

Energy, Climate Change, and Environmental Law under Trump

A joint newsletter of the following committees: In-House Counsel; Marine Resources; Forest Resources; Air Quality; International Environmental and Resources Law; Constitutional Law; Pesticides, Chemical Regulation, and Right-to-Know; and the ABA Section of International Law International Environmental Law Committee

June 2017

PROPOSALS TO ROLLBACK *CHEVRON* DEFERENCE: IMPLICATIONS FOR ENVIRONMENTAL LAW PRACTITIONERS

Ethan G. Shenkman and Allison B. Rumsey

During his nomination hearing, then-Judge Neil Gorsuch was grilled by Democratic senators on a hot-button environmental issue, pledging that, if confirmed, he “would try to come at [the issue] with as open a mind as a man could muster.” *Gorsuch Confirmation Day 2, Part 1*, C-SPAN, <https://www.c-span.org/video/?425138-1/supreme-court-nominee-stresses-independence-calls-criticism-judges-disheartening&start=17018> (Mar. 21, 2017, 05:01:30). What was that hot-button issue? It was the *Chevron* deference doctrine—the long-standing principle of administrative law that requires judges to “defer” to an executive branch agency’s interpretation of an ambiguous statute so long as that interpretation is “reasonable.” In his opinions for the U.S. Court of Appeals for the Tenth Circuit, Judge Gorsuch had questioned the wisdom and validity of that doctrine. The confirmation of Justice Gorsuch to the Supreme Court (on April 7, 2017) now sets the stage for possible reconsideration of a doctrine that has been a mainstay of environmental law.

Meanwhile, the *Chevron* doctrine has been making headlines on the legislative side of the Hill, too. On January 11, 2017, the U.S. House of

Representatives passed a regulatory reform bill that would eliminate the *Chevron* doctrine altogether.

What is all the fuss about *Chevron*? What would rolling it back mean? This article examines the implications for environmental law practitioners.

***Chevron’s* Importance to Environmental Law**

Chevron deference was born in the context of an environmental dispute, specifically, a 1984 Clean Air Act case (ironically one that arose when Justice Gorsuch’s mother was administrator of the Environmental Protection Agency (EPA)). *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Chevron* has since become a bedrock principle of administrative law, key to many environmental cases, the most-cited administrative law case of all time, and central to D.C. Circuit cases reviewing EPA regulations.

On the other hand, the *Chevron* doctrine is not monolithic—courts have recognized exceptions and identified hard cases where it carries less weight. An interpretation is only entitled to *Chevron* deference, for example, if (1) Congress has granted the agency authority to issue interpretations with the “force of law” and (2) the interpretation was

Continued on page 3.

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In this issue:

Proposals to Rollback *Chevron* Deference: Implications for Environmental Law Practitioners

Ethan G. Shenkman and Allison B. Rumsey1

Does President Trump’s Executive Order on Energy Independence Signal the End of Federal Climate Regulations? Not So Fast

Richard Ayres and Jessica Olson5

Global Climate Change and Sustainability Financial Reporting: An Unstoppable Force With or Without Trump

Linda M. Lowson.....8

Uncharted Waters: Overturning President Obama’s Indefinite Moratorium on Offshore Drilling in the Atlantic and Arctic Oceans

Richard Gardner11

Rolling Back the Obama Administration’s Environmental Agenda: Perspectives from Each of the Three Branches

Eric Waeckerlin and Tarn Udall.....14

TSCA Implementation: What’s in Trump’s Playbook?

Lynn L. Bergeson17

How Will the Trump Administration Manage Siting Solar Energy on Federal Land?

Lillian Rafii20

California Holds Fast to GHG Reduction in the Face of the Trump Administration Dismantling Climate Action Rules

Robert L. Hines22

Air Quality Committee, Vol. 20, No. 3
Constitutional Law, Vol. 13, No. 2
Forest Resources Committee, Vol. 6, No. 1
In-House Counsel Committee, Vol. 18, No. 1
International Environmental and Resources Law Committee, Vol. 19, No. 5
Marine Resources Committee, Vol. 20, No. 2
Pesticides, Chemical Regulation, and Right-to-Know, Vol. 18, No. 4

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Continued from page 1.

issued in the exercise of that authority. *U.S. v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). Further, deference may not be appropriate if the statute at issue is not one that the agency is charged with administering. *See Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (no *Chevron* deference to the Director of the Office of Workers' Compensation's interpretation of the Administrative Procedure Act (APA) because "the APA is not a statute that the Director is charged with administering.").

Criticism of *Chevron* and the Rationale for Rolling It Back

What is the objection to *Chevron*? In *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016), then-Judge Gorsuch's concurrence described *Chevron* as "more than a little difficult to square with the Constitution," and opined that it "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power." *Id.* at 1149. "*Chevron* invests the power to decide the meaning of the law, and to do so with legislative policy goals in mind, in the very entity charged with enforcing the law. Under its terms, an administrative agency may set and revise policy (legislative), override adverse judicial determinations (judicial), and exercise enforcement discretion (executive)." *Id.* at 1155. He concluded: "We managed to live with the administrative state before *Chevron*. We could do it again." *Id.* at 1158.

The debate continued at the Gorsuch hearing. Some senators attacked *Chevron*. Sen. Orrin Hatch (R-Utah) explained, "Reexamining *Chevron* is not about being anti- or pro-regulation. It's about restoring constitutional separation of powers. It's about ensuring that bureaucracy abides by the law no matter what its policy goals." *Gorsuch Confirmation Hearing, Day 2, Part 1* at 01:18:08. Other senators defended *Chevron*. Sen. Al Franken (D-Minn.) warned that Gorsuch's views on *Chevron* could upend the "landmark administrative

law" principle that says courts should be wary of overruling decisions by scientific experts without good legal reasons. *Id.* at 6:10:42.

Meanwhile, the regulatory reform House bill would amend APA to clarify that courts will "decide *de novo* all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies." The rationale for the legislation: (1) costs of overregulation ("The annual cost of federal regulation adds up to approximately \$1.86 trillion . . . each year."); (2) application of *Chevron* deference is beset with ambiguity ("court decisions have tried to evolve and clarify the doctrine, but this has in turn evolved into a complex area of case law and an evolving set of legal doctrines for review of agencies' statutory interpretations"); (3) the end result is too much power for agencies ("This complex series of case law decisions has increased the power of the Federal administrative agencies, giving them power as they seek 'permissible' interpretations of statutory provisions.")

The debate will likely resound in the executive branch as well: President Trump has picked Neomi Rao, a professor at George Mason University's Antonin Scalia Law School, to lead the White House Office of Information and Regulatory Affairs, which is an important gatekeeper on regulatory initiatives from all agencies, including EPA. Rao has been critical of *Chevron* deference in her testimony before Congress.

What Does All This Mean for Environmental Law Practitioners?

A complete jettison of *Chevron* may be a long shot. Even with Justice Gorsuch on the Supreme Court, a majority of justices may be reluctant to upend long-standing precedent, especially where Congress has legislated for decades against the backdrop of that precedent. Although there is at least one member of the Court, Justice Thomas, who has questioned the constitutional validity of the doctrine, it may be easier for justices sympathetic with some of

Gorsuch's criticisms to limit its reach rather than overturn it. Justice Gorsuch himself recognized that the issue of judicial deference is a nuanced one, acknowledging that scientific and technical experts are entitled to "great deference" from the courts: "No one is suggesting that scientists shouldn't get deference." *Gorsuch Confirmation Hearing, Day 2, Part 1* at 06:13:19. But courts should be the final arbiters of what "the law" means, he testified. Meanwhile, although a Senate version of the regulatory reform bill has been reported out of the Senate Committee on Homeland Security & Government Affairs with bipartisan support, the Senate bill does not contain the House bill provision overriding *Chevron* deference.

In any event, the implications of rolling back *Chevron* are not clear. At first blush, reversing a precedent that is so frequently cited would seem to have major implications, but some commentators have questioned how much difference *Chevron* deference really makes, as a practical matter, in deciding actual cases. As noted above, courts are already willing to find exceptions and/or to rule against agencies when they find their interpretations contrary to law (step one) or unreasonable (step two). And, as Justice Gorsuch himself noted, the country managed to function under a prior legal doctrine holding that an agency interpretation deserves deference if it is persuasive (*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

Environmental Counsel Should Keep a Few Points in Mind

First, the validity of *Chevron* deference will continue to be a hot topic in environmental litigation for the foreseeable future, especially given Justice Gorsuch's past statements. Parties will be looking for test cases to find new or more expansive exceptions to *Chevron* deference and to tee up the doctrine itself. As just one example, the lawyers and judges in the September 2016 D.C. Circuit argument over EPA's Clean Power Plan devoted nearly as much attention to whether the case fell within the *Chevron* rubric as they did to interpretation of the Clean Air Act itself. Parties

will need to devote ever more space in their briefs to address these arguments, and the lower courts will need to grapple with these issues in their opinions.

