

A Look Back At 2017's Enviro And Energy Law Developments

By **Stacey Mitchell and Kenneth Markowitz**

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2017 has been a year of dramatic shift in United States energy and environmental policy. Since taking office, President Donald Trump has taken actions to further campaign promises to increase domestic energy production and manufacturing and to improve our infrastructure, primarily through the use of executive orders and presidential memoranda. At times, Congress has worked with the president, sending to him for signature several Obama-era regulations that it overruled through the Congressional Review Act.

Additionally, Trump has commanded regulatory reform, including requiring the elimination of two regulations prior to the promulgation of any new regulation. Finally, in the international sphere, he has rallied in furtherance of his “America First” slogan, acting on international commitments that he claims benefit and protect U.S. interests. As the year draws to a close, it’s an apt time to review the key steps taken to achieve Trump’s campaign goals, assess the impacts of the administration’s actions, and postulate on what may be coming next.

Achievement Through Executive Action

The administration has made good on many energy and environment campaign promises in 2017 through executive orders, presidential memoranda and other similar authorities.[1] Unsurprisingly, Trump immediately initiated a dramatic reversal of course on policies related to climate change, including withdrawing The Climate Action Plan[2] and similar pronouncements such as “Preparing the United States for Climate Change.”[3] He disbanded the Interagency Working Group on Social Cost of Greenhouse Gases and withdrew multiple documents developed by the group to “ensure sound regulatory decision making” allowing for agencies to “use estimates of costs and benefits in their regulatory analyses that are based on the best available sciences and economics.”[4] On June 1, 2017, the president announced that the United States would withdraw from the Paris agreement, the global pact to combat climate change.[5]

To achieve his goal of energy independence, the president took steps to clear the path for approval of both the Keystone XL pipeline and the Dakota Access pipeline, and U.S. Department of the Interior Secretary Ryan Zinke lifted the moratorium on coal leasing on public lands. To pave the way to “make America great again,” in August he relaxed the environmental review process for major



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infrastructure projects with a goal of having them completed within two years. And most recently, the president decided on Dec. 4, 2017, in the largest disposal of public lands since the passing of the 1906 Antiquities Act, to scale back the Bears Ears and Grand Staircase-Escalante national monuments in Utah to “usher in a bright new future of wonder and wealth.”[6]

Collaboration with Congress

Congress also handed the president early wins through the Congressional Review Act, which provides Congress with a method of conducting oversight of agency rulemaking. Although having been used only once before, the CRA was used 14 times in the early days of the Trump administration, including on several rules impacting energy and environmental policy. In the energy and environmental sphere, Congress took aim at the Department of Interior’s stream protection rule, which would have impacted coal mining, invalidating the rule through this procedure. [7]

Regulatory Reform

What could not be accomplished through executive action, Trump directed his cabinet officials to undertake in the context of massive regulatory reform. At the environmental agencies, the regulatory reform has targeted rules designed to reduce greenhouse gas emissions. These agencies have also taken steps to delay or roll back regulations in other media that may impede energy production or job creation. The first salvo in most instances has been delay, not substantive revision, and the highlights include:

- **The Clean Power Plan:** On Oct. 10, 2017, the EPA took steps to repeal the CPP, the marquis regulation in the Obama Administration’s attempt to reduce GHG emissions and to meet international climate commitments. The EPA is taking comment on the proposed repeal until Jan. 16, 2018. While the rule has not become effective and related litigation has been held in abeyance at the request of the administration, on Nov. 9, 2017, the court denied the EPA’s request to suspend the litigation indefinitely, and instead required status reports at 30-day intervals and another 60-day abeyance, perhaps signaling a growing impatience with the agency to issue a rule as required by the Clean Air Act.
- **The Clean Water Rule:** On June 27, 2017, the EPA proposed to rescind the CWR, the Obama-EPA’s revised definition of streams and wetlands that are afforded national protection, and revert to the rule that had been in place for decades. The CWR is currently subject to a nationwide stay issued by the Sixth Circuit. On Nov. 16, 2017, the EPA proposed to delay the effective date of the CWR for two years after “the date of final action on this proposal.” The EPA’s two-year delay proposal is open for comment until Dec. 13, 2017. The EPA doubtless took this action in light of the U.S. Supreme Court argument heard in the fall term on the question of whether challenges to the CWR should be held in the first instance in federal district courts or the courts of appeals.[8] In the meantime, the EPA has stated that it is working on a draft new rule that would allow for protections under a narrower definition as articulated by the late U.S. Supreme Court Justice Antonin Scalia.[9]

