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## **The Trump Transition and the Environment**

### ***Rumors and Realities***

The first weeks of the Trump Administration have seen a flurry of executive and congressional activity aimed at rolling back Obama era environmental protections. This should not be surprising, since on the campaign trail, Donald Trump promised to reign in the EPA, shrinking it in both size and scope. He promised to eliminate “job killing” regulations and “fast track” permits for critical infrastructure projects. Trump also campaigned on reversing course on many of President Obama’s environmental priorities, including those relating to climate change, energy development and the regulation of air and water pollution. <sup>i</sup> This paper describes some of the early actions of the new administration and what we can expect in the coming weeks and months ahead. It also describes some of the practical and legal challenges the Trump Administration will face as it tries to make good on its campaign promises.

Since the election, rumors have run rampant. Widespread cuts are feared as well as the purging of scientific information related to climate change that Trump administration officials have referred to as “propaganda.” In response to these rumors, scientists within EPA, and outside, have scrambled to preserve data thought to be most vulnerable, and environmental groups and lawyers have made FOIA and other requests designed to ensure the critical data and information is preserved. <sup>ii</sup>

With the appointment of Scott Pruitt to head EPA, we can begin to get a more concrete sense of what to expect out of EPA. He is a close friend and ally with the oil and gas industry, an advocate for a greater role for the states (and a diminished role for EPA) when it comes to environmental protection, and he has questioned EPA’s regulation of Greenhouse Gas emissions under the Clean Air Act.<sup>iii</sup> He has also spoken about streamlining the regulatory process and changing how enforcement works by integrating this function into the regulatory programs. <sup>iv</sup>

Below are some rumors – and some realities, explained:

**Rumor: EPA will be abolished.** Despite the fact that legislation has been proposed to abolish the EPA, and Myron Ebell, who led Trump’s EPA transition team suggested cutting 10,000 positions from EPA,<sup>v</sup> this will not likely be possible.

**Reality:** Approximately 15,000 federal employees work for EPA, and EPA’s budget currently stands at about \$8 billion, with a significant amount of this being granted directly to states to

support water and wastewater investments, environmental cleanup, and to implement the Federal environmental programs.<sup>vi</sup> States rely heavily on EPA partnership and funding to implement environmental programs in their states, and much of EPA's day-to-day work is required by law and relied on by the regulated entities. Drastic cuts to EPA would be very controversial and would require changes in law that may be difficult to get through Congress without considerable debate and possible filibuster, and that would most certainly be subject to litigation if passed.

**What to Expect:** Congress and the President can restrain the use of EPA authority through budget riders. Budget cuts will most certainly lead to the layoff of staff, and based on statements made by Pruitt so far, we can expect that many of these layoffs will be directed at the EPA's climate programs, but that, to a large degree, the state grants programs will remain intact.<sup>vii</sup>

1. **Riders.** In 2016 alone, the Republicans tried to attach many dozens riders to constrain the exercise of EPA's regulatory authority - from one in the Senate Interior and Environment Committee appropriation to prevent the implementation or enforcement of a particular threatened species listing<sup>viii</sup> (the lesser prairie chicken) to a rider in the House Interior and Environment Committee appropriation prohibiting EPA from requiring the reporting of greenhouse gas emissions from manure management systems and preventing the EPA from limiting pollution from livestock production under the Clean Air Act (note that agriculture accounts for nearly 10% of the US GHG emissions). We expect to continue to see riders used to constrain the exercise of agency authority.<sup>ix</sup>
2. **Budget cuts.** If Trump plans on making good on his promise to reduce Federal Spending by 2%, while increasing defense spending and preserving entitlement programs, it means that EPA will likely face significant budget cuts. That being said, more recently, Trump and Scott Pruitt indicated a commitment to preserving state grants. (About half of the EPA budget goes to the states) This makes sense since Pruitt's stated position, not unlike what we heard from the EPA's transition lead – Ebell, is that we should rely on the states to address and implement the nation's environmental laws, and get rid of redundant federal programs. <sup>x</sup> (Note, since some states have chosen not to implement some or all of the national environmental laws, this approach may be problematic.) In addition, a significant reduction in staffing levels and efforts to scale back EPA's mandate, and perhaps shift more of the responsibility to the states will have to be paired with amendments to our foundational environmental laws. This will be controversial and may be difficult to accomplish since these changes would need the support of at least 60 Senators to get cloture (to end debate, and bring the matter to vote.)

