

## Environmental Highlights From Trump's First 100 Days

By **Juan Carlos Rodriguez**

*Law360, New York (April 26, 2017, 6:30 PM EDT)* -- President Donald Trump has focused much of his attention on environmental matters thus far into his first 100 days in office, steering regulatory agencies away from the Obama administration's priorities, beginning the process of rolling back major regulations and proposing steep budget cuts for the U.S. Environmental Protection Agency.

Here are several important actions taken by the Trump administration, Congress and environmentalists with the new president's 100th day in office quickly approaching.

### Regulatory Reform Executive Orders

With executive orders in January and February, Trump yanked the leash on executive agencies' regulatory work, instructing them to eliminate two existing regulations for every new one and requiring them to create "regulatory reform task forces" tasked with reviewing existing regulations with an eye toward repealing, replacing or modifying those that are "burdensome and harmful to the economy."

Brian Israel, a partner at Arnold & Porter Kaye Scholer LLP and chair of the firm's environmental practice group, said it's clear the Trump administration is focused on reducing regulatory burdens on companies. He noted that administration officials, including EPA Administrator Scott Pruitt, have also talked about returning regulatory power to states. But he said there are some inconsistencies between those philosophies that has created a degree of uncertainty.

"The uncertainty stems from the fact that there's nothing that guarantees that returning power back to the states would lead to a decrease in the regulatory burden on companies or a lowering of environmental standards," Israel said. "In fact, many states have made it very clear they intend to fill the regulatory void in terms of environmental standards and environmental enforcement."

Many stakeholders would prefer a more stringent standard that is uniform across the country than have individual sets of guidelines or requirements in each state, Israel added.

### EPA Budget

In March, Trump proposed slashing the EPA's budget by \$2.6 billion, or nearly one-third of its current funding. Congress did not react enthusiastically to the proposal and can exercise its power to create its own budget, but the administration sent a clear message about its priorities for the agency. Areas like enforcement and scientific research would be drastically reduced, and 3,200 employees would lose their jobs under Trump's plan.

Some cheered the budget proposal as a fulfillment of Trump's campaign promise to scale back an EPA that has been seen, in some corners, as heavy-handed. But others, including environmental groups, lambasted the White House, saying it is abdicating its responsibility to ensure the protection of human health and the environment.

"The budget is an illustration of Trump's failure to protect health and the environment," said Liz Perera, the Sierra Club's director of climate policy. "He's proposing huge cuts to EPA's core functions. He's taking the cops off the beat who are in charge of making sure polluters don't pollute our children and our communities. He has shown complete disregard for the importance of protecting the environment and instead has sided with polluters."

### **Energy Executive Order**

In a March executive order, Trump directed Pruitt to review the Clean Power Plan — the Obama EPA's effort to slash carbon dioxide emissions from existing power plants that Pruitt sued to stop as Oklahoma attorney general — as well as companion regulations that mandate carbon dioxide emissions reductions at new and modified power plants.

The order rescinds finalized guidance issued by former President Barack Obama's Council on Environmental Quality on how federal agencies should conduct greenhouse gas emission analysis in their National Environmental Policy Act-mandated reviews. It rolls back Obama's entire Climate Action Plan, of which the CPP is only a part, and it withdraws a mandate that the government consider the social cost of carbon when calculating the economic costs of climate change that are factored into new regulations.

Tom Lorenzen, a partner at Crowell & Moring LLP, said getting rid of the CPP will be a long, tough haul for the Trump administration. He said there are some routes the administration can pursue to try to unwind the rule that may be easier to achieve but would leave some form of regulation in place, a tradeoff that he said the administration may be unwilling to make.

"The things it would have to do if it doesn't want any regulation in place are heavy lifts," Lorenzen said. "There are a number of different options, and all of them have risks associated with them, and all of them will take significant time to implement."

### **Clean Water Rule and Pipeline Orders**

In February, Trump directed the EPA and the U.S. Army Corps of Engineers to propose a new rule

rescinding or revising the Clean Water Rule, also known as the Waters of the United States rule, which defines federal permitting jurisdiction under the CWA.

The Obama administration rule aimed to clarify federal permitting under the Clean Water Act, but opponents including several states and industry groups have challenged it. Appellate-level challenges were consolidated at the Sixth Circuit, which stayed the rule and said in a 2-1 ruling in February 2016 that appellate courts — not district courts — have sole jurisdiction. That litigation is on hold pending a decision from the U.S. Supreme Court.

Earlier this month, the Supreme Court rejected the Trump administration's request to halt an appeal over the rule while the EPA reviews the controversial regulation.

