OVERVIEW OF THE ADMINISTRATION’S POSSIBLE LEGAL MECHANISMS AND PROCESSES FOR CHANGING ENV. POLICY

- Executive Orders
- Changing Direction in Pending Cases
- Use of Congressional Record Review Act
- Enacting New Procedures for Federal Regulation
- Cutting Funding/Budget Blueprint
- Procedural Barriers to Citizen Enforcement Suits
EXECUTIVE ORDERS


- Reducing Regulation and Controlling Regulatory Costs (EO 13771-Jan 30, 2017)

- Enforcing the Regulatory Reform Agenda (EO 13777-Feb. 24, 2107)
EXECUTIVE ORDERS

- Comprehensive Plan to Reorganize the Executive Branch (EO 13781-March 13, 2017)
EO 13771 - Reducing Regulation and Controlling Regulatory Costs

- Two For One Rule
- Cost Offset Requirement
  - FY2017 - the “total incremental cost” of all new regs (including repealed ones) will be “no greater than zero.”
  - All new incremental costs associated with new regs must be completely offset by the elimination of existing costs associated with at least two prior regs.
EO 13771- Reducing Regulation and Controlling Regulatory Costs

Cost Offset Requirement (cont’d)
- After FY 2017 OMB will set the total incremental costs for each Agency
- OMB’s OIRA issued Interim Guidance on Feb. 2\textsuperscript{nd} and April 5\textsuperscript{th}.
  - Cannot Use Regulatory Impact Analysis
  - Benefits are not to be Considered
EO 13771- Reducing Regulation and Controlling Regulatory Costs

- Issues Raised by EO
  - “Required by Law” Exemption
  - Effect Determined by OIRA Internal Implementation Practices
  - Negative Incremental Cost Budget?
  - Repeals will require rulemaking
  - EO 12866 still in effect-must pass OMB Cost Benefit Analysis to repeal a rule
EO 13771- Reducing Regulation and Controlling Regulatory Costs

- EPA’s Response
  - Task Force Formed and has already identified rules to be repealed

- Litigation—Public Citizen, NRDC, Earth Justice, and Communication Workers of America filed a Complaint for Declaratory and Injunctive Relief on Feb. 8th.
Overview: Supplements EO 13771 by requiring agencies to develop a Regulatory Task Force that evaluates all regs for repeal, replacement or modification by identifying regs that:

- eliminate jobs, or inhibit job creation
- are outdated, unnecessary, or ineffective;
- impose costs that exceed benefits
EO 13777- Enforcing the Regulatory Reform Agenda

- create a serious inconsistency or otherwise interfere with regulatory reform initiatives & policies
- based on data, methods or information that cannot be reproduced.
EO 13777- Enforcing the Regulatory Reform Agenda

- EPA’s Response
  - Regulatory Reform Task Force Appointed
  - Opened a Docket for Public Comments - closes on May 15, 2017
  - EPA Program Offices are scheduling Public Meetings beginning April 24, 2017
  - Report Due within 90 days of EO
EO 13777-Enforcing the Regulatory Reform Agenda

- Obstacles
  - Potential Litigation over EO
  - Repealing Rules must follow OMB Cost/Benefit Analysis and Administrative Procedure Act Requirements
WOTUS RULE

- The Administration’s Efforts to Limit CWA Jurisdiction
  - Overview of the History of the Rule
  - EO 13778-Restoring the Rule of Law, Federalism and Growth by Reviewing the “Waters of the US Rule.”
WOTUS RULE

♦ Mandates a reconsideration by EPA/CORP of the Obama Rule that embraced the “significant nexus” approach & to consider adopting Justice Scalia’s opinion in Rapanos.

♦ Jurisdictional Waters would include only those relatively permanent, standing or continuously flowing bodies of water and wetlands with a surface connection to those types of waters.
EO instructs EPA and Corps to notify AG of the rule so the Court can be informed and take actions as appropriate

Status of the Litigation

April 3, 2017, Supreme Court denied DOJ’s Motion to hold the briefing schedule in abeyance. Petitioner Briefs due on April 27.
WOTUS RULE

- EPA’s Strategy of Repeal and then Replace
  - Trying to outrun Supreme Ct. decision on whether or not the 6th Cir. has exclusive jurisdiction

- Possible Legislative Fix – H. R. 1105
  - Repeals the Rule, introduced on Feb. 16, 2017, but has not moved out of committee
WOTUS RULE

- US v Joseph Robertson, appeal to the 9th Cir of a Criminal Case under the CWA.
  - Question whether 9th Cir. will restate or revise its position on the 2 Supreme Court tests for determining jurisdiction under the CWA.
Climate Change-EO 13783