**Rumor: *The Office of Enforcement and Compliance Assurance (OECA) will be cut.***<sup>xi</sup> This may be true but not necessarily imminent.

**Reality:** Both Myron Ebell and Scott Pruitt have talked about moving civil enforcements out of a centralized office back to the related programs. In fact, this was the way enforcement worked under different administrations over time. The current system works well, particularly when the offense involves violations that relate to more than one program. However, the truth is, if an administration wants to have a lax enforcement approach, this will be the policy whether enforcement is in a separate office or not. Pruitt has also talked about giving the states a greater role in enforcement. This may offer an additional excuse for cutting staff from the enforcement division.

**What to expect:** As a practical matter, it is not so simple to eliminate the OECA. Congress will have to reflect the change in EPA's budget and there may be some rule and statute changes needed as well. In any event, the change in enforcement philosophy will mean that nongovernmental environmental organizations will likely exercise their right to bring citizen suits to force environmental compliance by the EPA, states and regulated entities.

**Rumor: *Obama's environmental legacy will be unraveled.*** During the course of the campaign President Trump promised to unravel many of the centerpieces of Obama's environmental legacy – most notably – those relating to climate change.

**Reality:** The new administration and the Republican Congress are moving quickly to undo some Obama era rules and policies; however, it is generally neither quick nor easy to accomplish significant change. Lawsuits can slow down and hamper these efforts, and the administrative rulemaking process requires a lengthy public process before rules can be amended or eliminated. This uncertainty will continue to impact market forces, particularly as it relates to new investments in energy exploration and production. That being said – here is what we have seen so far:

1. ***Congressional Review Act.*** The Congressional Review Act (CRA) (passed in 1996 as part of Newt Gingrich's Contract for America) created an expedited process for Congress, through joint resolution, to review and reject a new regulation.<sup>xii</sup> (It has not been used very often since the President must sign the resolution as well for it to be effective.) The process gives Congress an opportunity to review most rules before they become effective. If congress votes to reject the rule, and the President signs the decision, the CRA prohibits a substantially similar rule from being promulgated without Congressional approval.

Regulations adopted by the Obama Administration in the final six months of the administration are at risk of being overturned by Congress. So far, rules that have been targeted for revocation and have been acted on by at least one chamber of Congress include<sup>xiii</sup>,

- **Stream Protection Rule** – A Department of Interior Rule that requires a stream buffer to prevent pollution of streams and other drinking water sources. It is

directed at coal mining operations whose practices had resulted in coal mining debris polluting nearby streams.

- **Methane Gas Emissions Rule** – A Department of Interior Rule that limits “flaring” or burning off natural gas during drilling operations on public lands.
- **Planning Rule** – A Department of Interior Rule that created a more inclusive process when planning for land management on BLM lands.
- **Disclosure Rule** - In addition, a SEC Rule requiring oil, gas and mining companies to disclose payments from foreign governments (to help prevent corruption) was overturned.

**What to expect:** There are more rules being considered by Congress including rules that govern the management of and GHG emissions from Municipal Solid Waste Landfills, limits on Oil and Gas exploration on the Arctic Continental Shelf.

**2. Executive Orders.** As we saw with President Obama, Presidents can get a lot of things done (or undone) by issuing executive orders. An executive order (EO) is an instruction to the Federal Agencies about how to exercise executive authority in a particular area.

