Wild Ride Ahead for Stakeholders Affected by Regulatory Changes

Ethan Shenkman is a partner in the environmental practice at Arnold & Porter Kaye Scholer LLP. He can be reached at ethan.shenkman@apks.com.

While some of the Trump administration's regulatory changes may be effected immediately through executive order, the most significant measures will need to grind their way through the administrative process and survive a gauntlet of legal challenges. As practitioners advise their clients on what to expect in this shifting landscape, a number of trends are beginning to emerge.

Incoming administrations naturally want to buy time to review their predecessors' positions and develop a strategy for implementing change. The Trump administration is no different, and the Justice Department has filed a flurry of requests to hold cases in abeyance and postpone hearings. Similarly, EPA and Interior have announced administrative stays of Obama-era regulations in the crosshairs, and proposed extending compliance deadlines.

What's notable is the growing number of court challenges to these delays. A variety of states, NGOs, and other stakeholders are challenging delays in implementing EPA's and DOI's oil-and-gas methane regulations; EPA's one-year delay for designating attainment areas under the 2015 ozone standards; the agency's 20-month delay of its facility accident prevention rule; and EPA's indefinite delay of the power plant effluent-limitation guidelines.

The path to regulatory reforms proposed by Trump is a bumpy and arduous road

In a significant development, the D.C. Circuit set aside EPA's 90-day stay of methane standards for new oil and gas sources, holding that it was reviewable because it was "tantamount to amending or revoking a rule" and not supported by the record. When DOJ asked the court to delay issuing its mandate for 52 days, the D.C. Circuit gave it only two weeks, to prevent EPA from running out the clock. Although a narrow ruling, it signals that the courts will take a hard look at agency justifications. Expect to see more decisions soon on the "power to delay."

Policymakers have significant discretion to change direction, but policy preferences are not the only dynamics at play. DOJ, for example, will also give consideration to long term institutional interests that transcend administrations. Nowhere was this more evident than in the Fourth Circuit's dismissal of a citizen suit brought against the Obama EPA by coal company Murray Energy. In January, the company had convinced a judge in West Virginia to issue a sweeping injunction requiring retroactive evaluations, under the court's continuing supervision, of the employment effects of all Clean Air Act regulatory actions impacting the coal industry, among others. These went beyond the analyses EPA normally conducts in major rulemakings.

What's interesting is not that the agency appealed, but that the appeal was blessed and vigorously argued by the current administration. As DOJ's new leadership has commented, whatever the current policy views may be on jobs and coal, the case presented separation-of-powers issues regarding the authority of district courts to issue broad "programmatic" relief in the context of mandatory-duty citizen suits — an interest that cuts across administrations. Practitioners should keep in mind the role that such interests play in government's litigation decisions.

On a number of fronts (beyond just health care), Trump is faced with the quandary of whether merely to repeal an Obama-era regulation, or to repeal and replace it with a new regulation. For example, EPA plans to withdraw the Clean Power Plan "on grounds that it exceeds the statutory authority provided under Section 111 of the Clean Air Act." But it has yet to indicate what it believes the scope of its authority is. Will the agency endorse a position that precludes any regulation of carbon emissions from existing plants, or will EPA seek to replace the CPP with a scaled-down program?

Similarly, with respect to the Waters of the United States rule, in which EPA and the Army Corps defined the phrase for purposes of Clean Water Act jurisdiction, the agencies must decide whether to repeal, or to repeal and replace. They proposed to rescind the Obama-era rule and to replace it with the previous definition. That proposal would, ironically, send the program back to the status quo that had existed since the Supreme Court last addressed the issue in its fragmented 2006 opinion in *Rapanos* — a status quo that few were happy with. While the administration has pledged to issue its own new-and-improved definition in 2018, observers are anticipating a heavy lift.

The administration has made numerous regulatory commitments on some complex issues, many of which will come due around the same time. There will likely be pressure to finalize the biggest and most controversial rules well before the next presidential campaign is in full swing, and if possible, with enough time so that the regulations can be defended in court by this administration's legal team. Practitioners should anticipate the potential for a regulatory bottleneck in 2019 and early 2020.