Updates on Litigation and Policy Changes Under the Trump Administration

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• This presentation is educational and does not constitute legal advice or legal opinions based on specific facts

• Please consult an attorney before acting on any information discussed or referenced in this presentation
Presentation Overview

• Did you hear about the 2016 election?
• Approaches for instituting reform
• Review key changes impacting Clean Air Act permitting, compliance, and enforcement
• Some useful reminders
Did you hear about the 2016 election?

• The transition from President Obama to President Trump has—to the surprise of nobody—resulted in different policy priorities (i.e., read “reversals”)

• The Trump Administration has used a number of methods to promote its goals, with mixed results

• This presentation focuses on the strategies employed to shape environmental litigation and policy, focusing on the Clean Air Act
The Trump Approach

- Liberate the economy from burdensome environmental regulation and enforcement
  - Minimizing federal regulatory interference
  - Scale back federal enforcement

- Hitting “reset” on cooperative federalism, with an emphasis on state rights and responsibilities

- When in doubt, ask “what would President Obama do,” and then pursue the opposite
Different Strokes

• President Trump: Mandate

• Former EPA Administrator Pruitt: Identify the desired outcome (using blunt force)

• Current EPA Administrator Wheeler: Work within the system in place (using finesse)

• EPA Assistant Administrator (OAR) Wehrum: Learn from past efforts and strategically work within the current system to effect change

• Similar savvy from OECA head Susan Bodine
Varied approaches to instituting reform

- Allocation of resources (i.e., budgets)
- Oversight of state and local agencies
- Positions taken in litigation and petitions
- Rulemaking
  - Changing course (Utility NSPS, WOTUS)
  - Speeding up (e.g., RTRs and NAAQS)
- Policies and guidance
- Doing nothing  わ(ツ)／
Key changes impacting Clean Air Act practitioners (like us!)

Among the many options, we will focus on:

- Federal enforcement
- Policy reforms
- NAAQS program issues
So, for today, we are skipping over:

- The Paris Agreement (climate accord)
- The Clean Power Plan repeal
- MATS and CSAPR policy shifts
- Regulating oil-and-gas operations
- Federal motor vehicle standards
- California’s motor vehicle standards
- Updates for self-disclosed violation policies
- The back-and-forth over issuance of § 114 info requests (HQ v. regional)
- The back-and-forth over sue-and-settle consent decrees
- Limiting the use of guidance documents to drive enforcement
- Tax policy for environmental compliance vs. penalty costs
- Reforms to Cost-Benefit analyses
- DOJ policies regarding compliance tools CDs
- Various other Executive Orders
- Game of Thrones fallout or theories
- Discussing time travel in the MCU
Key Changes – Federal Enforcement

• Drastic reduction in new enforcement cases brought by EPA
  – EPA HQ now reviews any EPA Region request for a DOJ referral (3/23/18 Bodine Memo)
  – National Enforcement Initiatives moving to National Compliance Initiatives (8/21/18 Bodine Memo)
  – Unclear how ongoing “reorganization” at EPA Regions will impact
Key Changes – Federal Enforcement

• Existing CAA cases reflect a mixed bag
  – Greater leniency reflected in some settlement negotiations (Harley)
  – NSR litigation positions seem static
    • Ameren Missouri - 8th Circuit CoA
    • Luminant Generation – 5th Circuit CoA

• Possible reversal on Obama-era SIP Call to eliminate SSM affirmative defenses

• RMRR guidance this summer?
Key Changes – Federal Enforcement

- The “cooperative federalism” mandate has extended deference to enforcement
- More coordination and local deference
  - 1/22/18 Bodine Memo ("the EPA will generally defer to authorized States as the primary day-to-day implementer of their authorized/delegated programs")
  - 10/30/18 Wheeler Memo ("general deference to states and tribes in state- and tribal-implemented programs")
Key Changes – Policy Reforms

• 12/7/17 Pruitt Memo re NSR “Actuals” Test
  – Post-project emission management ok
  – Focus on post-project actual emissions
  – “Predominant cause” to link emissions
  – No second guessing a company’s projections (absent “clear error”)

• 3/13/18 Pruitt Memo re NSR Project Emissions Accounting (f/k/a “project netting” in Hovensa)
  – Step 1 vs. Step 2 netting (enforceable)
  – Project definition critical
Key Changes – Policy Reforms

- “Common control” again means actual control, not mere influence or control of an “activity”
  - 4/30/18 Meadowbrook letter (to PaDEP)
  - 10/16/18 Ameresco letter (to WDNR)

- Adjacency in 9/4/18 Wehrum DRAFT memo
  - Physical proximity (except for O&G - ¼ mile)

- Once-In, Always-In – 1/25/18 Wehrum Memo

- Title V challenges now limited from reaching the merits of prior construction permits (no 2nd bite)
Key Changes – NAAQS Program Issues

• Streamlining goals
  – 4/12/18 Trump memo (“Promoting Domestic and Job Creation ...”)
  – 5/9/18 Pruitt memo (“Back to Basics”)

• Accelerated NAAQS reviews
  – Completed 5-yr reviews (kept primary NO\textsubscript{2} & SO\textsubscript{2} NAAQS)
  – But CASAC pushback on PM\textsubscript{2.5} review
Key Changes – NAAQS/Ozone Issues

• Ozone and PM2.5 SILs Memo
  – 4/17/18 Tsirigotis Memo + legal back-up

• 12/6/18 Ozone Implementation Final Rule at 83 Fed Reg 62,998

• Greater flexibility proposed by EPA for evaluating outside impacts
  – Beyond exceptional events – 4/4/19 memo
  – Background/International – § 179b(b)
Some useful reminders

- States are generally free to regulate more strictly than the federal government
  - But note Michigan’s “No Stricter Than Federal” law
  - Compare AQD-022, which often “requires” air dispersion modeling that is not required by federal law
  - How may EGLE differ from the MDEQ in its views?

- Federal rules must reach administrative completeness and survive judicial review in order to truly take lasting effect

- Federal policies may have a short shelf life given the 2020 presidential election, so ...
One last reminder …

“You can’t keep the Democrats out of the White House forever and when they get in, I’m back on the streets!”

- Sideshow Bob, *The Simpsons*
Questions?

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