- **Permit Streamlining for High Priority Infrastructure Projects<sup>xiv</sup>** – This EO directs the administrative agencies to prioritize certain infrastructure projects (like the contentious natural gas pipelines) in their NEPA review. NEPA – the National Environmental Policy Act, requires federal agencies to evaluate the environmental and related social and economic impacts of major projects. It is likely that whoever drafted this EO for the new administration was not aware of the FAST Act a 2015 bipartisan bill that already does just about everything in the order, and to the extent that they differ, it may cause confusion and un-necessary delays. One difference is the new EO creates a process for the White House Council on Environmental Quality to designate projects that are to get expedited treatment as opposed to the new permitting council established under the FAST act.
- **Dakota Access and Keystone Pipeline Orders<sup>xv</sup>** – An EO was issued on February 8<sup>th</sup> to advance the Dakota Access pipeline. It directed the Army Corps of Engineers to end its environmental review and approve a key easement for the project. The tribe quickly filed a lawsuit contesting the easement arguing it crosses land that was unlawfully taken from them in 1944. Meanwhile, work to finish the pipeline is underway. The Keystone EO is somewhat simpler in that it invites the developer to resubmit the cross border permit application that was rejected by the Obama administration. This will restart a process that can take some time, but at its end, gives the President absolute authority to decide.
- **Two for One Order<sup>xvi</sup>** – This EO requires federal agencies to identify two existing rules for repeal for every new rule they issue, with the added requirement that agencies must balance out the cost of complying with the new rules by withdrawing rules with equivalent

costs. This order was immediately challenged by environmental groups that argue that it violates provisions in the Clean Air Act and the Clean Water Act that require EPA to issue rules to implement the statutory protections without regard to the additional considerations set out in the EO. The order, by its own terms shall be “implemented consistent with applicable law,” so the courts might find that it won’t apply to these and other statutory mandates that require rulemaking. The legal challenge also questions the requirement to offset the costs of the new rules arguing that it ignores the economic and other benefits of the new rules and the implementation guidance tells agencies not to consider existing costs of rule compliance when calculating cost offsets.

- **Regulatory Review Order**<sup>xvii</sup>- This EO requires federal agencies to designate “regulatory reform officers” and establish “regulatory reform task forces” with the goal of identifying existing regulations for repeal or modification. According to the EO, the Task Force shall “attempt to identify regulations that eliminate jobs, or inhibit job creation; are outdated, unnecessary, or ineffective; impose costs that exceed benefits; create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; are inconsistent with the Information Quality Act and its guidance or derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.” This EO will face a similar challenge as the Two-for-One order insofar as most of EPA’s regulations are required to implement statutory mandates.

**What to expect:** It is being reported that Trump is preparing executive orders to roll back a number of Obama’s environmental priorities.<sup>xviii</sup> These include executive orders related to:

- **The Clean Power Plan**, an EPA rule that limits greenhouse gas emissions from existing fossil fuel electric generating plants and will require states to develop detailed plans to reduce carbon emissions from these sources – or to offset emissions from these sources with the goal of reducing carbon pollution from the power sector by 32% from the 2005 levels by 2030<sup>xix</sup>
- **The Waters of the United States** is an EPA and Army Corp of Engineers Rule that clarifies the extent of Federal Clean Water Act jurisdiction as it relates to wetlands, and intermittent rivers and streams.<sup>xx</sup> The new rule was meant to address inconsistency among district court rulings. The new rule was immediately challenged and the 6th Circuit Court of Appeals, stayed implementation of the rule, until the case is decided.<sup>xxi</sup> It is widely expected that the Trump administration will formally revoke the rule. (The administration could instead decline to defend the regulation, but interveners in the case could keep the litigation alive.) Note that unless there is a change in the statute the jurisdictional confusion will continue until there is a new rule or court decision
- **Coal Leasing Ban**<sup>xxii</sup> the Bureau of Land Management’s moratorium on coal leasing to develop options that change lease royalty rates to take into account the cost of climate impact from burning coal.

