

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

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# OVERVIEW OF THE ADMINISTRATION'S LEGAL MECHANISMS AND PROCESSES FOR CHANGING ENV. POLICY

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

# EXECUTIVE ORDERS

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

# EXECUTIVE ORDERS

- Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “WOTUS” Rule (EO 13778-Feb. 28, 2017)
- Comprehensive Plan to Reorganize the Executive Branch (EO 13781-March 13, 2017)
- Promoting Energy Independence and Economic Growth (EO 13783-March 28, 2017)

# EXECUTIVE ORDERS

- Issuance of Permits with Respect to Facilities and Land Transportation Boundaries of the US (EO 13867-April 10, 2019)

# EO 13771- Reducing Regulation and Controlling Regulatory Costs

- Two For One Rule
  - ◆ Agency must repeal two rules for every new one it issues.
- Cost Offset Requirement
  - ◆ Agency must offset the private cost of compliance with any new regulation.
  - ◆ Agency must cap the overall private cost of compliance with all regulations at a specific amount each year.

# EO 13771- Reducing Regulation and Controlling Regulatory Costs

- Cost Offset Requirement (cont'd)
  - ◆ OMB sets the total incremental costs for each Agency
  - ◆ OMB's OIRA issued Interim Guidance on Feb. 2 and April 5, 2017.
    - ◆ Cannot Use Regulatory Impact Analysis
    - ◆ Benefits are not to be Considered

# EO 13771- Reducing Regulation and Controlling Regulatory Costs

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



# EO 13771- Reducing Regulation and Controlling Regulatory Costs

## ■ EPA's Response

- ◆ FY2018- 10 Regulations (3 significant) and 3 new rules.
- ◆ Task Force projects for FY 2019 a \$817.9 million Cost Savings (does not include EPA & DOT's Safe Vehicles Rule (potential savings of \$120-\$340 Billion))

## EO 13771- Reducing Regulation and Controlling Regulatory Costs

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

## EO 13771- Reducing Regulation and Controlling Regulatory Costs

- Other Deregulation Agenda Cases
  - ◆ Friends of Alaska National Wildlife Refuges v. DOI, March 29, 2019
  - ◆ League of Conservation Voters v. Trump, March 29, 2019. (Revoked in part EO 13795)

# EO 13777- Enforcing the Regulatory Reform Agenda

- Overview: Supplements EO 13771 by requiring agencies to develop a Regulatory Task Force that evaluates all regs for repeal, replacement or modification by identifying regs that:
  - ◆ eliminate jobs, or inhibit job creation
  - ◆ are outdated, unnecessary, or ineffective;
  - ◆ impose costs that exceed benefits

## EO 13777- Enforcing the Regulatory Reform Agenda

- ◆ create a serious inconsistency or otherwise interfere with regulatory reform initiatives & policies
- ◆ based on data, methods or information that cannot be reproduced.

# EO 13777- Enforcing the Regulatory Reform Agenda

- EPA's Response
  - ◆ Regulatory Reform Task Force Appointed and later revised by Administrator Wheeler in Aug. 2018
  - ◆ Opened a Docket for Public Comments on April 2017-rec'd 460,000 comments (63,416 were unique)

# EO 13777- Enforcing the Regulatory Reform Agenda

- ◆ EPA Program Offices held Public Meetings in April and May, 2017
- ◆ Report to OMB on EPA's plan to review of existing regulations (May 2017) and final report detailing actions by Sept. 2017
  - ◆ Smart Sectors
  - ◆ Staying Regulations

# EO 13777-Enforcing the Regulatory Reform Agenda

## ■ Obstacles

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



# WOTUS RULE

- The Administration's Efforts to Limit CWA Jurisdiction
  - ◆ Overview of the History of the Rule
    - ◆ Response to Supreme Court Decisions
  - ◆ EO 13778-Restoring the Rule of Law, Federalism and Growth by Reviewing the "Waters of the US Rule."

# WOTUS RULE

- ◆ Mandates a reconsideration by EPA/CORP of the Obama Rule that embraced the “significant nexus” approach & to consider adopting Justice Scalia’s opinion in Rapanos.
- ◆ Jurisdictional Waters would include only those relatively permanent, standing or continuously flowing bodies of water and wetlands with a surface connection to those types of waters

# WOTUS RULE

- ◆ EO instructs EPA and Corps to notify AG of the rule so the Court can be informed and take actions as appropriate
- EPA's Strategy of Repeal and then Replace
  - ◆ March 2017 EPA publishes its intent to review, rescind or revise

