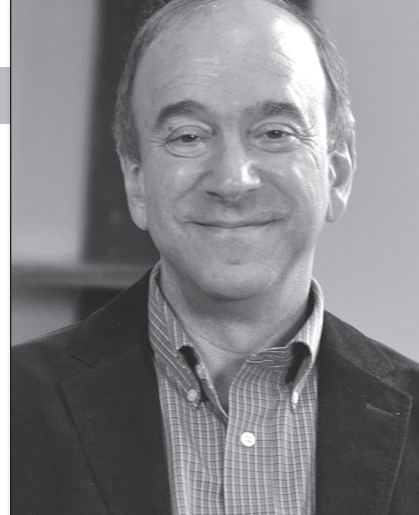


What Happens When a New White House Opposes Ongoing Litigation?



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The transition team for the incoming Trump administration has no doubt been identifying pending federal environmental litigation in which the Justice Department is advancing legal arguments no longer favored by the president-elect. What can we expect is on the Trump environmental litigation hit list? And what are the actual limits on an incoming administration's authority to transform environmental policy in litigation?

The top two targets are obvious: EPA's Clean Power Plan and the Clean Water Rule jointly issued by EPA and the Army Corps of Engineers. The CPP is the most ambitious environmental regulation ever. The CWR, which expansively defines the Clean Water Act's geographical reach, is close behind.

The new administration possesses the authority to revise both rules. The full scope and substance of neither is compelled by the plain meaning of the relevant statutory language. Within each, EPA is in part exercising its legislatively delegated lawmaking authority by reasonably interpreting ambiguous statutory language. But for that same reason, both the CPP and the CWR are susceptible to significant modification should EPA in a Trump administration decide to exercise its discretionary authority to revisit those earlier interpretations based on a different, but nonetheless still reasonable interpretation of that same statutory language.

There are nonetheless significant limits on how and the extent to which any such regulatory changes can be accomplished. Both the environmental statutes themselves and the Administrative Procedure Act impose strict procedural requirements on how existing regulations are changed. In addition, the meaning of some statutory language is plain, which will limit agency

statutory interpretations that cannot be squared with that plain meaning. Finally, the massive amount of scientific information underlying both rules and the APA's requirement that agencies not act in an arbitrary and capricious manner will restrict EPA's ability to promulgate new rules based on inconsistent scientific findings.

There is also a strict order to how the federal government changes its position in pending litigation. The Justice Department will generally not take action until after its client agency has formally shifted its position. In pending litigation challenging EPA rules, the agency must first formally announce its reconsideration of the prior rule and then the DOJ attorneys can request a stay of the litigation in light of that agency action.

But, even then, the many parties who have intervened in the litigation in support of the rule will oppose any such stay, and the courts retain discretion to maintain and decide the case until the current rule is in fact formally changed. Absent intervening federal legislation, which can al-

ways override an agency regulation, that could take a long time, especially because any effort to formally rescind the rule will of course also be subject to legal challenge. It is far easier to claim that a rule will be changed than to change it.

The new administration will also need to guard against the tendency to overreach. If past is prologue, the transition teams will be inundated by requests by parties opposed to the federal government in pending environmental litigation to have the government immediately cease enforcement actions or defense of existing rules. And the parties making those requests will be under the misapprehension that their political support of the winning candidate translates

into an abrupt end of DOJ litigation they disfavor.

As both liberal and conservative transition teams have learned in the past, that is not how the Justice Department operates. Even the appearance of political interference with pending enforcement actions will draw a quick, unqualified rebuke. Any incoming political appointees previously involved in pending litigation will also be barred from any participation in the matter because of strict federal ethics rules.

A new administration may also discover surprising resistance to massive regulatory reform by many powerful interests in the business community. Industry would often prefer a certain regulatory program to an uncertain one, especially those in industry who have already complied. Those many businesses whose own economic bottom lines are promoted rather than undermined by tougher pollution controls, because of their commercial dependence on clean water, clean air, or a stable climate, will likewise oppose dramatic changes. The CPP, in particular, is supported by powerful business interests.

Members of the conservative Federalist Society are known to carry pocket-sized copies of the Constitution to underscore their belief in the founding document's original meaning. I expect environmentalists will likely soon be carrying their own competing pocket-sized versions of the Administrative Procedure Act and the Federal Code of Ethics.

There are still the tenets of the Administrative Procedure Act and the Federal Code of Ethics