Trump also unshackled the Keystone XL and Dakota Access oil pipelines, controversial projects whose progress was slowed by Obama amid fierce resistance from tribes and environmental groups, in January executive orders.

In February, the Army Corps of Engineers executed an about-face and issued an easement to Dakota Access, allowing the project to proceed. And in March, the U.S. Department of State flip-flopped and approved construction of the pipeline.

### **Congressional Actions**

Congressional Republicans have taken advantage of a friendly, bill-signing pen in the White House and passed several environmentally focused Congressional Review Act measures, including the U.S. Department of the Interior's Stream Protection Rule, which aimed to minimize coal mining's harm to surface water and groundwater. The House has also passed a CRA resolution that would eliminate the U.S. Bureau of Land Management's rule that would limit the venting and flaring of methane from oil and gas operations on public and tribal lands, but its fate is uncertain in the Senate.

Aside from CRA actions, the House has passed a few bills, all of which are pending in the Senate, that would have serious impact on environmental policy.

For example, the Regulatory Accountability Act would require agencies to choose the lowest-cost rulemaking, "repeal" the Chevron deference and require agencies to account for the direct, indirect and cumulative impacts of new regulations on small businesses.

The Regulations from the Executive in Need of Scrutiny Act would allow Congress to hold an up-or-down vote on any major rule or ruling from an agency, meaning those that affect more than \$100 million in commerce.

And the Midnight Rules Relief Act would amend the CRA to allow Congress to disapprove multiple regulations at once, rather than the current process, which only allows one regulation at a time.

## **Litigation Delays**

The highest-profile litigation delay sought by the Trump administration is for the CPP. Oral arguments were held in the case in September before an en banc D.C. Circuit, but the U.S. Department of Justice has asked the court to hold off on issuing an opinion so the EPA can review and possibly rescind or revise the plan in accordance with Trump's executive order.

But the administration has also sought to hold in abeyance a slew of other cases revolving around challenges to regulation, including on ozone standards, mercury standards, methane standards and effluent standards for power plants. Most of those requests have been granted by the courts. It also asked the Supreme Court to delay a ruling on a jurisdictional question related to the Clean Water Rule, but that request was denied.

"There have been a number of requests to hold pending litigation in abeyance while the agency gets its arms around the rules, and that makes a lot of sense because this administration didn't do these rulemakings," said Megan Berge, a partner at Baker Botts LLP. "The last administration did the same thing."

## **Opposition From Environmentalists**

Earthjustice, the Natural Resources Defense Council, the Sierra Club and many other environmental groups have already started fighting back against Trump's policies in court.

Public interest legal groups in February sued the Trump administration, alleging the "two-for-one" executive order is "irrational" and puts public safety at risk by not considering any beneficial effects of new rules.

David Goldston, the NRDC's director of government affairs, said his group sued over the order because it's an effort to "sideline the regulatory system."

"It makes it harder for new safeguards to be put in place, and it creates illegal and destructive tradeoffs where, to deal with a new problem, you have to pretend that an existing problem no longer is of concern," Goldston said.

Environmental groups have also fought against many of the court delays sought by the administration, and the Center for Biological Diversity recently filed a lawsuit challenging a CRA measure that repealed a rule that restricted hunting practices such as baiting bears with food and shooting wolves and bears from aircraft on certain federal lands.

"The administration has issued attack after attack on environmental protections across the board in its first 100 days," Goldston said. "The president's made these grand gestures, but it will take months if not years to accomplish them, and we expect that we will be able to block many of these rollbacks because they are counter to law and science."

## **Other Highlights**

In March, the leaders of the EPA and U.S. Department of Transportation said they will revisit Obama-era standards on greenhouse gas emissions for 2022 to 2025 model cars and light trucks, a win for automakers that said the standards were too tough to meet.

The announcement was a rebuke to the Obama administration's efforts to reduce greenhouse gas pollution from the transportation sector and deal with climate change, and again shows the Trump administration's commitment to easing regulatory obligations on industry.

Also in March, Pruitt shot down environmentalists' bid to shelve an agricultural pesticide that the Obama administration had recommended be banned over concerns about its effect on children's brains.

The Pesticide Action Network North America and Natural Resources Defense Council had petitioned the EPA to ban all uses of chlorpyrifos, which the groups said is linked to increased risks of behavioral problems and learning disabilities.

Chlorpyrifos, a chlorinated organophosphate insecticide, is commonly used on food crops, including small fruits and vegetables like strawberries, apples and broccoli. It was outlawed in home and garden uses in 2000.

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