- **The Risk Management Plan:** On Jan. 13, 2017, the Obama-EPA issued its final "Accidental Release Prevention Requirements," designed to modernize the existing rule and to eliminate industrial incidents and protect workers. The rule's implementation was immediately delayed, and subsequently through two separate final rules, the EPA has delayed the effective date of the RMP until Feb. 19, 2019, in order to reconsider the amendments.
- **The Effluent Limitation Guideline for the Steam Electric Power Generating Source Category (Steam Electric ELG):** The ELG had its first update in over 30 years to limit the discharges of arsenic, lead, mercury and other heavy metals from power plants, which was finalized in 2015 and became effective as of Jan. 4, 2016. Nearly 16 months later, in the midst of litigation and following receipt of stakeholder petitions, the agency took steps to stay the litigation and reconsider the rule. On Sept. 18, the agency finalized a rule and will reconsider the standards applicable to two waste-streams subjected to new, more stringent limitations and delay compliance until at the earliest Nov. 1, 2020. At the heart of the reconsideration will be the question of "economic achievability."
- **Corporate Average Fuel Economy Standards (CAFÉ):** The EPA reopened the mid-term evaluation (MTE), which the Obama-EPA rushed to an early conclusion immediately prior to leaving office. The agency will reconsider whether the GHG standards for model years 2022-2025 are appropriate, and must conclude this process by April 1, 2018. These actions will in turn drive the long-term corporate average fuel economy standards that will be finalized by the National Highway Traffic Safety Administration.[10] While there has been pressure on the EPA from the automobile manufacturers to scale back the current targets, which ramp up to 54.5 miles per gallon by 2025, major moves are not likely as California and 13 other states and Washington, D.C., will likely hold the targets through waiver and authority and other factors.

International Impacts

When Trump announced that the United States would withdraw from the Paris agreement, he based the decision on voluntary benchmarks that he claims were disadvantageous to the United States and indicated that the United States would cease its implementation unless it can renegotiate terms.[11] The president's actions left the United States isolated from the rest of the world.[12] However, withdrawal from the Paris agreement takes time: By the terms of the agreement, the United States can withdraw no earlier than Nov. 4, 2020 — the day after the 2020 election.[13] In the meantime, the U.S. (as a party of the Paris agreement) sent a small delegation to the 23rd Conference of Parties, held in Bonn, Germany in November 2017. While continued U.S. participation in the negotiations was welcomed by some parties and observers as beneficial, the Trump administration made clear that absent an ability "to identify terms for engagement that are more favorable to American businesses, workers and taxpayers," the U.S. will remain engaged to "ensure a level playing field that benefits and protects U.S. interests" up until it officially exits the agreement.[14]

The story is different with regards to the Montreal Protocol. In November, the Trump administration declared its support for the Montreal Protocol and for a landmark international agreement known as the

Kigali Amendment, which will eliminate hydrofluorocarbons (HFCs) a refrigerant with high GHG global warming potential, upon coming into force Jan. 1, 2019. The administration recently signaled that it has "initiated the process to consider U.S. ratification."^[15]

Proof of the Pudding is in the Eating

The success of the Trump administration's strategy will become clear only over time and, in most instances, following litigation. Courts will issue decisions related to regulatory delay and rescission, and the agencies will need to show some substantive progress towards drafting replacement rules or to justify further delay. Ultimately, when the agencies do propose the substantive replacement rules, they will need to withstand not just scrutiny on the extent of policy discretion, but on the law and the underlying scientific basis for action. While it is accepted that a "change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations," that agency must adhere to the law and assure that its actions are not arbitrary or capricious.^[16] Domestically, the real test will come if U.S. Environmental Protection Agency Administrator Scott Pruitt pursues the undoing of the endangerment finding, the underlying basis for action under the Clean Air Act. This would trigger a lengthy and complex litigation process. Internationally, perhaps the litmus test will be whether the United States submits a revised nationally determined contribution, the voluntary commitment to mitigate its GHG emissions that each party makes under the Paris agreement.^[17] Overall, however, there can be little doubt that this administration has a vastly different blueprint for U.S. energy and environmental policy than any of its recent predecessors, and that it has set in motion actions to achieve its goals.

