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CLIENT ALERT

Trump: The First Year - Deconstruction of the Administrative State Stymied by the D.C. Circuit

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Introduction

Nearly eight months into the Trump administration, the Executive Branch continues to roll back Obama-era regulations and policies. As we have discussed, this process is more onerous than one might expect. And recently, in addition to the already burdensome administrative process, the D.C. Circuit has been making the administration's job considerably harder.

Below we highlight three such opinions from that court:

1. Rejecting EPA's attempt to stay the effective date of a new Clean Air Act methane rule;
2. Allowing states to intervene to defend more stringent Clean Air Act ozone National Ambient Air Quality Standards; and
3. Allowing states to intervene to defend Obamacare cost-sharing payments.

Methane Rule

In May 2016, the Obama EPA promulgated a first-of-its-kind rule requiring the oil and gas industry to drastically curb methane emissions from their operations. Legal challenges soon followed. But the advent of the Trump administration brought with it the potential for changes to the rule, if not a wholesale rollback. Since April, when EPA Administrator Scott Pruitt announced an intention to reconsider the rule, it has seen more than its share of drama. In June, EPA administratively stayed the rule under a Clean Air Act provision allowing a stay of effectiveness for reconsideration in certain circumstances. The D.C. Circuit summarily reversed that stay in early July, finding that EPA failed to demonstrate that the stay was justified under the statute EPA invoked. Then, on July 31—the same day that environmental groups requested that the three-judge panel issue its mandate, i.e., requiring its ruling reversing the administrative stay to go into effect—the full Court (sitting *en banc*) granted the request in a 9-2 decision without issuing a detailed opinion and ordered the mandate to issue. In both striking down EPA's attempt to stay the effective date of a prior administration's rule and requiring its ruling to take effect without delay, the D.C. Circuit removed one tool from EPA's toolkit and made plain that the Trump administration's efforts to deconstruct the administrative state will face close judicial scrutiny and likely must proceed through lengthy notice-and-comment processes.

Ozone NAAQS

In 2015, EPA promulgated a stringent new standard for ozone, and again, litigation ensued. On April 11, 2017, the D.C. Circuit granted the Trump administration's request to indefinitely stay oral argument. Then, on July 6 — nearly two years after the rule was promulgated — a group of states that had submitted an amicus brief in support of EPA's 2015 ozone NAAQS moved to convert their status to intervenors, arguing that EPA no longer adequately represented their interests. Such late interventions are rarely granted. Yet, after full briefing on the issue and over the opposition of both EPA and the petitioners, the D.C. Circuit granted the motion without a detailed explanation. But the stay of oral argument remains in effect, and the case is likely to be

mooted if EPA takes final action to revise the NAAQS, so it is too soon to tell what if any effect intervention will have.

Meanwhile, on June 6, the Trump administration extended the deadline for EPA to promulgate initial area designations for the 2015 ozone NAAQS—an action that, once finalized, declares whether areas are in compliance with the standards and triggers mandatory remedial action—by one year, from October 1, 2017 to October 1, 2018. Environmental and public policy groups challenged that delay soon after, followed by a challenge from a coalition of states on August 1. On August 2, EPA reversed course and decided to adhere to the original deadline of October 1, 2017, for initial area designations, finding the information gaps it had previously believed warranted a delay to not be prohibitively extensive. Nothing prevents EPA from delaying the deadline again at a later time, though, so the saga may well continue.

Affordable Care Act

The environmental arena is not the only area of focus for the new administration's deregulatory push. To the contrary, Obamacare is another big target, beyond Congress's Sisyphean quest to repeal it. Last year, the U.S. House of Representatives sued the Obama administration's Department of Health and Human Services to invalidate a key appropriation for cost sharing benefiting states participating in the Affordable Care Act's insurance exchanges. The U.S. District Court in D.C. ruled in the House's favor, finding that HHS's interpretation of appropriations law was incorrect, and enjoined continued cost-sharing payments, but stayed the injunction pending appeal. Although the Obama administration vigorously defended the cost sharing, the Trump administration has made no such promises. Instead, the Trump administration has indicated a willingness to settle with the Legislative Branch, which is where a bipartisan coalition of states and the District of Columbia come in. In May 2017, after the case reached the D.C. Circuit, affected states moved to intervene to protect their interests in maintaining health insurance coverage for their citizens—a rare move reflecting the seriousness of the federal government's apparent shift in position. After full briefing on the matter, the D.C. Circuit granted the post-judgment motion to intervene, finding that the states have standing to intervene, that the motion was timely given the recent developments, and that the states "raised sufficient doubt concerning the adequacy of the Department's representation of their interests." Slip Op. at 1–3. The litigation is still on hold, however, so the immediate impact of intervention is unknown. What we can say is that, in two significant cases and despite a federal rule that disfavors late intervention, the Court is allowing states to intervene in cases to defend rules that the new administration may no longer support.

Conclusion

The Trump administration is attempting to make good on its campaign promises regarding the deconstruction of the administrative state. Although it is continuing to learn how difficult that may be, we are still in the early days of the administration. The lessons learned now may inform how agencies proceed, resulting in successful revisions or reversals of prior actions.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

David Chung
Partner – Washington, D.C.
Phone: +1 202.624.2587
Email: dchung@crowell.com

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Elizabeth B. Dawson
Counsel – Washington, D.C.
Phone: +1 202.624.2508
Email: edawson@crowell.com