

"Environmental Policy & Law under the Trump Administration: Smooth Sailing or a Bumpy Ride?"

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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

- Expediting Reviews & Approvals for High Priority Projects (EO 13766-Jan. 24, 2017)
- Reducing Regulation and Controlling Regulatory Costs (EO 13771-Jan 30, 2017)
- Enforcing the Regulatory Reform Agenda (EO 13777-Feb. 24, 2107)

EXECUTIVE ORDERS

- Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule (EO 13778-Feb. 28, 2017)
- Comprehensive Plan to Reorganize the Executive Branch (EO 13781-March 13, 2017)
- Promoting Energy Independence and Economic Growth (EO 13783-March 28, 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 - ◆ FY2017-the “total incremental cost” of all new regs (including repealed ones) will be “no greater than zero.”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. 2nd and April 5th.
 - ◆ 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 - ◆ Task Force Formed and has already identified rules to be repealed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.

EO 13777- Enforcing the Regulatory Reform Agenda

- 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

WOTUS RULE

- ◆ 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 greenhouses 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 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 Shelf

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