Second, practitioners will want to monitor these developments so that they can counsel their clients on compliance and litigation strategy. Counsel for both private parties and federal agencies may want to consider alternative arguments that do not rely excessively on judicial deference doctrines, given that they may be in flux for a while. Further, in a world in which agency interpretations are given less deference, the regulated community may find less clarity about the meaning of laws and regulations as individual judges come to different conclusions.

Third, and most significantly, rolling back *Chevron* deference could add a layer of complication for the Trump administration as it pursues new regulatory and deregulatory initiatives. The Supreme Court has made clear that changes in agency positions on legal issues may be entitled to *Chevron* deference, so long as the agency provides a reasoned explanation and the new interpretation is itself permissible and supported by the record. But if *Chevron* is judicially or legislatively overruled or narrowed, government lawyers will have a more difficult task in defending these changes. Justice Gorsuch himself posited that *Chevron* is not a conservative or a liberal issue; rather, it "advantage[s] whoever has their hands on the brakes or the administrative state at a particular time."

Counsel for nonfederal parties who were busy defending Obama-era EPA regulations frequently argued for extensive judicial deference; counsel on the other side, seeking to challenge those regulations, argued the opposite. The former group may now find themselves on the side challenging EPA, as the new administration changes course, and a reverse dynamic may be at play for the latter group. Now that the "shoe is on the other foot," counsel in these cases may need to recalibrate their deference arguments.

It will also be interesting to see how this issue unfolds in the Trump administration's Department of Justice. DOJ has a longstanding institutional interest in its ability to defend the legal interpretations of its client agencies, regardless of administration, and has traditionally been a staunch supporter of *Chevron* and related deference doctrines. We will see whether and how DOJ's positions evolve in the new administration, as DOJ seeks to defend the administration's regulatory initiatives in court.

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DOES PRESIDENT TRUMP'S EXECUTIVE ORDER ON ENERGY INDEPENDENCE SIGNAL THE END OF FEDERAL CLIMATE REGULATIONS? NOT SO FAST

Richard Ayres and Jessica Olson

After eight years of aggressive federal action to reduce greenhouse gas emissions, the Trump administration is committed to reversing course. An executive order (EO) signed March 28, 2017 (Presidential Executive Order on Promoting Energy Independence and Economic Growth, available at <https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economy-1>), directs federal agencies to take steps to undo or significantly revise existing climate regulations in the interests of "promoting energy independence" and "economic growth." But despite these broad objectives and the strong rhetoric surrounding the executive order, the actual effect of the action will likely be limited.

Since 2007, the courts have upheld the U.S. Environmental Protection Agency's (EPA) authority to regulate GHG emissions under the Clean Air Act. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court held that (1) greenhouse gases (GHGs) are pollutants regulated under the Clean Air Act and (2) that EPA is obligated to make a determination whether GHGs emitted from the tailpipes of vehicles "cause or contribute" to the endangerment of public health and welfare. EPA made this so-called endangerment finding based on thousands of scientific studies and public comments. 74 Fed. Reg. 66,496 (Dec. 15, 2009). The finding underpins many regulations EPA subsequently promulgated under title II of the act, 42 U.S.C. §§ 7521-7590, governing motor vehicles, and other titles of the act, including those governing stationary sources such as power plants and manufacturing facilities, designed to drive reductions of GHG emissions from the largest sources of such emissions. The courts have repeatedly upheld EPA's authority to regulate GHG emissions under the Clean Air Act.

See, e.g., *American Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011); *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012); *Utility Air Reg. Grp. v. EPA*, 134 S. Ct. 2427 (2014).

The bottom line is that for all its broad statements, the Trump executive order is of little immediate legal significance. Narrowing or eliminating federal regulations would require 18–24 months of administrative process and an additional 1–2 years of extensive court battles. At this point, changes in federal policy, even if adopted, might not markedly alter the transformation of the U.S. energy economy as it continues to move away from carbon-intensive forms of energy, with or without the additional regulatory requirements. With the cost of renewables and gas power now below that of other sources, consumers have little incentive to return to more expensive, highly polluting energy sources. Major efforts to modernize the electric grid will further enable the transition to a lower-carbon economy. The pace of these changes may be slowed by a shift in federal policy away from GHG regulation, but they will still happen.

With that background in mind, we turn to the main areas addressed by the executive order.

Electric Power

First, with respect to GHG emissions from stationary sources, the executive order directs EPA to (1) “review” and “if appropriate” publish proposed rules that “suspend, revise or rescind” EPA’s Clean Power Plan (CPP) and new source performance standards (NSPS) for fossil fuel-fired power plants, and (2) review the proposed federal implementation plan; *see* 80 Fed. Reg. 64,966 (Oct. 23, 2015). It also directs EPA to inform the attorney general that the rules are under review so that the attorney general “may, as appropriate,” inform courts adjudicating challenges to the CPP and NSPS of the review and, “in his discretion,” ask the court to stay or “otherwise delay further litigation” in the cases while the administrative review proceedings are under way.

An en banc panel of the D.C. Circuit heard more than six hours of oral argument at the end of September in the CPP case on an expedited schedule at industry and state petitioners’ request. After the executive order was signed, EPA in both cases asked the court to hold the cases in abeyance pending administrative review of the regulations, and EPA issued notices in the *Federal Register* stating that the agency is now reviewing the regulations and will “initiate proceedings to suspend, revise, or rescind” the rules depending on the outcome of that review, 82 Fed. Reg. 16,329, 16,330 (Apr. 4, 2017). The court has ordered both cases be held temporarily in abeyance and directed the parties to submit additional briefing regarding whether the cases should be remanded or the abeyance should be continued. As of the date this article went to press, the court had not yet issued a decision on the matter.

Fossil Fuels

Second, the executive order directs EPA and the U.S. Department of the Interior to review and, “if appropriate,” propose to revise GHG regulations applicable to oil and gas extraction operations, in accordance with the policy that agencies rescind any regulations that are found to “unduly burden” the development of domestic fossil fuel resources. EPA has already pulled back the information collection request that was to support regulation of methane from existing natural gas production sources. EPA standards for new sources of methane emissions in oil and gas production could be the target of reversal under the Congressional Review Act, but that faces opposition in the Senate. The House of Representatives has passed a resolution, H.J. Res. 36, disapproving of the U.S. Department of the Interior (DOI) rules on methane waste under the Congressional Review Act. A resolution has been introduced in the Senate (S.J. Res. 11), but has not yet been the subject of a vote.

The order also directs DOI to rescind a secretarial order that instituted a moratorium on new coal leases on federal land until a process to update the environmental review of the federal coal leasing

program under National Environmental Policy Act (NEPA) could be completed. Secretary Zinke has rescinded the order as directed, Secretarial Order 3348, *available at* https://www.doi.gov/sites/doi.gov/files/uploads/so_3348_coal_moratorium.pdf, and environmental organizations (and a tribe) have already challenged the lawfulness of his actions in new litigation, *Citizens for Clean Energy v. Zinke*, No. 4:17-cv-30 (D. Mont. Mar. 29, 2017).

CEQ Guidance

Third, the executive order directs the White House Council on Environmental Quality (CEQ) to “rescind” its guidance on how to analyze climate impacts in environmental impact statements required by NEPA. Eliminating the CEQ guidance will not eliminate project proponents’ obligation to analyze the climate effects of proposed projects, which is established by statute and the courts. *See, e.g.*, 42 U.S.C. § 4332(2)(C); *High Country Conservation Advocates v. U.S. Forest Service*, 52 F. Supp. 3d 1174 (D. Colo. 2014). But it will complicate compliance and potentially work against the administration’s objective of streamlining project timelines, because project proponents will no longer be able to count on the “safe harbor” provided by the CEQ guidance. The result will probably be additional delay, litigation, and uncertainty in obtaining approval for projects requiring a NEPA statement.

