Grappling With "Power to Delay" as Regulations Undergo Changes

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"I understand entirely that a new administration needs time to figure out what it wants to do, [but] it is now November 9," D.C. Circuit Judge Karen L. Henderson informed government attorneys last fall. Environmental groups and industry had both challenged an EPA rule adopting a long-delayed Maximum Achievable Control Technology standard for hazardous air pollutants emitted by brick and tile manufacturers. Before the court could hear argument, the agency requested an indefinite abeyance of litigation while the agency reconsiders.

Judge David B. Sentelle acknowledged the new administration's prerogative, but questioned whether the court should stand idly by. "I don't see what we're taking away from you if we deny your motion." Even if the court upheld the 2015 rule, EPA could still change it. "You're not locked in for the entire future of mankind." Judge Patricia A. Millet bluntly added, "Don't you have some duty to act with exceptional urgency?"

Environmental law firm practitioners follow developments on a weekly basis, as the Trump administration seeks to revise or rescind dozens of environmental regulations. As we mark the administration's first anniversary, one thing has become clear — change takes time. The regulatory regimes are complicated, and Congress has imposed strict procedural mandates and deadlines. One question that practitioners are now confronting as they advise clients on what lies ahead: to what extent does a new administration have the ability to call a time-out to stay a court proceeding challenging a rule or implementation of the underlying rule itself while it navigates the reconsideration and rulemaking process?

Consider the saga of the Obama administration's hydraulic fracturing rule. A district court enjoined the rule soon after it was finalized in 2015, eventually holding that the Bureau of Land Management exceeded its statutory authority. The government appealed, but before argument Trump announced his intent to reconsider the rule.

Caught in a legal limbo, government lawyers had to walk a thin tightrope before the Tenth Circuit, attempting simultaneously to defend the Executive Branch's authority to regulate oil and gas activities on public lands, while preserving BLM's ability to reverse course on policy. The government wanted to keep its appeal live but held in abeyance, thus maintaining the lower court's injunction against the rule, while forestalling an appellate decision that could interfere with BLM's rulemaking process.

This "death defying" balancing act was too much for the court. It agreed not to decide the merits, but instead of continuing the abeyance, it dismissed the appeal and directed the trial court to vacate its opinion and injunction — an ironic result, potentially resurrecting the very rule that BLM wants to rescind.

Court cases could affect not only White House's agenda but future administrations'

The land agency's attempt to stay its methane rules met a similar fate. In June, BLM announced it was delaying compliance deadlines under the Obama-era waste prevention regulations, which had directed drillers to detect and repair leaks, and limit venting and flaring from wells on federal and tribal lands. BLM claimed authority under the Administrative Procedure Act, which allows agencies to postpone effective dates pending judicial review when "justice so requires."

Attorneys general from California and New Mexico were among those who challenged the postponement before Judge Elizabeth D. LaPorte, who struck it down as arbitrary and capricious. "A free pass for agencies to exceed their statutory authority and ignore their legal obligations under the APA" would make "a mockery of the statute."

Nor are these issues limited to EPA and BLM. In a new lawsuit, attorneys general from five states are challenging the Trump National Highway Traffic Safety Administration's authority to delay implementation of a prior rule increasing penalties for violations of fuel economy standards.

Meanwhile, EPA proposed a new rule to delay the effective dates of the Obama-era regulation defining the jurisdictional term "Waters of the United States" under the Clean Water Act, in case the existing judicial stay of that regulation is lifted before the administration can complete its two-phase rulemaking process to repeal and replace WOTUS.

Although the sheer number of "delay" cases winding their way through the courts is unprecedented, controversy over the power to delay is not new. In the Obama administration, for example, government lawyers sought abeyances and stays to buy time for their client agencies.

As law firm practitioners keep abreast of how courts grapple with these issues, they should keep in mind that new law on "the power to delay" could affect not only the Trump administration's regulatory agenda, but ground rules for future administrations as well.