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[1]Among the numerous executive orders and presidential memoranda impacting energy and environmental policy and issued by Trump, are:

- Executive Order 13766, Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, (Jan. 24, 2017)
- Presidential Memoranda Regarding Construction of the Keystone XL and Dakota Access Pipelines (Jan. 24, 2017);

- Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs (Jan. 30, 2017);
- Executive Order 13777, Enforcing the Regulatory Reform Agenda (Feb. 24, 2017);
- Executive Order 13778, Restoring the Rule of Law, Federalism and Economic Growth by reviewing the “Waters of the United States” Rule. (Feb. 28, 2017); and
- Executive Order 13783, Promoting Energy Independence and Economic Growth (March 28, 2017).

[2] President Barack Obama’s plan to reduce carbon dioxide emissions and prepare for climate change was first issued in 2008, and was updated biannually until June 25, 2013.

[3] Executive Order 13653. The order directs the federal community to work together with external stakeholders to enhance climate preparedness, adaptation and resilience. (Nov. 1, 2013)

[4] See Executive Order 13783 at Sections 3 and 5.

[5] On Aug. 4, 2017, the U.S. submitted a communication to the United Nations regarding its intent to withdraw from the agreement as soon as it is eligible.
<https://www.state.gov/r/pa/prs/ps/2017/08/273050.htm>.

[6] The Bears Ear Monument was established by President Barack Obama in 2016 and the Grand Staircase-Escalante was established by President Bill Clinton in 1996. Authority to set aside landmarks comes pursuant to the 1906 Antiquities Act. 16 U.S.C. § 431 et. seq.

[7] With certain limited exceptions, any final rule passed by an agency is subject to a formal disapproval by Congress which then must be submitted to the president who must either sign or veto the legislation. Importantly, the CRA action not only invalidates the regulation, but prohibits reissuance of the same or substantially similar regulation by an agency without approval from Congress. 5 U.S.C. § 801 et. seq.

[8] The Sixth Circuit decided that it had exclusive jurisdiction to hear challenges to the rule. National Association of Manufacturers v. U.S. Department of Defense, et al. Case No. 15-3751. (Feb. 22, 2016).

[9] Rapanos v. Unites States 547 U.S. 715 (2006). See also, Executive Order 13778 at Section 3.

[10] 82 Fed. Reg. 39551 (Aug. 21, 2017). The EPA also to comment on whether the light-duty vehicle standards established for model year 2021 remain appropriate.

[11] The Paris agreement was the result of multiyear negotiation among the 197 nations that are parties to the United Nations Framework Convention on Climate Change (UNFCCC).

[12] Syria and Honduras have now signed on, leaving the U.S. potentially as the only party to the UNFCCC not in the Paris agreement.

[13] Under Article 28 of the Paris agreement, Parties can submit notifications of withdrawal three years after the date on which the agreement became effective, which, for the U.S., was Nov. 4, 2016. After submitting notification of withdrawal, the agreement permits withdrawal after one year.

[14] U.S. Department of State, Media Note. <https://www.state.gov/r/pa/prs/ps/2017/11/275597.htm>

[15] Statement of State Department Principal Deputy Assistant Secretary Judy Garber at the 29th Meeting of of the Parties to the Montreal Protocol (Montreal, Canada, November 2017).

[16] FCC. Fox Television Stations Inc., 556 U.S. 502, 515 (2009).

[17] Under its NDC, the United States committed to achieve an economy-wide target of reducing its GHG emissions by 26-28 per cent below its 2005 level in 2025 and to make best efforts to reduce its emissions by 28 percent.