Social Cost of Carbon

Fourth, the executive order directs agencies to cease using the federal Interagency Task Force’s Social Cost of Carbon when determining the costs and benefits of their regulations. At least one court has held that where an agency endeavors to use a cost-benefit analysis, it cannot ignore a major category of benefits, such as those represented by the social cost of carbon. *Ctr. for Biological Diversity v. Nat’l Highway Transp. Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008). The result is likely to be a wide variation in the cost-benefit formulas agencies will use for their analyses. As with the repeal of CEQ’s guidance, the order is likely to

produce more burdensome litigation, uncertainty, and delay.

Eliminating “Burden”

Lastly, the executive order directs all federal agencies to submit plans (within 180 days of the order, unless that deadline is extended by the White House), to “alleviate or eliminate aspects of agency actions that burden domestic energy production.” A “burden” is defined as follows: “to unnecessarily obstruct . . . or impose significant costs” on “siting, permitting, production, utilization, transmission, or delivery of energy resources.” While this catchall provision is an invitation to agencies to go further than the specific directives in the order, the need to show that the “obstruction” or additional cost is “unnecessary” could prove an important limitation on the reach of this part of the order. For example, the Clean Air Act requires states to meet National Ambient Air Quality Standards, and equip new sources with state-of-the-art pollution controls. Regulations to carry out these statutory requirements are necessary, even if they increase the cost or difficulty of obtaining permits for new energy facilities.

Actual Effects of the EO

While the executive order clearly conveys a different—and negative—view of environmental regulations in the Executive Office of the President, the order is self-executing only with respect to the previous executive orders it explicitly rescinded. Generally, in the environmental context, regulations established under statutory authority—not to mention statutes themselves—have independent and superior legal authority to a presidential executive order. Revising or rescinding any of the above-described regulations will require the same administrative procedure mandated for all agency rulemaking processes. Before proposing to revise or rescind a rule, the executive order requires an agency to find that changes are “appropriate.” The balancing test implicit in this term seems unlikely to be held to override explicit statutory environmental directives, particularly when

America essentially ceased decades ago to use foreign fuels to generate electric energy and when economic growth is increasingly unconnected to growth in energy consumption.

Even if agencies make the required “appropriateness” finding, amending or revoking regulations is a time-consuming and laborious process. EPA and DOI would have to (1) take some months to draft a proposed rule, which must include a reasoned basis for changing course; (2) publish the proposed rule and allow for a public comment period; (3) review and respond to what will surely be large quantities of comments; and (4) draft and publish a final rule and rationale based on the record. For complicated rules, this process often takes about two years. To short-circuit this process risks being summarily overturned by a reviewing court. Moreover, any final rule is almost certain to be challenged by environmental and public health organizations and states, further delaying any certainty with respect to federal climate regulations. The slow pace of political appointments at EPA and reports of infighting between Administrator Pruitt and transition team holdovers could extend that period of uncertainty even more by holding up promulgation of final rules.

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GLOBAL CLIMATE CHANGE AND SUSTAINABILITY FINANCIAL REPORTING: AN UNSTOPPABLE FORCE WITH OR WITHOUT TRUMP

Linda M. Lowson

Overview

Climate Change and Sustainability Financial Reporting (CCSFR) is a complex, swiftly evolving, and now crucial area for issuers and capital providers globally. It has arrived front-and-center in global capital markets with the entrance of G20/Financial Stability Board (FSB) oversight. The Trump administration's resolute efforts to retract, revoke, or otherwise invalidate the climate protection progress made by the Obama administration, as well as Trump executive orders (EOs) aimed at scaling back financial regulation, will not diminish or derail the global tidal wave of investor demand for “full and fair” CCSFR, nor will Trump administration actions alter or impede the seismic shift of global governmental support for this disclosure.

President Trump views environmental and financial deregulation as main tools to stimulate economic growth and job creation. The EOs issued to date have focused upon Environmental Protection Agency (EPA) rules and the repeal or revision of the Dodd-Frank Act. CCSFR is governed by securities laws worldwide, and in the United States, Securities & Exchange Commission (SEC) regulation, which implements and enforces the U.S. securities laws, is the controlling authority. CCSFR is not legally impacted by EPA rules or the Dodd-Frank Act. The SEC has not yet issued any final or proposed rules on CCSFR, but the “materiality” principle inherent throughout the SEC regime applies to all issuer SEC filings.

Neither President Trump nor his cabinet or agency officials have mentioned CCSFR, and the rational linkage between CCSFR and economic growth/job creation is attenuated at best. The new SEC chair appointee, Jay Clayton (Senate confirmation

pending), in his March 2017 nomination hearing testimony to the Senate Committee on Banking, Housing and Urban Affairs, supported the 2010 SEC Climate Change Guidance in response to a direct query from Senator Jack Reed: “public companies should be very mindful of that guidance as they are crafting their disclosure.” The SEC chair has a dominant influence on SEC rulemaking and enforcement policies, and will be appointing a new Corporate Finance Division chief and a new Enforcement Division chief after Senate confirmation. However, the entire five-member commission must vote on new rules and regulations and will be expected to consider President Trump’s political philosophy. Thus, it is prudent to consider the potential relevance of certain Trump EOs.

It is noted that EOs have certain legal restrictions: (1) EOs that are not issued under specific statutory authority from Congress can be legally challenged as overstepping presidential authority or the spirit of the Constitution; (2) EOs do not directly compel the SEC to act because it is an independent regulatory agency; and (3) the Administrative Procedure Act (5 U.S.C. subchapter II, <https://www.archives.gov/federal-register/laws/administrative-procedure>) (APA) applies, and has stringent agency notice and comment requirements for amending or rescinding existing rules or adopting new rules.

Trump Executive Orders with Potential Relevance

Executive Order on Reducing Regulation and Controlling Regulatory Costs, January 30, 2017 (<https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling>): This EO, known as the “two-for-one” EO, requires that two regulations must be repealed for each new one issued, and seeks to reduce the regulatory burden.

Executive Order on Financial Regulatory Reform, February 3, 2017 (<https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-executive-order-core-principles-regulating-united>

states): This EO directs the Treasury secretary to consult with the Financial Stability Oversight Council (FSOC) (consisting of U.S. federal and state financial regulatory heads, including the SEC chair) and report to President Trump within 120 days, identifying any laws, treaties, regulations, guidance, reporting and recordkeeping requirements, and other government policies that inhibit federal regulation of the U.S. financial system in a manner consistent with the “Core Principles,” which include making regulation “efficient, effective, and appropriately tailored.” The SEC likely will treat this EO and the “Core Principles” with deference, but may be reluctant to fully implement this broad evaluation directive, given that the SEC’s Disclosure Effectiveness Initiative (<https://www.sec.gov/spotlight/disclosure-effectiveness.shtml>) is already tackling the modernization and streamlining of SEC issuer disclosure rules.

Executive Order on Enforcing the Regulatory Reform Agenda, February 24, 2017 (<https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda>): This EO requires each federal agency to form a task force to review existing regulations and recommend whether to repeal or simplify those deemed to harm the economy and job creation. This massive regulatory review process will require scarce agency time and resources, and the SEC may be disinclined to carry out this directive, given that the SEC’s mandate is not to protect the economy and job creation, but to protect investors and capital markets (both of which are served by “full and fair” CCSFR).

Executive Order on Promoting Energy Independence and Economic Growth, March 28, 2017 (<https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economic-growth-1>): This EO directs federal agencies to take steps to rescind or significantly revise existing climate regulations in the interests of “promoting energy independence” and “economic growth.” Its implementation is subject to varying

agency interpretations, is legally restricted by APA requirements, and has already provoked vehement protest from various U.S. stakeholder constituencies as well as congressional backlash. U.S. Senators Jack Reed and Sheldon Whitehouse, and more than 30 Democratic senator co-sponsors, immediately introduced legislation to rescind this EO, entitled “The Clean Air, Healthy Kids Act,” which would block federal agencies from implementing it.

