuant to this title shall not apply to any Federal law, statute, or requirement.*¹⁸⁶

Puerto Rico agencies non-compliant with the *Expedited Permitting Process* can be compelled by the Oversight Board using *such enforcement actions as necessary* as provided by Section 104(1),¹⁸⁷ of PROMESA.¹⁸⁸ Likewise, it requires submission of newly enacted local laws, as provided under Section 204(a),¹⁸⁹ to determine if the law would *adversely impact* the *Expedited Permitting Process*. A finding that the law would *adversely impact* the *Expedited Permitting Process* would trigger the dispositions of Section 204(a) related to statutes that are found *significantly inconsistent* with the fiscal plan. Note that PROMESA is restrictive to statutes under Section 204(a) and does not include rules and regulations under Section 204(b).¹⁹⁰ Under this reading, the Oversight Board does not have the authority to review newly enacted rules and regulations that might affect the *Expedited Permitting Process* nor can it find that a new regulation is inconsistent with the *Expedited Permitting Process* under Section 204(b) since this section looks at the impacts on the fiscal plan and not the impacts on the *Expedited Permitting Process*. Although Section 504(e) of PROMESA,¹⁹¹ prohibits the addition of certain terms to the *Critical Project* not contemplated under the applicable law (e.g. certificate, right of way, permit, lease), it does not refer to rules, regulations, or the *Expedited Permitting Process*. This reading would allow agencies to amend the *Expedited Permitting Process* using rules and regulations.

Critical Project's environmental evaluation required under Puerto Rico law is performed after the project has been deemed as a *Critical Project*. The evaluation is performed by the *Interagency Environmental Committee* (Committee) established under PROMESA.¹⁹² The Committee consists of the Coordinator, a representative of the Governor, the Environmental Quality Board, the Planning Board, DRNE, and any other relevant agency determined by the Coordinator.¹⁹³ Under this process, neither the Coordinator, the Governor, nor the Oversight Board would have beforehand environmental considerations of applicable Puerto Rico law to determine if they approved or disapproved of the designation as a *Critical Project*. This contradicts Puerto Rico's environmental planning public policy established by the *Ley de Política Pública Ambiental*, among many others.

185 *Id.* § 2213(b)(3).

186 *Id.* § 2211(7).

187 *Id.* § 2124(l).

188 *Id.* § 2214 (c)(2).

189 *Id.* § 2144(a)(1).

190 *Id.* § 2144(a).

191 *Id.* § 2214(e).

192 *Id.* § 2214(a)(1).

193 *Id.* § 2214(a)(2).

The *Expedited Permitting Process* does not apply to federal laws, statutes, or requirements in the same manner.¹⁹⁴ Nonetheless, PROMESA states that all federal agency reviews and actions related to a *Critical Project shall be expedited in a manner consistent with completion of the necessary reviews and approvals by the deadlines under the Expedited Permitting Process, but in no way shall the deadlines established through it be binding on any Federal agency.*¹⁹⁵ It would seem that Congress considered federal environmental laws applicable to Puerto Rico more relevant and protective of the environment than local legislation tailored on many instances to the island's environmental reality. However, PROMESA does require expediency to the judicial system by requiring federal courts to provide expedited judicial review of claims under Title V.¹⁹⁶

Overall, designated Critical Projects will have less stringent environmental evaluation both as a design under PROMESA and as a result of Title V using Puerto Rico Law No. 76-2000.¹⁹⁷ The Puerto Rico act mandates that for the duration of a declared emergency,¹⁹⁸ local agencies exempt certain actions from complying with the terms and procedures under the different planning and administrative statutes and their regulations.¹⁹⁹ These include the *Puerto Rico Planning Boards Organic Act*,²⁰⁰ *Regulations and Permits Administration Organic Act*,²⁰¹ *Commonwealth of Puerto Rico Autonomous Municipalities Act of 1991*,²⁰² and the *Commonwealth of Puerto Rico Uniform Administrative Procedures Act*.²⁰³ It also imposes on local agencies unreasonable terms to present endorsements, oppositions, and evaluate environmental documents.²⁰⁴ The terms do not allow agencies to properly consider environmental impacts and benefits while at the same time severely restricting public participation. Currently only two projects have been designated as *Critical Projects*: a lateral

194 *Id.* U.S.C. § 2211 (7).

195 *Id.* § 2215 (c).

196 *Id.* § 2215(c).

197 Ley de procedimientos para situaciones o eventos de emergencia, Ley Núm. 76-2000, 3 LPRA §§ 1931-45 (2011 & Supl. 2018).

198 *Id.* § 1931. The definition of emergency is:

(a) Emergency. Is any serious abnormality such as a hurricane, tidal wave, earthquake, volcanic eruption, drought, fire, explosion, or any other kind of catastrophe, or any serious disruption of the public law and order, or an attack by enemy forces through sabotage or through the use of bombs, artillery or explosives of any nature, or by atomic, radiological, chemical, or bacteriological means, or by any other means that the enemy may use in any part of the territory of the Commonwealth of Puerto Rico, that merits the mobilization and extraordinary use of human and economic resources to remedy, avoid, prevent or diminish the severity or magnitude of the damages caused or that could be caused. Likewise, the term 'emergency' covers any event or grave problems of deterioration in the physical infrastructure for the rendering of essential services to the people, or that endangers the life, public health, or safety of the population or of a sensitive ecosystem.

Id.

199 *Id.* § 1932.