- **Climate considerations in NEPA reviews** were added by the Obama administration as part of his government wide efforts to address Global Climate Change.<sup>xxiii</sup> We expect the new administration to walk back the requirement that all NEPA reviews consider climate impacts.

**3. Taking a New Position in Pending Court Cases.** A new Attorney General will have an opportunity to influence pending litigation. The following are some important cases that are in the works and what could happen to them. It is not unusual for courts to see if a new administration will reverse course through new rulemaking. Until that actually occurs though, even if the new Attorney General decides to abandon the defense of a particular case, other parties to the case will generally be able to keep the cases alive. In addition, any new rules or actions of the administration would be the subject of new legal challenges.

- ***West Virginia et al. v. EPA, et al.*** The U.S. Court of Appeals for the District of Columbia Circuit will be ruling soon on a challenge to the Clean Power Plan (CPP), the rule that regulates greenhouse gas emissions from existing fossil fuel burning power plants.<sup>xxiv</sup> It is not clear whether the new Administration will be able to stop the case or be able to change course before the decision is issued. It is widely expected that the Court will uphold the CPP and that a Supreme Court appeal would follow. Note that the US Supreme Court already determined that greenhouse gasses were air pollution that could be regulated under the Clean Air Act in *Massachusetts et al vs. Environmental Protection Agency* (U.S Supreme Court, July 26, 2007).

The new administration will likely take action to revoke or significantly weaken the CPP. Rulemaking is a lengthy process that includes opportunities for public comment and a requirement that EPA respond. That being said, if the case is appealed to the Supreme Court it is not clear what the court would do under this scenario. (For example the Court could find that the case is moot or remand it to the lower court for reconsideration.)

- ***North Dakota, et al. v. EPA, et al.*** This case challenges the rules that limit greenhouse gas emissions from new and substantially modified power plants.<sup>xxv</sup> While this case is fully briefed, it is not due to be argued in the DC Circuit until April 17<sup>th</sup>, giving the new Administration greater opportunity to ask for additional briefing so that they can change course, or to ask that the case be remanded back to the EPA to rescind and modify the rule.
- ***Murray Energy, et al. v. EPA, et al.***<sup>xxvi</sup> and ***Wisconsin, et al. v. EPA, et al.***<sup>xxvii</sup> are challenges to EPA's ozone standards. The Wisconsin case (also referred to as the "Sierra Club case") is of particular interest to Vermont because much of our air pollution comes from Midwestern coal-burning states and the challenge relates to a provision in the rule that requires state plans for attaining national ambient air quality standards (NAAQS) include provisions that prevent "emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS]."

**What to Expect: Reversing Climate Change Policy** – In 2007, the Supreme Court determined that EPA has the authority to regulate Greenhouse Gas emissions under the Clean Air Act if the EPA determines that these gasses threaten the public health and welfare.<sup>xxviii</sup> The Obama administration made the requisite determinations and then enacted a number of rules to address GHG pollution including the Clean Power Plan and other rules to limit carbon pollution from new and existing power plants, new fuel economy standards for cars and trucks, regulations on methane leaks from oil and gas drilling, and rules about GHG emissions from landfills.<sup>xxix</sup> These policies, combined with additional rules on which work had begun for additional sectors of the economy (including airlines and marine shipping) are the basis of the United States’ plan to meet our obligations under the Paris Climate Accord.