The CCSFR Business Case and Policy Considerations

There is a clear and compelling business case for SEC mandatory issuer CCSFR and for rigorous SEC enforcement in this area, consisting of five principal global market and regulatory forces (space limitations preclude detailed discussion of these factors):

1. Inescapable Transition to Low-Carbon, Clean Tech Economy: Implementation of the 2015 Paris Climate Agreement, to which G20 Finance Ministers remain firmly committed, will cause a profound and fundamental adjustment of the global economy over the next 20 years.
2. Irrefutable Global Investor Demand for Full and Fair CCSFR Disclosure: Investors want mandatory, comprehensive, consistent, and comparable CCSFR, and nothing less. See, e.g., CERES, Investors Have Their Say on Sustainability & Stock Exchanges: Feedback on the World Federation of Exchanges (WFE) ESG Guidance and Recommendations, March 2017, <https://www.ceres.org/files/reports/investors-have-their-say-on-sustainability-stock-exchanges-feedback-on-the-wfe-esg-guidance-and-recommendations..>
3. Issuer SEC Disclosure Deficiencies Harm U.S. and Global Financial Markets: Lax enforcement by the SEC on climate-related disclosure has led to investigations by the New York attorney general and the California attorney general against several

energy companies, including, most recently, Exxon in November 2015, for alleged inadequate climate risk disclosure under U.S. securities laws causing harm to the investing public.

4. Securities Regulators and Stock Exchanges Worldwide Are on Board: There are now over 40 Organisation for Economic Co-operation and Development (OECD) and emerging market countries that mandate sustainability disclosure, and 55 stock exchanges have joined the Sustainable Stock Exchange Initiative (<http://www.ssei.org/>).
5. G20/FSB Supervision: This global macroprudential leadership involvement signals a critical, global power shift from the voluntary sustainability reporting sphere to a financial regulatory-dominated sustainability reporting world, prompting national securities regulators to issue a definitive position on climate-related reporting.

It is undeniable that escalating climate change and an increasingly resource-constrained world are creating serious financial system systemic risks and have made CCSFR critical to investment and lending decisions, as acknowledged by the G20/FSB.

The only question for the SEC to decide is what specific CCSFR disclosure regime best protects investors and markets and whether this disclosure should be mandated by issuing a new proposed rule, or solely by application of the materiality principle, ideally with issuance of additional SEC interpretative guidance.

Governor Mark Carney, in an April 2017 speech entitled “The High Road to a Responsible, Open Financial System” (<http://www.bankofengland.co.uk/publications/Documents/speeches/2017/speech973.pdf>), stated that “financial market leaders must fulfill their responsibility in establishing a responsible, open financial system,” and that this requires international regulatory

cooperation “for establishing common minimum standards and consistent implementation which deliver similar outcomes . . . Such an approach would allow capital to move more freely, efficiently and sustainably between jurisdictions . . . This high road leads to more jobs, higher sustainable growth, and better risk management across the G20.”

This is cogent advice that speaks directly to the Trump administration agenda, and countenances only one course of action—for the United States to remain a signatory to, and timely implement, the 2015 Paris Climate Agreement, and for the SEC to mandate and properly enforce “full and fair disclosure” of climate-related and sustainability risks. Any Trump administration or SEC action to discourage or delay CCSFR is ill-advised, as it will only serve to complicate issuers’ CCSFR compliance, increase investor and capital market systemic risk, and erode global market perception of U.S. financial system stability and historical SEC investor protection leadership.

Linda M. Lawson is Chief Executive Officer of the Global ESG Regulatory Academy™, which provides regulatory and compliance advisory and professional education in CCSFR. She launched and chaired the ABA 2016 Working Group on Sustainability Financial Reporting, and is editor-in-chief of an ABA special publication on Climate Change and Sustainability Financial Reporting (June 2017). She previously practiced with Shearman & Sterling LLP and Proskauer Rose LLP, and served as Arthur Andersen’s U.S. Financial Services Strategy Head and Member of its Financial Services Executive Leadership Team.

UNCHARTED WATERS: OVERTURNING PRESIDENT OBAMA’S INDEFINITE MORATORIUM ON OFFSHORE DRILLING IN THE ATLANTIC AND ARCTIC OCEANS

Richard Gardner

Introduction

On December 20, 2016, with four weeks left in office, President Obama invoked section 12(a) of the Outer Continental Shelf Lands Act (OCSLA) to permanently withdraw hundreds of millions of acres of federally owned lands from new offshore oil and gas production in the Arctic and Atlantic Oceans. While section 12(a) of OCSLA authorizes the president of the United States to “withdraw from disposition any of the unleased lands of the outer Continental Shelf,” it contains no similar provisions that allow the president to reopen them. 43 U.S.C. § 1341(a).

The Trump administration’s “America First Energy Plan” aims to “maximize the use of American resources” by opening more federal lands to oil and gas exploration and production, increasing domestic energy production, and eliminating burdensome regulations on industry in hopes of “freeing [the U.S.] from dependence on foreign oil.” *An America First Energy Plan*, WHITE HOUSE, <https://www.whitehouse.gov/america-first-energy>. Only four days after his inauguration, President Donald Trump signed executive orders aimed at reviving the Dakota Access and Keystone XL pipelines. He was also quick to appoint pro-fossil fuel executives and supporters to head his cabinet, as well as other major federal agencies such as the Department of the Interior, Environmental Protection Agency, and Department of Energy.

Given President Trump’s staunch support of the country’s oil and gas industry, he may very well explore a number of possibilities in an attempt to undo President Obama’s last minute use of broad discretionary authority to indefinitely block drilling in large areas of federal waters. While President Obama was not the first president to

use OCSLA to protect offshore federal lands from oil and gas exploration and production, it does represent the broadest use of OCSLA since its enactment in 1953 due to the amount of acreage involved and the order's lack of an expiration date. Tom DiChristopher, *How Barack Obama Threw a Wrench into Donald Trump's Energy Plans*, CNBC (Dec. 20, 2016, 4:32 PM), <http://www.cnbc.com/2016/12/20/obama-expected-to-invoke-1953-law-to-block-offshore-drilling.html>. Hence, the potential avenues available to reverse or overturn President Obama's prohibition on Arctic and Atlantic drilling are largely unprecedented, and the likelihood of success of such a challenge is mainly unknown.

This article will first take a quick look at past presidential actions in regards to OCSLA, including any challenges to such actions, in hopes of illuminating the options President Trump can invoke in an attempt to reverse the indefinite moratorium on offshore drilling in the newly prohibited areas. The remainder of the article will look to other avenues through which President Trump could potentially reverse the moratorium.

Overview of the Outer Continental Shelf Lands Act

OCSLA was enacted in 1953 in order to grant the federal government jurisdiction and control of the U.S. Outer Continental Shelf (OCS) for purposes of mineral leasing. 43 U.S.C. § 1332. OCSLA provides guidelines for the exploration and development of the OCS's energy and non-energy minerals, and allows the Secretary of the Interior to grant offshore leases. *Id.* Since the enactment of OCSLA, the offshore oil and gas industry has provided significant contributions to employment, the national economy, government revenues, and domestic energy production. *Benefits of U.S. Offshore Oil and Natural Gas Development*, American Petroleum Institute, <http://www.api.org/oil-and-natural-gas/wells-to-consumer/exploration-and-production/offshore/benefits-of-us-offshore-oil-and-natural>.

Past Executive Orders Under OCSLA

President Obama was not the first president to use OCSLA to protect federal lands from offshore oil and gas activities. In 1990, President George H.W. Bush used section 12(a) to place certain areas in the Gulf of Mexico and the Atlantic Ocean under presidential moratorium, prohibiting all leasing and related activities. FEDERATION OF AMERICAN SCIENTISTS, OFFSHORE OIL AND GAS DEVELOPMENT: LEGAL FRAMEWORK 4 (2014). In 1998, President Clinton extended the moratorium until 2012. *Id.* at 4–5. In 2008, President George W. Bush rescinded the moratorium on offshore drilling and issued his own executive order, which withdrew only designated marine sanctuaries from oil and gas activities. *Id.* at 5. Unlike Obama's sweeping use of the provision, past presidential action under the provision remained relatively small in scope, generally involved smaller swaths of offshore federal lands, and only lasted for a fixed period of time. Hence, all previous presidential action under OCSLA has remained unchallenged, meaning there is no existing precedent on how courts will view a challenge.

Other Avenues Available to President Trump

While there are several potential options available to reverse the moratorium on offshore drilling, none of them are particularly easy, quick, or predictable in terms of their likelihood of success. President Trump can challenge the moratorium in court, arguing that section 12(a) of OCSLA does not allow for the indefinite moratorium of offshore federal lands, or in the alternative, that section 12(a) inherently allows the president to reverse previous moratoria issued under the provision. While such an argument may work, it would be a slow and arduous process, and probably be tied up in the courts for the duration of President Trump's first term in office.