- Plan to reconsider, revise and/or rescind Obama’s Global Climate Change Policies
- Takes aim at: CPP, O&G methane regs, BLM’s fracking rules, “social cost of carbon” in monetizing impacts of climate change in cost benefit analysis
- Sweeping reexamination of and potential rebalancing of U.S. policy re: energy and the environment
Climate Change-EO 13783

- On April 3rd, EPA published in the Fed Reg withdrawal of proposed rules implementing the CPP
- On April 4th, EPA published in the Fed Reg its intent to review CPP and to initiate proceedings to suspend, revise or rescind the rule.
Climate Change-EO 13783

- **Issues with Deregulating GHGs**
  - Endangerment Finding-EPA will remain obligated to enforce some regulation of GHGs
  - Revising the Endangerment Finding?
    - Extensive Scientific Record/Legal Challenges
Climate Change-EO13783

Possible Mechanisms to Undo CPP

- Repeal or Revise through Legislation
- Amend the Act to Deprive EPA authority to implement the rule
- Through the Appropriation Process pass legislation denying EPA the budget to implement or enforce the CPP
EPA and DOJ Changing Direction in Pending Cases?

- DOJ has filed Motions in Several Cases Seeking a Continuance In Order to Evaluate Positions
  - West Virginia v. EPA—challenge to CPP. Court of Appeals ruled today to pause the litigation for 60 days; EPA must file status reports every 30 days; and Litigants are asked to file briefs on whether Court should remand to EPA.
Changing Direction in Pending Cases

- **EPA Issues:**
  - “Endangerment Finding” - Sp Ct has already ruled that greenhouse gases were air pollution in 2007 - Will EPA seek to reconsider this finding?
  - Will EPA Repeal and Replace?
  - Effect on Supreme Court’s Stay of CPP?
Changing Direction in Pending Cases

- Murray Energy v EPA – Mercury and Air Toxics Standards for the Coal Industry-Ct. issued its decision to hold the case in abeyance on April 27th.

- Walter Coke, Inc. v EPA - CAA Startup, Shutdown & Malfunction Issues. Court has Ordered the case be abated, 90 day reporting to Court on status.
Changing Direction in Pending Cases

- Murray Energy and Wisconsin v EPA cases challenging EPA’s 2015 ozone std have been put in abeyance by the Court.
  - Legislation has been introduced to push back attaining 70 ppb std to 2025; Democrat AGs have written a letter in opposition
Invalidating EPA Regs under the Congressional Review Act (CRA)

- Allows Congress to invalidate any final agency rule after it is promulgated
  - Time for Action is Limited (May 9 or 10th)
  - Whole reg must be invalidated, only one reg per resolution; allows 10 hours of debate
  - Once invalidated, the agency is barred from reissuing it or another reg that is “substantially the same” and no judicial review
Invalidating EPA Regs Under the CRA

Examples to date:

- Steam Protection Rule Disapproved: required a stream buffer near coal mining to prevent pollution to streams.
- Methane and Waste Prevention Rule-Gas Emissions Rule that limited flaring on Public lands-Pending
- Considering: GHG emissions from MSW Landfills, limits on O & G exploration on the Arctic Continental Self
Invalidation EPA Regs Under the CRA

- April 20th Center for Biological Diversity filed a lawsuit challenging the constitutionality of CRA revocation
Enacting New Procedures for Federal Regulation

- Midnight Rules Relief Act (H.R. 21)
  - Removes the CRA one resolution for each regulation requirement

- REINS Act-Regulations from the Executive in Need of Scrutiny Act (H.R. 26)- similar to Trump 2 for One Rule
  - New Process for issuance of Major Rules
  - Would require review of all regs over a 10 year period by Congress
Enacting New Procedures for Federal Regulation

- Regulatory Accountability Act (H.R. 5)- would amend the APA
  - Adds numerous obstacles to the regulatory process, such as “least costly” to regulated parties analysis
  - Abolishes the Chevron Deference-Cts would interpret Agency rules, without any deference to Agency interpretation.
Cutting Funding

- Trump Issues his Budget Blueprint on March 13th
- Deep cuts to EPA Budget - 31% reduction
- EPA’s Enforcement Budget Cut 24%
  - Result: More Citizen suits to enforce regs? States to take the lead?
- Congress’s Reaction?
- Issues with Riders in Budget that could cut EPA initiatives further?
Citizen Suit Issues

- Will limits be placed on Equal Access to Justice Act?
  - Rewards for Attorney Fees to be limited?
- Proposed “Stop Settlement Slush Funds Act”
  - Gov’t would be barred from including payments to 3rd parties in settlements, eliminating SEPs
Citizen Suit Issues

- Proposed “Sunshine for Regulatory Decrees and Settlement Act”
  - Addresses “sue & settle” tactics
  - Intended to avoid collusive agreements in environmental litigation btw citizen groups and governmental agencies.
Final Thoughts

- Role of the States
- Climate Change/Paris Agreement
- Need for a Great Dealmaker