- **A new narrative on climate.** There is no question that the Trump Administration will be taking a new approach when it comes to climate change. We have already seen the administration back away from the position of outright denial that climate change exists and/or that it is caused by human activity. Instead, the new narrative is that “climate change is happening, and to some extent (we don’t know to what degree) it is caused by humans, and it is possibly creating some impacts. Because we can’t say with certainty whether a particular natural disaster (ex. drought, fire, floods) is due to climate change versus other natural causes, there is no basis for regulatory action.”<sup>xxx</sup> This narrative matters because under the Clean Air Act, before the EPA can regulate a pollutant it must determine that the pollutant will threaten the health and welfare of current and/or future generations (the “Endangerment” finding) and that the entity that is being regulated is responsible in whole or in part for the pollution which threatens the public health and welfare (the “Cause and Contribute” finding.)<sup>xxxi</sup>
- **Deregulation.** While the new administration might want to deregulate greenhouse gasses it will not be quick or easy. Because of the Supreme Court ruling, EPA will remain obligated to enforce some regulation of GHGs. If the new EPA administrator decides to revise the endangerment finding (as some observers predict) that will be made more difficult by the extensive scientific record developed by the Obama EPA, and it will be subject to legal challenge. Of course, it is possible for Congress to intervene and pass new legislation to strip EPA of authority to regulate Greenhouse Gasses (see HR 637). In the Senate, however, such a change would require a 60 vote majority for passage.
- **Social Cost of Carbon.** Another way the new administration can walk away from existing climate policy is by changing how they calculate the “social costs of carbon.” The Supreme Court decision *Michigan, et al. v. EPA et al.* provided that agency rules related to GHG pollution must consider costs. In order to estimate the positive value of a rule, EPA has measured the social cost of carbon. The social cost of carbon measures the cost in dollars of the long-term damage done by a ton of carbon dioxide (CO<sub>2</sub>) emissions in a given year. For example, the EPA estimated that the Clean Power Plan would produce climate benefits of up to \$29 billion in 2030, compared with costs of just \$8.4 billion.<sup>xxxii</sup>

Observers believe that Pruitt is likely to change how the social cost of carbon is estimated so that its value is reduced.<sup>xxxiii</sup> One way is to change how the benefits are calculated to take into account only those benefits within the United States. The current approach considers the global benefits of the rule.

- ***The Paris Climate Accord.*** Trump promised during his campaign to get the US out of the Paris Climate Agreement. Since Obama entered into the agreement using his executive authority (without going to Congress for ratification, as you would a treaty,) Trump, by executive order, could order the US withdrawal from the agreement. However, formal withdrawal requires a four year process to complete. It is more likely that the new administration will simply no longer participate in implementation negotiations and make no effort to meet the US commitment to reduce the nation's GHG emissions by 28% from 2005 levels by 2025.<sup>xxxiv</sup>

Even with the Trump Administration walking away from international agreements and working to reverse GHG rules, there will still be progress on climate in the US.<sup>xxxv</sup> Cities and States are already taking leadership roles, and many have entered into international agreements of their own committing to ambitious cuts in greenhouse gas emissions. For example, both New York and California Governors have pledged to reduce their states' GHG to 40 percent below 1990 levels by 2030.<sup>xxxvi</sup>

Businesses are also stepping up to the plate, making goals of carbon neutrality part of their corporate missions and urging the new administration not to withdraw from our global commitments.<sup>xxxvii</sup> And perhaps, most importantly the energy market has changed. Renewable energy is becoming cost competitive, and the renewable and energy efficiency industries have created millions of new jobs across the country.<sup>xxxviii</sup> Innovations in battery storage technology are anticipated to offer even greater opportunities to scale up investment in renewable energy. In addition, so long as natural gas remains inexpensive, it is unlikely that utilities will invest in new coal plants, or will invest in upgrading existing plants.

- ***Challenging California's Clean Car Rules.*** At the time the Clean Air Act was revised in 1977 to establish clean fuel standards for cars and light trucks, there was a concern that the new rule would be less stringent than emission standards already in place in California. Consequently, EPA granted a waiver to California, permitting it to adopt its own vehicle emission standards, and allowed other states to seek EPA permission to adopt the more stringent California regulations. 15 other states follow the California rules. The latest waiver was granted in 2013 and will be good until 2022 when the 2013 standards expire.<sup>xxxix</sup>

The California emission standards play a vital role when it comes to the US effort to curb carbon pollution. California is the 6<sup>th</sup> largest economy in the world. This means that their regulations influence the market. Auto manufacturers are developing new low emission and zero emission technologies to meet the California rules. Many states



besides California are counting on this new technology becoming more widely available. With emissions from the transportation sector counting for 25% or more of the GHG of the country, decarbonizing the nation's fleet will be essential if we are to achieve our state and national climate goals. For that reason, it is important to pay particular attention to whether the Trump EPA will attempt to roll back the California rules. It won't be simple or easy as it would require a lengthy rulemaking process and it would certainly be the subject of legal challenge.