# WOTUS RULE

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

# WOTUS RULE

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

# Climate Change-EO 13783

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

# Climate Change-EO 13783

## ■ Clean Power Plan

### ◆ Background

- ◆ Oct 2015 EPA publishes the CPP
- ◆ Immediate challenges to the rule filed by states and industry in the D.C. Circuit
- ◆ Jan. 2016 D.C. Circuit rejects a stay of the rule

# Climate Change-EO 13783

- ◆ Feb. 2016 Supreme Court issues stay of the rule
- ◆ Sept. 27, 2016 D.C. hears oral arguments
- ◆ Trump Admin. Response
  - ◆ March 2017 Issues EO



# Climate Change-EO 13783

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

# Climate Change-EO 13783

- ◆ Oct. 2017 EPA proposed to repeal the CPP- “exceeds the Agency’s statutory authority.”
- ◆ Aug. 2017 The Affordable Clean Energy Rule –Public Comment for 30 days.
- ◆ April 26, 2019, EPA sends the ACE Rule to OMB for review.

# Climate Change-EO 13783

- ◆ May 6, 2019 EPA files another status report with the court asking for continuation of the abeyance until June 2019.
- ◆ What is Next???

# Climate Change-EO 13783

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

## Keystone XL-Presidential Permit (EO-13867)

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

## Keystone XL-Presidential Permit (EO-13867)

- ◆ TransCanada reapplies for the permit
- ◆ 2015 State Department denies the permit
- Trump Response
  - ◆ Jan. 24, 2017 Trump issues a new EO (13766) to expedite review of high priority infrastructure projects and asks TransCanada to reapply.

## Keystone XL-Presidential Permit (EO-13867)

- ◆ March 23, 2017 the State Department grants the Permit.
- Indigenous Environmental Network files suit challenging the Presidential Permit (3-27-2017).
  - ◆ Issues-Final agency action; does State Department need to comply with NEPA and ESA

## Keystone XL-Presidential Permit (EO-13867)

- ◆ Judge Orders the State Department to complete NEPA work and puts an injunction in place.
- Trump Response
  - ◆ Trump issues a new presidential permit, superseding the previous permit and revoking it.



## Keystone XL-Presidential Permit (EO-13867)

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

## Keystone XL-Presidential Permit (EO-13867)

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

## Keystone XL-Presidential Permit (EO-13867)

- ◆ President is improperly seeking to grant permission for the entire pipeline based on the definition of “facilities” in the EO.
- ◆ TransCanada filed a Motion to Dismiss the case challenging the March 2017 presidential permit, since the new permit makes the 2017 permit moot.

# Changing Direction in Pending Cases

- Murray Energy v EPA – Mercury and Air Toxics Standards for the Coal Industry-Ct. issued its decision to hold the case in abeyance on April 27th.
- Walter Coke, Inc. v EPA - CAA Startup, Shutdown & Malfunction Issues. Court has Ordered the case be abated, 90 day reporting to Court on status.

# Changing Direction in Pending Cases

- Murray Energy and Wisconsin v EPA cases challenging EPA's 2015 ozone std have been put in abeyance by the Court.

## Invalidating EPA Regs under the Congressional Review Act (CRA)

- Allows Congress to invalidate any final agency rule after is promulgated
  - ◆ Time for Action is Limited (May 11, 2017)
  - ◆ Whole reg must be invalidated, only one reg per resolution; allows 10 hours of debate
  - ◆ Once invalidated, the agency is barred from reissuing it or another reg that is “substantially the same” and no judicial review

# Invalidating EPA Regs Under the CRA

## ■ Examples to date:

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

## Invalidation EPA Regs Under the CRA

- April 20, 2017 Center for Biological Diversity filed a lawsuit challenging the constitutionality of CRA revocation – dismissed for lack of standing.



# Enacting New Procedures for Federal Regulation

- Midnight Rules Relief Act (H.R. 21)
  - ◆ Removes the CRA one resolution for each regulation requirement
- REINS Act-Regulations from the Executive in Need of Scrutiny Act - similar to Trump 2 for One Rule
  - ◆ New Process for issuance of Major Rules
  - ◆ Would require review of all regs over a 10 year period by Congress

## Enacting New Procedures for Federal Regulation

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

# Cutting Funding

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

# Citizen Suit Issues

- Will limits be placed on Equal Access to Justice Act?
  - ◆ Rewards for Attorney Fees to be limited?
- Sue and Settle Policy
  - ◆ Gov't would be barred from including payments to 3<sup>rd</sup> parties in settlements, eliminating SEPs

## Citizen Suit Issues

- ◆ Intended to avoid collusive agreements in environmental litigation btw citizen groups and governmental agencies.

# Final Thoughts

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