200 Ley orgánica de la Junta de Planificación de Puerto Rico, Ley Núm. 75 de 24 de junio de 1975, 23 LPRA §§ 62-66 (2011 & Supl. 2018).

201 Ley para la reforma del proceso de permisos de Puerto Rico, Ley Núm. 161-2009, 23 LPRA §§ 9011-28 (2011).

202 Ley de municipios autónomos de Puerto Rico, Ley Núm. 81-1991, 21 LPRA §§ 4001-08 (2011 & Supl. 2018).

203 Ley de procedimiento administrativo uniforme del Gobierno de Puerto Rico, 3 LPRA §§ 9601-9713 (2011 & Supl. 2018).

204 3 LPRA §§ 1934-35 (2011 & Supl. 2018).

expansion of the Fajardo Municipal Landfill,²⁰⁵ and a public housing project.²⁰⁶ The Fajardo Municipal landfill extension might oppose Puerto Rico's public policy of waste management as it fosters landfill use instead of reduction, reuse, and recycling of waste management.²⁰⁷ It could also contravene EPA's position on landfill use and management in Puerto Rico.

All of this makes us conclude that Title V can be a recipe for ill informed decision making that would inevitably affect the island's natural resources and the health of its communities.

V. FINAL REMARKS

PROMESA's authority to create and enforce fiscal plans and budgets severely affects the ability of the Government of Puerto Rico to achieve its constitutional environmental mandate. PROMESA disturbs all branches of local government. Administrative agencies are affected the most. Considering that most natural resource management is performed by administrative agencies, we can expect environmental services, actions, policies, and programs to decrease in quantity and quality. In addition, PROMESA and the fiscal plans are economically focused with apathy for regulation and an appetite for expedited processes. The inherence of the Government of Puerto Rico to control its regulatory system is drastically impacted through multiple statutory and fiscal plan measures. Since environmental and natural resource management relies heavily on regulations, this disproportionately impacts this sector.

But, PROMESA is not limitless. There are some territorial and federal constraints to its power including Puerto Rico's constitutional environmental mandate, cooperative federalism, and other federal environmental laws and regulations. Although the Oversight Board is not limited by the environmental mandate of our constitution, Puerto Rico's governmental branches are still bound to it. PROMESA has not freed them from the constraints of the constitution. In this regard, the Oversight Board's request for regulations, deregulation, and enactment of new statutes can only go so far because the constitution still operates on the branches of government with authority to carry out such actions. PROMESA does not give authority to the Oversight Board to create regulations or legis-

²⁰⁵ FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, CRITICAL PROJECT REPORT: FAJARDO MUNICIPAL LANDFILL, LATERAL EXPANSION (Aug. 28, 2018), <https://cpp.juntasupervision.pr.gov/wp-content/uploads/2018/08/CPR-Fajardo-Municipal-Landfill-Lateral-Expansion.pdf>.

²⁰⁶ FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, CRITICAL PROJECT REPORT: VIEWPOINT AT ROOSEVELT (July 18, 2018), <https://cpp.juntasupervision.pr.gov/wp-content/uploads/2018/07/FOMB-Determination-letter-Viewpoint.pdf>. (There are multiple controversies surrounding the designation and actual construction of this project, see Press Release Cámara de Representantes, *En la Mira Cameral Desarrollador de Proyecto Viewpoint* (Sept. 11, 2018), <http://www.tucamarapr.org/dnncamara/web/ActividadLegislativa/Noticias/TabId/361/ArtMID/1432/ArticleID/1366/En-la-mira-cameral-desarrollador-de-proyecto-Viewpoint.aspx>; CYBERNEWS, *Justice Department to evaluate Viewpoint Housing Project Referral Next Week*, CARIBBEAN BUSINESS (Aug. 21, 2019), <https://caribbeanbusiness.com/justice-dept-to-evaluate-viewpoint-housing-project-referral-next-week/>).

²⁰⁷ Ley para la reducción y el reciclaje de desperdicios sólidos en Puerto Rico, Ley Núm. 70-1992, 12 LPRÁ §§ 1320-1320u (2014); Ley de mitigación, adaptación y resiliencia al cambio climático de Puerto Rico, Ley Núm. 33-2019, <http://www.bvirtual.ogp.pr.gov/ogp/Bvirtual/leyesreferencia/PDF/2019/0033-2019.pdf>.

late. In this regard, environmental, and natural resource conservation is more protected than other initiatives that do not have constitutional protection.

The most important constraint, however, is the inability of the Oversight Board, the fiscal plans, and the budgets to affect federal laws and territorial laws, programs, regulations and policies that are one way or another associated with the federal programs. This is significantly important considering that natural resources are often managed cooperatively by federal and territorial actors. There are numerous ways the territorial government can establish this cooperative federalism. Bearing in mind that environmental cooperative federalism usually favors territorial standards and gives deference to territorial law, this mechanism will allow such programs to continue their mandate while not necessarily becoming more federalized. Nonetheless, not all territorial environmental and natural resources initiatives have a federal nexus.

We conclude that the Puerto Rican environmental rule of law is not extinct, but it is extremely vulnerable. PROMESA, the Oversight Board, the Government of Puerto Rico, the fiscal plans, and certified budgets ignore a core element: *near-term and long-term financial stability requires a healthy environment and responsible use of natural resources*. PROMESA and its effects on the Puerto Rican environmental rule of law are still in its infancy. To ensure near-term and long-term financial stability the Oversight Board and the Government of Puerto Rico need to correct course to conserve and provide for the responsible use of our natural resources.