President Trump can also urge Congress to amend OCSLA to expressly allow for the reversal of moratoria invoked under section

12(a). The president could also attempt to use the Congressional Review Act to repeal the moratorium (assuming he can tie President Obama's moratorium to an existing regulatory ruling such as those governing offshore exploration and production or environmental safeguards and review). The Congressional Review Act, used successfully only once before the Trump administration, has already been used seven times by President Trump to reverse seven of the Obama administration's regulations. Rebecca Shabad, *Obscure Law Republicans Are Using to Nix Obama-Era Regulations*, CBS News (Mar. 30, 2017, 6:00 AM), <http://www.cbsnews.com/news/the-obscure-law-republicans-are-using-to-nix-obama-era-regulations/>.

Last, President Trump could scrap the Bureau of Ocean Energy Management's (BOEM) most recent Five-Year Program for offshore oil and gas leasing, which did not include for lease any blocks in the Arctic or Atlantic Oceans, and develop a new auction for the 2017–2022 Program that includes both the Atlantic and Arctic. 43 U.S.C. § 1344. Section 18 of OCSLA requires the Secretary of the Interior to prepare and maintain an oil and gas leasing program that best meets the national energy needs for the five-year period following approval of the program. *Id.* Yet for areas in the Atlantic and Arctic Oceans to be included in the revised Program, the moratorium would most likely first have to be reversed. Introducing a new Program means BOEM would have to restart the approval process, requiring a new environmental site assessment under the National Environmental Policy Act, among other procedural and administrative hurdles. *Id.* Altogether, the process would likely take at least two years, and no further OCS lease sales would occur until the process was complete. *Id.*

Conclusion

The likelihood of successfully reversing President Obama's moratorium on offshore drilling in the Arctic and Atlantic Oceans remains largely unknown. What is for certain is that no matter

how President Trump attempts to reverse the moratorium, it will be a slow and arduous process, requiring considerable time and governmental resources. More importantly, the ultimate fate of the moratorium, and any ruling as to the interpretation of OCSLA, could have huge implications for the future of the offshore oil and gas industry.

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ROLLING BACK THE OBAMA ADMINISTRATION'S ENVIRONMENTAL AGENDA: PERSPECTIVES FROM EACH OF THE THREE BRANCHES

Eric Waeckerlin and Tarn Udall

On March 28, 2017, President Trump issued a long-awaited executive order (EO), entitled “Promoting Energy Independence and Economic Growth,” which outlines his attack on Obama-era energy and environmental policies. The EO is at once expansive and targeted. It contains a broad catchall, ordering a novel review process of all agency actions that “potentially burden” the development or use of domestic energy resources. It also specifically addresses key programs and policies.

The EO is heavy on foreshadowing, but light on legal bite, as regulatory entities must attempt to execute the changes through available processes for revising, rescinding, or stalling regulations. Each option involves different legal standards and carries unique implications for the environmental community, regulated industry, and the success of this administration’s environmental agenda. Some of the changes identified by the EO will be quickly realized, but most others will take significant time and process to effect, likely prompting litigation and uncertainty along the way. This article briefly addresses legal guardrails that will bind the execution of the EO’s commands.

The Long and Winding Road— Administrative Perspective

The EO contains instructions for the Environmental Protection Agency (EPA) and other regulatory bodies to “suspend, revise, or rescind” a number of rules. However, the Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, restricts these bodies’ ability to do so. First, the APA authorizes agencies to revise or repeal a duly enacted rule *only* after providing the public with notice and an opportunity to comment unless a very narrow “good cause” exception applies. 5 U.S.C. § 553(b), (c). An

agency may not act in an arbitrary or capricious manner when revising or repealing a rule. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009) (if an agency changes policy, it “must show that there are good reasons for the new policy”). Not all agency change must be subjected to a more searching review than original agency action, but the Supreme Court has interpreted *Fox* to require “*more substantial justification* when “[an agency’s] new policy rests upon factual findings that contradict those which underlay its prior policy.” *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1209 (2015) (emphasis added) (quoting *Fox*, 556 U.S. at 515).

Each agency must determine, based on an established administrative record, what constitutes the necessary justification to revise or repeal the rules and regulations targeted by the EO. This could include considerations about how the prior administration used the social cost of carbon/methane to calculate costs and benefits, whether the rules in question are authorized by and within the scope of governing statute(s), and whether the prior administration properly considered relevant factors, including the decrease in national greenhouse gas emissions in recent years. The justification will need to be reasoned and thorough to avoid being arbitrary and capricious.

Second, “[t]he suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under the APA[]” and requires notice and comment. *Env’tl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983) (indefinite suspension of reporting requirements was substantive rulemaking, and EPA failed to demonstrate good cause to forgo notice and comment); *see also Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 27 (D.D.C. 2012) (citing cases).

However, pursuant to 5 U.S.C. § 705, an agency may postpone the effective date of its action pending judicial review where it “finds that justice so requires.” In *Sierra Club*, EPA invoked APA section 705 in delaying two rules’ effective

dates, and the court found the action arbitrary and capricious because, among other reasons, the agency did not even mention the four-part test required for a *court* to stay agency action—likelihood of success on the merits; irreparable harm; balance of equities; public interest. *Sierra Club*, 833 F. Supp. 2d at 29–30.

Finally, additional delay may occur due to public scrutiny as agencies attempt to pull back Obama-era environmental regulations. It is not unprecedented for public opinion to deter an agency’s effort to rescind a rule or issue a new one. *See, e.g.*, EPA, Press Release, EPA and Army Corps Issue Wetlands Decision (Dec. 16, 2003), available at https://archive.epa.gov/epapages/newsroom_archive/newsreleases/540f28acf38d7f9b85256dfe00714ab0.html (EPA and Army Corps of Engineers announcing that the agencies would not issue a new rule on federal regulation of wetlands and noting the decision was made “[a]fter soliciting public comment to determine if further regulatory clarification was needed”).

Whose Side Are You On?—Judicial Perspective

An incoming president can further erode the environmental legacy of a predecessor by shifting position in ongoing litigation. Environmental litigation almost always involves multiple parties with diverse interests, including intervening citizen groups and states.

The success of these groups in defending rules the federal government chooses to abandon is not without precedent. For example, intervenors successfully defended President Clinton’s roadless rule to prohibit road construction, road reconstruction, and timber harvesting on roadless areas within the National Forest System despite a change in position by a new administration. *See Wyoming v. U.S. Dep’t of Agric.*, 414 F.3d 1207, 1211 (10th Cir. 2005); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1107 (9th Cir. 2002), abrogated on other grounds by *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).

Similarly, environmental groups picked up and successfully prosecuted an enforcement case against Duke Energy Corporation after the Bush administration shifted course. *See Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007).

Citizen groups have already begun efforts to defend Obama-era rules. For example, a few weeks before the EO was issued, the Department of Justice (DOJ) sought a temporary abeyance and to cancel oral argument in a legal challenge to the 2015 Bureau of Land Management (BLM) rule on hydraulic fracturing on federal and tribal lands. DOJ explained that BLM was preparing a notice of proposed rulemaking to rescind the rule. Intervenors opposed the motion, replying that “shielding the district court’s ruling from appellate review could have far-reaching impacts to the Citizen Groups and public interest that extend well beyond just this Rule[.]” Intervenors’ Resp’t-Appellants’ Response in Opp. to Fed. Appellants’ Motion to Continue Argument and Hold Case in Abeyance at 10, *State of Wyoming, et al. v. Zinke, et al.*, No. 16-8068 (10th Cir. Mar. 15, 2017). Citizen groups contended that the legal questions must be answered regardless of whether the specific rule survives. Intervenors appealed to the protections of APA, arguing that an abeyance would effectively allow BLM to rescind the rule indefinitely without meeting the stringent notice and comment requirements. *Id.* at 8–9.

The Tenth Circuit canceled the oral arguments but did not rule on the abeyance, instead calling for supplemental briefing. The panel listed issues the parties must address, including whether the intervenors have standing if DOJ “abandons its appeal.” Order at 3, *State of Wyoming, et al. v. Zinke, et al.*, No. 16-8068 (10th Cir. Mar. 17, 2017).