- ***Climate Resilience/Adaptation.*** Most of the focus of the new administration has been on unwinding the Obama era rules and regulations related to reducing greenhouse gas emissions. There are some early indications that they will not be walking away from the requirement that federal agencies take into account possible climate related impacts, like sea level rise, as part of their planning – but we will know more in the coming weeks and months.

### **Conclusion:**

This is just the beginning of the new administration, and there is a lot we still don't know. What happens next will depend in part on whether Congress will take this opportunity to reverse course on major environmental laws, and whether the Democratic minority in the Senate will be able to hold them back. We will be looking to the courts to see how they will rule on important cases, like the challenge to the Clean Power Plan, as well as to challenges to actions taken by the new administration to reverse course on these and other rules. We have yet to see who Pruitt will bring in to help him run the EPA, and whether the career civil servants at EPA be able to successfully resist (or slow-walk) some of the changes in direction. <sup>xi</sup>

Former EPA Administrator Gina McCarthy, in an interview with the Washington Post shortly after the election, reminded us that many of the career employees at EPA have experience with transitions to a new administration. She observed that these employees understand that, with a new team in charge, there will be shifts in policy, but that, despite these changes, the work of the agency largely continues unchanged. She noted, "the need for clean air, water and land does not go out of style and is not limited to any one party." She went on to say that staff would do well to "keep focused on what they need to do today to protect public health and our precious natural resources."<sup>xii</sup> That may be good advice for all of us.

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[https://www.washingtonpost.com/news/energy-environment/wp/2016/11/21/epa-chief-trump-cant-halt-u-s-shift-to-clean-energy/?utm\\_term=.ca77e9bef240](https://www.washingtonpost.com/news/energy-environment/wp/2016/11/21/epa-chief-trump-cant-halt-u-s-shift-to-clean-energy/?utm_term=.ca77e9bef240)

<sup>xxxvi</sup> “States Will Lead on Climate Change in the Trump Era,” Editorial, New York Times, December 26, 2016.  
<https://www.nytimes.com/2016/12/26/opinion/states-will-lead-on-climate-change-in-the-trump-era.html>

<sup>xxxvii</sup> Hiroko Tabuchi, “U.S. Companies to Trump: Don’t Abandon Global Climate Deal” New York Times, November 10, 2016. <https://www.nytimes.com/2016/11/17/business/energy-environment/us-companies-to-trump-dont-abandon-global-climate-deal.html>

<sup>xxxviii</sup> <https://energy.gov/articles/doe-releases-first-annual-national-energy-employment-analysis>

<sup>xxxix</sup> <https://www.epa.gov/regulations-emissions-vehicles-and-engines/california-greenhouse-gas-waiver-request>.

<sup>xl</sup> For a good post election analysis of what might come, see Jody Freeman, “Implications of Trump’s Victory and the Republican Congress for Environmental, Climate and Energy Regulation: Not as Bad as it Seems?” Environmental Law Program, Emmett Clinic, Policy Initiative, November 10, 2016.  
<http://environment.law.harvard.edu/postelection/>

<sup>xli</sup> Brady Dennis, “EPA chief: Trump can’t halt U.S. shift to clean energy,” Washington Post, November 21, 2016.  
[https://www.washingtonpost.com/news/energy-environment/wp/2016/11/21/epa-chief-trump-cant-halt-u-s-shift-to-clean-energy/?utm\\_term=.ca77e9bef240](https://www.washingtonpost.com/news/energy-environment/wp/2016/11/21/epa-chief-trump-cant-halt-u-s-shift-to-clean-energy/?utm_term=.ca77e9bef240)