“The Trump Administration’s Impact on Environmental Policy and Law”

May 22, 2019
Elizabeth Hurst
Law Offices of Elizabeth A. Hurst PLLC
OVERVIEW OF THE ADMINISTRATION’S 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

- Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “WOTUS” Rule (EO 13778-Feb. 28, 2017)

- Comprehensive Plan to Reorganize the Executive Branch (EO 13781-March 13, 2017)

EXECUTIVE ORDERS

- Issuance of Permits with Respect to Facilities and Land Transportation Boundaries of the US (EO 13867-April 10, 2019)
EO 13771- Reducing Regulation and Controlling Regulatory Costs

- **Two For One Rule**
  - Agency must repeal two rules for every new one it issues.

- **Cost Offset Requirement**
  - Agency must offset the private cost of compliance with any new regulation.
  - Agency must cap the overall private cost of compliance with all regulations at a specific amount each year.
Cost Offset Requirement (cont’d)

- OMB sets the total incremental costs for each Agency
- OMB’s OIRA issued Interim Guidance on Feb. 2 and April 5, 2017.
  - 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
  - FY2018- 10 Regulations (3 significant) and 3 new rules.
  - Task Force projects for FY 2019 a $817.9 million Cost Savings (does not include EPA & DOT’s Safe Vehicles Rule (potential savings of $120-$340 Billion))
EO 13771 - Reducing Regulation and Controlling Regulatory Costs

- Litigation - Public Citizen, NRDC, Earth Justice, and Communication Workers of America filed a Complaint for Declaratory and Injunctive Relief on Feb. 8, 2017.
  - Legal Issues
    - Standing
    - APA: Arbitrary and Capricious?
    - Ripeness
EO 13771- Reducing Regulation and Controlling Regulatory Costs

- Other Deregulation Agenda Cases
  - Friends of Alaska National Wildlife Refuges v. DOI, March 29, 2019
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 and later revised by Administrator Wheeler in Aug. 2018
  - Opened a Docket for Public Comments on April 2017-rec’d 460,000 comments (63,416 were unique)
EO 13777- Enforcing the Regulatory Reform Agenda

- EPA Program Offices held Public Meetings in April and May, 2017

- Report to OMB on EPA’s plan to review of existing regulations (May 2017) and final report detailing actions by Sept. 2017
  - Smart Sectors
  - Staying Regulations
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
- Response to Supreme Court Decisions
- 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
- EPA’s Strategy of Repeal and then Replace
  - March 2017 EPA publishes its intent to review, rescind or revise
WOTUS RULE

- April 2017 Supreme Ct. denies EPA’s request to suspend case.
- EPA’s Initial 2 step Process
- EPA’s Suspension (Delay) Rule
- Dec 2018 Dt. Ct issues order vacating the rule. Gov’t appeals to 4th Cir. in Feb. 2019, but later withdraws the appeal.
WOTUS RULE

- Possible Legislative Fix – H. R. 1105
  - Repeals the Rule, introduced on Feb. 16, 2017, but never moved out of committee

- Will It Ever End?
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

- Clean Power Plan
  - Background
    - Oct 2015 EPA publishes the CPP
    - Immediate challenges to the rule filed by states and industry in the D.C. Circuit
    - Jan. 2016 D.C. Circuit rejects a stay of the rule
Climate Change-EO 13783

♦ Feb. 2016 Supreme Court issues stay of the rule
♦ Sept. 27, 2016 D.C. hears oral arguments

◆ Trump Admin. Response
♦ March 2017 Issues EO
Climate Change-EO 13783

- April 4, 2017 EPA published in the Fed Reg its intent to review CPP and to initiate proceedings to suspend, revise or rescind the rule.
- April 2017 DOJ granted suspension of litigation for 60 days.
- Aug. 2017 the Court rules that the case should remain suspended.
Climate Change-EO 13783

♦ Oct. 2017 EPA proposed to repeal the CPP- “exceeds the Agency’s statutory authority.”

♦ Aug. 2017 The Affordable Clean Energy Rule –Public Comment for 30 days.

♦ April 26, 2019, EPA sends the ACE Rule to OMB for review.
Climate Change-EO 13783

♦ May 6, 2019 EPA files another status report with the court asking for continuation of the abeyance until June 2019.

◆ What is Next???
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
Keystone XL-Presidental Permit (EO-13867)

- History of XL Keystone Permitting
  - TransCanda applied for a Presidential Permit in 2008
  - State Department conducted a review under NEPA and ESA
  - 2012 Obama denied the permit due to a law that imposed a deadline on consideration of the impacts.
Keystone XL-Presidential Permit (EO-13867)

- TransCanada reapplies for the permit
- 2015 State Department denies the permit

**Trump Response**

- Jan. 24, 2017 Trump issues a new EO (13766) to expedite review of high priority infrastructure projects and asks TransCanada to reapply.
Keystone XL-Presidential Permit (EO-13867)

- March 23, 2017 the State Department grants the Permit.

- Issues-Final agency action; does State Department need to comply with NEPA and ESA
Keystone XL-Presidential Permit (EO-13867)

- Judge Orders the State Department to complete NEPA work and puts an injunction in place.

- Trump Response
  - Trump issues a new presidential permit, superseding the previous permit and revoking it.
Keystone XL-Presidential Permit (EO-13867)

- Also issues a new EO establishing a new process for future permits.
  - President is the sole, final decision maker
  - No final agency action subject to judicial review under the APA.
Keystone XL-President Permit (EO-13867)

- April 5, 2019, Indigenous Environmental Network files a lawsuit challenging the new Presidential permit.
  - Plaintiff argues:
    ♦ President does not have authority over the 1.2 miles of the land for the U.S. – Canada Border, as Congress has directed BLM to manage that land.
Keystone XL-Presidential Permit (EO-13867)

- President is improperly seeking to grant permission for the entire pipeline based on the definition of “facilities” in the EO.

- TransCanada filed a Motion to Dismiss the case challenging the March 2017 presidential permit, since the new permit makes the 2017 permit moot.
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.
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 11, 2017)
  - 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 20, 2017 Center for Biological Diversity filed a lawsuit challenging the constitutionality of CRA revocation – dismissed for lack of standing.
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 - 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-Courts would interpret Agency rules, without any deference to Agency interpretation.
Cutting Funding

- New Budget cuts EPA by 31%
  - $6.1 Billion and change of $2.7 Billion
- Largest cut to an Agency by 7%, next is the State Department
- More Citizen suits to enforce regs? States to take the lead?
- Congress’s Reaction?
Citizen Suit Issues

- Will limits be placed on Equal Access to Justice Act?
  - Rewards for Attorney Fees to be limited?
- Sue and Settle Policy
  - Gov’t would be barred from including payments to 3rd parties in settlements, eliminating SEPs
Citizen Suit Issues

- 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