With One Fell Swoop—Legislative Perspective

While the administrative and judicial avenues will be long and protracted, one congressional option is swift and blunt. The Congressional Review Act (CRA), used only once before in 2001 to

repeal a relatively minor OSHA ergonomics rule, permits Congress to nullify certain regulations by passing joint resolutions of disapproval. The 115th Congress exhibited symptoms of CRA fever, introducing resolutions to erase dozens of rules.

One significant consideration for the regulated community is whether use of the CRA is good policy over the long run. A rule successfully repealed through the CRA may not be reissued in “substantially the same form” except under authority of a newly enacted law. 5 U.S.C. § 801(b)(2). The definition of “substantially similar” has never been tested.

For example, a BLM rule, known as “Planning 2.0,” fell under the CRA axe on March 27 when President Trump signed the joint resolution of disapproval. This rule was developed to modernize and streamline how public stakeholders are engaged in making management decisions impacting 245 million acres of public land. Now, the burning question—and one courts will surely face—is whether BLM is stuck with its planning regulations last updated in 1983. This could mean that the agency would lack the ability—absent explicit congressional authorization—to make even minor modifications to how it plans for the future by employing modern tools like Geographic Information System or online databases.

The venting and flaring rule was a top priority for CRA consideration, and the House of Representatives approved its resolution within weeks of inauguration on February 3. In the Senate, a vote on the joint resolution introduced by Senator John Barrasso (R-Wyo.) failed on May 10. With the CRA off the table, should the agency strive to suspend, revise, or rescind the rule as instructed by the EO, it must do so via the time-consuming and complicated administrative avenues discussed above.

Conclusion

The EO marks a significant fork in the road of this country’s climate change and environmental policy. The regulated community, environmental organizations, and public are in for an uncertain ride as the Trump administration continues to dismantle Obama-era regulations.

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TSCA IMPLEMENTATION: WHAT'S IN TRUMP'S PLAYBOOK?

Lynn L. Bergeson

Most people knew candidate Trump was no fan of climate change regulation or the Clean Water Rule (CWR). Mr. Trump's views on chemical management were never clearly articulated, however. Some may have interpreted this notable silence as support for Toxic Substances Control Act (TSCA) reform, given the broad bipartisan support it enjoyed before its enactment last June. Others may have assumed candidate Trump, in the heat of the campaign, was unaware of the significant commercial, legal, and trade implications occasioned by enactment of the Frank R. Lautenberg Chemical Safety of the 21st Century Act (Lautenberg), the most sweeping legislative overhaul to our domestic chemical management law in four decades. Similar to candidate Trump, President Trump has kept his TSCA cards close to his vest. To the extent money talks, the President's fiscal year 2018 budget doubles down on slashing the U.S. Environmental Protection Agency's (EPA) budget by over 30 percent. The chemicals program, however, would largely be spared cuts and in fact would get a boost under the Trump budget submitted to Congress in late May, suggesting solid support for ensuring the new law is implemented timely.

TSCA Reform

TSCA is the federal law that provides EPA with authority to regulate imported, manufactured, and processed industrial chemical substances, including chemicals intended for commercial and consumer uses. Lautenberg extensively amended TSCA, revising and adding definitions, expanding testing authority, regulating new and existing chemicals, expanding information reporting, narrowing confidential business information protection, and tinkering with preemption, among other changes. Further extensive information is available on our TSCA Reform website: <http://www.lawbc.com/knowledge-resources/tsca-reform-news-info>.

The run-up to enactment was protracted and contentious, and many thought it unlikely. The law passed under a Democratic president and a Republican-led House and Senate. How the law was passed is the stuff of growing urban legend. *See* <https://www.youtube.com/watch?v=0riZtGD-Q4Q>. The important take-home point for purposes of this discussion is the law passed with broad bipartisan support, a fact in which many stakeholders have taken perhaps false comfort knowing what we now know.

The Trump Administration and EPA

Mr. Trump is no fan of EPA, and he has wasted no time in expressing the view that environmental regulation needs to be rolled back. Two cherries sit atop Mr. Trump's pie of diminished environmental protection. The first is his selection of Scott Pruitt for EPA administrator, an unlikely pick to lead the agency. An avowed skeptic of mainstream climate change science, the former attorney general of Oklahoma sued EPA 14 times opposing President Obama's climate change policies. While Administrator Pruitt does not believe climate change is a "hoax," he supports debate, not action, to measure the impact of human activity on climate change, a view well outside the scientific mainstream.

The second cherry is President Trump's 2018 budget, which proposes a jaw-dropping 31 percent reduction in EPA funding (from \$8.2 billion in 2017 to \$5.7 billion in 2018). By any standard, this proposal is a thinly veiled weapon of mass-EPA destruction. Under this plan, 3200 EPA employees would lose their jobs, some 50 EPA programs would be sacrificed, and 50 percent of the EPA Office of Research and Development's budget would be eliminated, among other major consequences.

What This May Mean for TSCA Implementation

To date, there has been no public change in the Office of Chemical Safety and Pollution Prevention's (OCSPP) course of conduct regarding

TSCA implementation. With the exception of former Toxics Assistant Administrator Jim Jones, key staff within OCSPP and the Office of Pollution Prevention and Toxics (OPPT) remains the same. Acting Toxics Assistant Administrator Wendy Cleland-Hamnett is an experienced, able leader, well respected by staff and diverse stakeholders alike, a veteran OCSPP leader who knows the law and OCSPP staff well, and whose presence within the agency is undoubtedly reassuring during these uncertain times. Nancy Beck, Ph.D., DABT, was recently brought on as the principal deputy assistant administrator for OCSPP, and began working at EPA on May 1. Dr. Beck holds a doctorate in environmental health, and for the past five years has served as the senior director for Regulatory Science Policy at the American Chemistry Council.

Like any administration, the Pruitt administration can be expected to drive EPA regulatory and science policies. Mr. Trump is an outspoken critic of what he described as the Obama EPA's "manipulated" (fake?) science to support a political outcome and, of course, vowed to "fix" this. Under Lautenberg, EPA is required to promulgate the TSCA Inventory notification rule, TSCA procedures for prioritizing chemicals for risk evaluation, and TSCA procedures for chemical risk evaluation, all by June 2017. It is difficult to predict how exactly the new administration can be expected to influence the many critically important policy issues at play in these proposals, especially since Mr. Pruitt personally has no apparent prior experience with chemical law and policy. Dr. Beck's recent arrival at EPA, however, significantly enhances the front office's bandwidth in science policy issues.

That the administration will seek to influence chemical regulatory policy, however, is clear as the stakes are high and the consequences for the domestic chemical industry too great to be ignored. How, for example, will "weight of evidence" be defined; must all "conditions of use" be included in the scope of every section 6(b) risk evaluation; how should the "reasonably foreseen" provision

in definition of "conditions of use" be applied; will the composition of the Science Advisory Committee on Chemicals change and, if so, when. These are just a few of the many consequential decisions that this administration will decide concerning the Frank R. Lautenberg Chemical Safety for the 21st Century Act, some of which will almost certainly be litigated. In that neither a permanent toxics assistant administrator nor a general counsel has yet been identified, the window is closing for political appointees to make their mark on the framework rules, or on the scope of the risk evaluations for the 10 chemical substances identified on December 19, 2016. EPA reopened the comment period on this action in March, but little can be inferred from this decision or from Mr. Pruitt's decision to decline to commit to prioritizing an asbestos ban (asbestos is one of the 10 priority chemicals) when asked if he would do so during his confirmation hearing.

Interesting questions also arise from application of the EOs President Trump has issued with respect to their impact on TSCA implementation. EO 13,777, Enforcing the Regulatory Reform Agenda, issued on February 24, 2017, follows closely on the heels of his previous EO concerning government regulations (EO 13,771), which directs the head of every agency to designate an officer to "oversee the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms." Of particular note is Executive Order No. 13,771, issued on January 30, 2017, requiring that agencies identify two rules for repeal for every new regulation the agency proposes. The particulars of the EOs are on top of the cold, hard fact that an expectedly unfriendly Trump Office of Management and Budget (OMB) will be in charge of regulatory reviews of each regulation, and significant EPA policies. Application of the EO to the TSCA implementation could burden OPPT's already strained resources to an unsustainable degree, hamper its ability to devote its limited resources to implementing the new law, and seriously disrupt the chemical manufacturing community by holding hostage urgently needed new chemicals.

