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OPINION

Trump Faces Obstacles in Plans to Rollback Environmental Regulations

Reversal of Obama's climate change commitments isn't likely to happen quickly.

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Thirty-six years ago, a conservative "change agent" marched into Washington promising to "get the government off the backs" of industry and the American people.

Those who practiced environmental law during the Reagan years remember well how that played out. Yes, the U.S. Environmental Protection Agency's budget was slashed by 22 percent under Anne M. Gorsuch [Burford], President Ronald Reagan's EPA administrator. But membership in the Sierra Club, one of many litigious environmental groups, exploded in the Reagan years from 80,000 to 500,000. And the budgets of the ten largest environmental activist groups doubled.

Now President Donald Trump and EPA administrator Scott Pruitt proclaim their determination to rollback "excessive" EPA regulation, reverse President Barack Obama's climate change commitments and get EPA "off the backs" of industry. What is most likely to result from their efforts to move the country in an entirely new direction?

If history is a guide, their aspirations face formidable impediments. "The System's" inertial resistance on the one hand, and its intractable self-propulsion on the other, inherently retard the pace and reach of any major reversals in federal regulation.

The diversity of stakeholders and multiplicity of fora baked deep into the fabric of national environmental policy almost guarantee that radical transformation of the EPA and environmental policy is not going to happen fast, if ever.

Looking back at the Reagan years, one is reminded, by illustration, that the most complex, far-reaching and perhaps most burdensome of all

federal environmental programs—the EPA's "cradle to grave regulation of 'hazardous waste'"—was promulgated during Reagan's first term.

Long-standing and newer regulations certainly can be changed, but doing so takes time and resources. Rescinding or amending current regulations requires going through the cumbersome notice and comment process dictated by the Administrative Procedure Act, which typically takes well over a year in noncontroversial cases.

Opponents can and will file comments that the EPA must address and overcome on credible grounds. Its final action to replace or rescind existing regulations will be subject to judicial review, generally before the U.S. Court of Appeals for the D.C. Circuit, currently comprised of seven Democratic appointees and four Republican appointees.

Environmental nongovernmental organizations (ENGOs) challenging Trump initiatives can thus expect a reasonable probability of drawing a receptive panel.

Panel compositions aside, to successfully defend each "deconstruction" (a new term put into use by White House chief strategist Steve Bannon) of existing regulations, the Trump-Pruitt administration will need to assemble a supportive administrative record. That takes time and the president's modus operandi to date plainly eschews the deliberative process (e.g., the hasty, original "immigration ban").

ENGOs have successfully challenged EPA regulations issued under every administration, and they have wasted no time taking on Trump's initiatives.

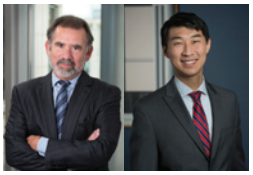
The Natural Resources Defense Council has already sued the government over its attempt to delay designating the rusty patched bumble bee an endangered species. And the resurrection of the Dakota Pipeline, efforts to unwind sweeping Obama climate change initiatives, and other promised reversals are certain to draw ENGO litigation firepower. We can also expect ENGOs to: enlist the courts to force the EPA to regulate where Pruitt wishes the EPA to step down; and employ "citizen suits" to enforce compliance with environmental laws and permits when the government does not.

Individual states are also sure to advance "pro-environmental" agendas. The California Senate just unveiled an "anti-Trump package" of environmental bills, which, if enacted, would, inter alia, "prohibit state or local agencies from amending or revising their rules and regulations .. to be less stringent than the baseline [i.e., current federal standards]." Other states with Democratic attorneys general may follow California's lead and be more aggressive in issuing environmental regulations, as New York's Attorney General Eric Schneiderman and other AGs have publicly stated.

Last, but certainly not least, we expect the plaintiffs' bar to be more active, suing where the federal government once regulated. Most federal environmental laws provide for attorney fees upon some level of litigation success. The prospect of diminished enforcement under the Trump administration would seemingly yield attractive toxic tort opportunities for the plaintiffs' bar.

Environmental regulation is not dead nor will it easily be slammed into reverse. While the authority wielded by Trump and Pruitt is considerable, our body politic and legal system recognize and empower judges, ENGOs, the states and private plaintiffs too. None of them have yet promised to reverse the tide of greater and more restrictive rules intended to protect the environment and public health.

In prognosticating what Trump and Pruitt may accomplish, we express no value judgment about the merits of changing the direction of environmental regulation and enforcement. We merely anticipate how the new administration's promised actions will precipitate opposing reactions that will create considerable blockages in the gears of change.



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