It is unclear if the new administration appreciates the urgent need to ensure OPPT staff is sufficiently resourced to process new chemical notifications, and the critical role new chemicals play in sustaining industry and paving the way for more environmentally benign chemistries. EPA was expected to gain between 50 and 200 positions to implement Lautenberg. With a proposed reduction of thousands of positions, the prospect of even minimal net gains may be unachievable. Given the backlog of chemical notifications since June, OPPT is in urgent need of reinforcement to clear the jam and get back to a 90-day (instead of 6–9 months) review schedule, as contemplated by TSCA. More recent reports from EPA suggest Mr. Pruitt and his staff have made significant progress in diminishing the back-log, and EPA is to be commended for this success and urged to continue along this path. Similarly, required rulemakings under Lautenberg apparently are on track, as are the risk evaluations for the 10 priority chemicals. EPA is urged to stay focused and on target as failure to implement the new law timely and credibly will invite an erosion of the trust the public was beginning to place in the federal government's ability to manage chemical risks since Lautenberg's bipartisan enactment.

Call to Action

The magic moment in time that enabled Lautenberg's enactment was truly remarkable. Chemical stakeholders vested in ensuring Lautenberg is thoughtfully implemented should work hard now to fulfill the bipartisan and multi-stakeholder support on which Lautenberg's enactment rested. TSCA implementation is unlike other high profile environmental issues, as it resonates at a very personal level with the public. Restoring the public's confidence in EPA's ability to regulate chemical safety is essential to the success of the chemical community and its downstream customers.

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HOW WILL THE TRUMP ADMINISTRATION MANAGE SITING SOLAR ENERGY ON FEDERAL LAND?

Lillian Rafii

Brief History of Siting Solar Energy on BLM Land

After decades of allowing fossil fuel extraction operations on federal lands, in 2012 the Bureau of Land Management (BLM) heralded a new process of permitting utility-scale renewable energy facilities on federal land under the agency's Solar Energy Program (or Western Solar Plan). Under President Obama, the Department of the Interior issued a programmatic environmental impact statement (PEIS), which created and set out criteria for multiple solar energy zones (SEZs), which are areas of land described as "well suited" for utility-scale production of solar energy and where BLM would prioritize solar energy and associated transmission infrastructure development. The purpose of the SEZs, championed by former Secretary of the Interior Ken Salazar, was to prescreen large swaths of BLM land so that utility-scale solar development would minimize or avoid damage to environmental and cultural resources and allow for optimized access to transmission lines. Nineteen SEZs now exist among six southwestern states totaling 285,000 acres dedicated for solar siting and an additional 19 million acres of variance areas are intended for case-by-case consideration. *Bureau of Land Management Solar Energy Program Western Solar Plan*, <http://blmsolar.anl.gov/> (last visited Mar. 27, 2017). Generally speaking, opening BLM land for renewable energy development was a monumental shift in federal land policy related to energy production. No solar development had been permitted on federal land before 2009. From 2010 through 2016, 36 solar energy projects were approved, though some have been terminated since approval. *Renewable Energy Projects Approved Since the Beginning of the Calendar Year 2009*, https://www.blm.gov/wo/st/en/prog/energy/renewable_energy/Renewable_Energy_Projects_

[Approved_to_Date.html](#) (last visited Mar. 27, 2017). In comparison, thousands of permits per year are approved for fossil fuel extraction, such as for coal mining and oil and gas extraction. Coal mining leases alone cover over 570 million acres of BLM land. *Total Federal Coal Leases in Effect, Total Acres Under Lease, and Lease Sales by Fiscal Year Since 1990*, https://www.blm.gov/wo/st/en/prog/energy/coal_and_non-energy/coal_lease_table.html (last visited Mar. 27, 2017). In the past two decades, over 74,000 permits for fossil fuel extraction have been granted.

After the creation of the PEIS, BLM partnered with California to create the Desert Renewable Energy Conservation Plan (DRECP), with the intended goals of providing a streamlined process for the development of utility-scale renewable energy generation and to provide for long-term conservation and management of 22.5 million acres in southern California. The final rule, issued by BLM, created 388,000 acres of designated focus areas (DFAs) out of the total 22.5 million acres where renewable energy projects proposals were intended to be prioritized.

In addition to the landscape evaluation of the SEZs was a set of rules that were finalized on November 10, 2016, shortly after the election regarding solar and wind energy development on public lands. This included the requirement of a competitive leasing program set with the stated intent of ensuring that taxpayers receive fair market value for federal land. The program is similar to the competitive leasing process that the fossil fuel industry uses in leasing federal land. The new rules also created designated leasing areas (DLAs), or preferred areas for renewable energy development.

Although BLM has created several preferred areas intended to streamline renewable energy development, now primarily through the DFAs in southern California under the DRECP and DLAs in competitive leasing areas, further site-specific environmental impact analysis and potential long-term mitigation are required before construction begins.

Response to the New Rules

Predictably, as with many federal land use management decisions, stakeholder responses have been mixed. Many environmental protection groups participated in the creation of SEZs and generally consider them a promising first step partly because as part of the Solar Energy Program, 79 million acres of federal land were excluded from utility-scale solar energy development to protect wildlife and endangered species from utility-scale solar production. This is especially an issue for large solar developments, which can span thousands of acres of land used by wildlife for their habitat.

After objections and multiple lawsuits from Native American tribes, who voiced concern on perfunctory notice and efforts to discuss cultural sacred land, BLM has methodically included many steps of consultation into the permitting process. Yet, some have continued to call for improved efforts in including Native American tribal participation.

Solar industry voices have been cautiously positive toward the overall goal of increasing available land but critical for how the process has been finalized. Deep-seated concerns persist regarding the unpredictable costs and lengthy time commitment of further environmental review once an application has been approved. Despite the work done to prescreen the DLAs and DFAs, additional environmental mitigation and potential challenges from regional or third parties remain. In addition, developers are apprehensive of the practice of lease payments due upon approval of the permit, often before developers secure critical arrangements such as their power purchase agreement or interconnection agreements. As opposed to private land leases, where opportunities for option leases exist, requiring full lease payments during completion of detailed environmental reviews makes siting projects on BLM land too costly.

As a result, concerns remain from the solar industry on the success and viability of siting large projects

on BLM land. A critical benefit of siting on federal land comes from the elimination of pesky title issues found in using private land. However, the costs needed to build utility-scale solar projects, given extensive mitigation prerequisites and lease payments required before key post-production arrangements, have detracted from their desirability. Therefore, in choosing where to site their utility-scale solar projects, the majority of developers have primarily chosen private land. According to the Major Solar Projects list kept by the Solar Energy Industries Association, a total of 2156 ground-mounted solar projects over 1 MW existed in the United States at the end of 2016. MAJOR SOLAR PROJECTS LIST, <http://www.seia.org/research-resources/major-solar-projects-list> (last visited Apr. 10, 2017). According to BLM's list of approved renewable energy installations, a total of 10 solar energy projects are currently operational on BLM land as of March 2017.

What to Expect Under the Trump Administration?

Newly appointed Interior Secretary Ryan Zinke has not spoken directly on the future of the nation's renewable energy projects, but has spoken of other energy development, such as a federal land model that would be friendlier to oil and gas drilling. In addition, President Trump sent a clear signal promoting the coal industry at the end of March by issuing an executive order to end the moratorium on issuing new coal leases that President Obama had placed to further study appropriate market rental rates.

In comparison, the new administration has remained quiet on its goals regarding solar siting on federal lands and on the solar industry generally, but hints of their potential direction exist. Department of Energy Secretary Rick Perry circulated a memorandum on April 14, 2017, ordering a 60-day review of the U.S. electric grid to investigate the "erosion of baseload power." Although the memorandum specifically listed coal, natural gas, nuclear, and hydroelectric forms of energy, it did not list solar or other renewable

energy sources. Many interpret the noticeable omission as a signal that the Department of Energy will not prioritize solar energy development in this administration.

Finally, issues of department support and infrastructure remain. Under the Obama administration, processing a solar development permit took approximately 18 months to two years. A “fast track” program exists to place solar permits in designated solar areas at the beginning of the line, but its success depends on robust infrastructure and staffing at BLM to process the applications. President Trump has targeted funding at many agencies, and a reduction of funding from the Department of the Interior would only lengthen the permit processing time.

Conclusion

To reach national renewable energy goals and to combat the increasing rate of climate change, renewable energy sources must continue to develop rapidly. Ultimately, issues of siting remain a critical factor of solar development. Whether BLM land proves to be a desired solar siting path will depend on many factors, including its success in ensuring environmental protection, providing for nearby transmission lines, and streamlining the application and leasing process. BLM land can provide smart energy development given appropriate attention and resources. Alternatives, such as smaller solar projects closer to transmission lines, have not been promoted but could be a potential opportunity to reduce hurdles in siting. The new administration will be making critical decisions, either in promoting solar energy siting or through avoidance of the issue, on how solar energy on federal land develops.

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CALIFORNIA HOLDS FAST TO GHG REDUCTION IN THE FACE OF THE TRUMP ADMINISTRATION DISMANTLING CLIMATE ACTION RULES

Robert L. Hines

The inauguration of Donald J. Trump as the 45th President of the United States on January 20, 2017, brought with it levels of angst and concern not felt for some time within the environmental community. While some welcome the notion of “regulatory reform” that was the hallmark of the Trump campaign and that has formed the framework for President Trump’s first 100 days in office, others, particularly among governmental leaders in California, have vowed to fight legislative and regulatory reform, and to respond forcefully to executive orders flowing from the White House.

Just prior to the November 2016 election, California passed Senate Bill 32 (SB 32) and Assembly Bill 197 (AB 197) (codified at, respectively, Cal. Health & Safety Code § 38566 and Cal. Health & Safety Code §§ 38506, 38531, 38562.5, 38562.7, 39510, 39607 and Cal. Gov’t Code § 9147.10, et seq.), which continued California on its required objective to cut greenhouse gas (GHG) emissions by at least 40 percent below 1990 levels by 2030. The reductions were identified by California Governor Jerry Brown’s office at the time as the most ambitious reduction goals in North America. The basis for these reductions was set out in the landmark California Global Warming Solutions Act of 2006, Assembly Bill 32 (AB 32) (codified at Cal. Health & Safety Code § 38500, et seq.).

So where do California and other like-minded states go from here in the context of targeted reduction of GHGs and providing incentives for the development of sources of alternative energy? Has the president, as some suggest, signed Earth’s “death warrant” by issuing executive orders in late March directing the U.S. Environmental Protection Agency (EPA) to “rework” its Clean

Power Plan, ordering the Department of Interior to lift its current moratorium on federal coal leasing and loosening restrictions on oil and gas development (including methane flaring) on federal lands, and instructing all federal agencies to stop factoring climate change into the environmental-review process for federal projects (with the federal government recalculating the “social cost of carbon”)? (See, e.g., White House, Presidential Executive Order on Promoting Energy Independence and Economic Growth (Mar. 28, 2017), <https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economy-1>). As discussed below, California has responded in a number of coordinated and related ways to the Trump administration’s efforts to roll back regulations. Indeed, California’s Attorney General Xavier Becerra was quoted as saying California will continue “pushing the envelope” on environmental quality and taking action on climate change. (See Law360, *California AG Promises to Battle Trump on Enviro Issues*, Mar. 30, 2017.)

First and foremost, California will continue to push toward a 40 percent reduction in GHG emissions by 2030, and toward 80 percent by 2050. California has been joined by other states to reduce GHGs: among them New York, Connecticut, Delaware, Hawaii, Iowa, Illinois, Maine, Maryland, Massachusetts, New Mexico, Oregon, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia. The federal basis to regulate GHGs stems, of course, from EPA’s endangerment finding regarding the threat posed by carbon dioxide and other GHGs, which followed the U.S. Supreme Court’s ruling in 2007 in *Massachusetts v. EPA*, 549 U.S. 497 (2007).

California has also stayed firm on strict emissions standards for cars and trucks, exemplified in late March by the California Air Resources Board unanimous vote to maintain the state’s 2025 limits on goals for zero-emission vehicle sales through 2030 (at 15 percent of total sales by 2025), and to nearly double the average fuel economy of new cars and trucks by 2025 to 54.5 miles per

gallon. (See, e.g., State of Cal. Air Resources Bd., *Advanced Clean Cars Midterm Review* (Mar. 24, 2017), <https://www.arb.ca.gov/msprog/acc/mtr/res17-3.pdf>). The transportation sector accounts for around 40 percent of GHG emissions, so targeting this sector is seen as crucial by the Air Resources Board and the governor’s office. (See Cal. Env’tl. Protection Agency, *California Greenhouse Gas Emission Inventory—2016 Edition* (June 17, 2016), <https://www.arb.ca.gov/cc/inventory/data/data.htm>). California’s Low Carbon Fuel Standard also plays an important role in addressing GHG emissions from the transportation sector. California’s long-standing waiver to create its own automotive and truck standards derives from the federal Clean Air Act (42 U.S.C. § 7401, et seq.), and whether the Trump administration attempts to follow the (ultimately unsuccessful) Bush administration’s effort in 2007 to reject a waiver application from California remains to be seen.

Another pillar of California’s climate action plan involves what have been termed “short-lived climate pollutants” or “super pollutants”—climate pollutants other than carbon dioxide such as methane, fluorinated gases including hydrofluorocarbons, and black carbon. In contrast to the Trump administration’s rollback of oil and gas regulations on federal lands, California, through the Air Resources Board, approved methane emission limits on the oil and gas sector to be phased in between 2018 and 2020, to reduce emissions from the sector by 1.4 million metric tons of equivalent carbon dioxide annually. (See, e.g., Cal. Env’tl. Protection Agency, *CARB Approves Rule for Monitoring and Repairing Methane Leaks from Oil and Gas Facilities* (Mar. 23, 2017), <https://www.arb.ca.gov/newsrel/newsrelease.php?id=907>). With estimates of \$50 million worth of “wasted” gas every year due to leaky equipment, the requirements will attempt to curb methane leaks from existing facilities, and to prevent (or minimize) the type of catastrophic leak that occurred from late 2015 to early 2016 at Southern California’s Aliso Canyon natural gas storage field. The new limits are expected to cost the industry over \$27 million annually, before

savings in natural gas releases are factored in. (See Carolyn Whetzel, *California Methane Rule First Stab at Climate “Super Pollutants,”* 32 Toxic L. Rep. (BNA) 353 (Mar. 30, 2017).)

And as a further response to the ongoing rollback of environmental, natural resources, and public health protections from Washington, D.C., California also recently introduced three proposed bills: Senate Bills 49, 50, and 51. SB 49 would render federal environmental standards enforceable under state law; SB 50 would establish a policy to discourage the transfer of federal public land in California to owners other than the federal government; and, SB 51 proposes additional whistleblower protections for federal employees working in the environmental sciences and climate change-related fields.

In short, California continues to lead with respect to climate change laws and policies, and the corresponding effort to reduce emissions of GHGs. To date, the effort has not unleashed the dire economic outcomes predicted by opponents of AB 32. To the contrary, the state’s economic growth has been twice the national rate, with impressive creation of “green jobs.” Indeed, California has seen significant opportunities to promote project development consistent with the targeted reduction of GHGs and provide sources of alternative energy—such as solar, geothermal, landfill gas to energy, biomass, wind and other technologies—and energy storage systems to support the state’s renewables portfolio standard. With respect to energy storage, California recently enacted AB 2514 (Cal. Pub. Util. Code §§ 2835, et seq., 9620), targeting 1.3 gigawatts of energy storage system capacity from the state’s three large investor-owned utilities by 2020, to enable better utilization of energy produced by variable renewable energy systems like solar and wind. As noted above, several other states have adopted or are adopting similar mandates. The economic growth of the clean energy sector is currently expected to dwarf the potential for job growth in the fossil fuel economy. For example, it has been noted that renewable energy now creates jobs 12 times faster than the rest of the economy. (See Kate Samuelson,

Renewable Energy Is Creating Jobs 12 Times Faster than the Rest of the Economy, FORTUNE (Jan. 27, 2017), <http://fortune.com/2017/01/27/solar-wind-renewable-jobs/>.)

And California’s leadership in this area has a global reach as well. It has been suggested that China may soon start its own cap-and-trade program, building on the example set by California (where cap-and-trade is authorized through 2020). There is also planned outreach by California climate change officials to their counterparts in India.

So it seems very clear that California will continue to “push the envelope” when it comes to taking action to curb GHG emissions and address and prevent GHGs and respond to climate change—the Trump administration’s actions notwithstanding. In so doing, Governor Brown’s legacy may be much more difficult to dismantle than former President Obama’s climate change efforts.

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