

Regulatory Reform: Current Perspectives

Jane C. Luxton, former General Counsel,
National Oceanic and Atmospheric Administration
U.S. Department of Commerce;
Member, Clark Hill PLC
Washington, D.C.
Lakewood, CO

REGULATORY REFORM: CURRENT PERSPECTIVES

By Jane C. Luxton

Presidents as far back as Jimmy Carter¹ – and every one since – have championed the cause of regulatory reform to reduce the economic burden of unnecessary regulation, but none have made it a higher priority than the Trump Administration. On his first day in office, President Trump issued a Presidential Memorandum freezing all new regulations,² and within a week adopted another on “Streamlining Permitting and Reducing Regulatory Burden.”³ Multiple Executive Orders followed, along with the harder work of implementation across the federal government, all aimed at “deconstruction of the administrative state,” in the colorful language of Presidential advisor Steve Bannon.⁴ A status check two years later reveals a mixed bag of results: many new rules stopped cold, some regulations reversed, a number of deregulatory actions mired in litigation, additional change delayed by a government shutdown and likely to face increased Congressional oversight, and a sense of urgency on the part of the Administration to complete as much as possible before the next election.

Rollout and Subsequent Steps

Clearly prepared to hit the ground running, the Trump Administration moved from its Inauguration Day freeze on any non-finalized regulations to a January 24, 2017, Memorandum directing

¹ See, e.g., M. Welch, “Democrats These Days Hate Deregulation, but Once Upon a Time They Loved It,” *Los Angeles Times*, Feb. 8, 2018, available at <http://www.latimes.com/opinion/op-ed/la-oe-welch-deregulation-carter-20180208-story.html>. President Carter’s first State of the Union Address stressed his commitment to this objective: “Bit by bit we are chopping down the thicket of unnecessary federal regulations by which government too often interferes in our personal lives and our personal business.” *State of the Union Address* by President Jimmy Carter, Jan. 19, 1978, available at: <https://www.presidency.ucsb.edu/documents/the-state-the-union-address-delivered-before-joint-session-the-congress-1#axzz1kO7MUBd5>.

² *Memorandum for the Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review*, Jan. 20, 2017, 82 Fed. Reg. 8346 (Jan. 24, 2017). For a compilation of Trump Administration regulatory reform initiatives, analysis, and other resources, see <https://www.clarkhill.com/contents/regulatory-reform>.

³ *Memorandum on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing*, Jan. 24 2017, 82 Fed. Reg. 8667 (Jan. 30, 2017).

⁴ P. Rucker and R. Costa, “Bannon Vows a Daily Fight for ‘Deconstruction of the Administrative State,’” *Washington Post* (Feb. 23, 2017), available at https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html?utm_term=.686a10366e5e.

The views expressed in this paper are solely those of the author (or authors).

Please cite as: Jane C. Luxton, “Regulatory Reform: Current Perspectives,” *Natural Resources Development and the Administrative State: Navigating Federal Agency Regulation and Litigation* 7C-1 (Rocky Mt. Min. L. Fdn. 2019).

the Secretary of Commerce, in consultation with relevant federal agencies, to initiate a process of outreach and comment solicitation on changes the federal government could make to streamline permitting and reduce regulatory burdens on domestic manufacturing.⁵ On the same day, reinforcing a campaign promise to rebuild infrastructure, the White House issued Executive Order (“EO”) 13766 on *Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects*,⁶ which created a high-level interagency task force to designate “high priority” infrastructure projects and put them on a fast track, with expedited procedures and deadlines for completion of environmental reviews and permit approvals.

In quick succession, the Administration released a series of EOs operationalizing government-wide regulatory reform initiatives. On January 30, the President signed EO 13771 on *Reducing Regulation and Controlling Regulatory Costs*, which required that for every new regulation promulgated, two must be revoked, and that the incremental cost of any new regulation had to be offset by elimination of the costs of at least two existing rules.⁷ For fiscal year 2017, the net total regulatory cost increase for each agency could not exceed zero; for the following year, allowable incremental cost increases were to be set by the Office of Management and Budget (“OMB”).

On February 24, the follow-on EO 13777 on *Enforcing the Regulatory Reform Agenda* created mechanisms and accountability to make sure federal agencies carried out the mandates of EO 13771.⁸ The new directives required each agency to appoint a Regulatory Reform Officer responsible for implementing EO 13771 within 60 days and establish a Regulatory Reform Task Force charged with identifying regulations that should be repealed, replaced, or modified. The Task Forces were instructed

⁵ Memorandum on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing, see note 3 *supra*.

⁶ EO 13766, *Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects*, Jan. 24, 2017, 82 Fed. Reg. 8657 (Jan. 30, 2017).

⁷ EO 13771, *Reducing Regulation and Controlling Regulatory Costs*, Jan. 30, 2017, 82 Fed. Reg. 9339 (Feb. 2, 2017).

⁸ EO 13777, *Enforcing the Regulatory Reform Agenda*, Feb. 24, 2017, 82 Fed. Reg. 12285 (March 1, 2017).

to focus on regulations in a number of categories: those that eliminate jobs, are outdated or ineffective, impose costs that exceed benefits, create regulatory inconsistencies or interfere with regulatory reform objectives or policies, rely on data that is not publicly available or reproducible, or derive from EOs or Presidential directives from a previous Administration that have been overridden or modified. Initial Task Force reports were due in 90 days.

To help agencies deal with the new requirements, OMB issued interim guidance on February 2, 2017,⁹ and a final version on April 5,¹⁰ laying out the cost savings calculations and other methodologies to be used in implementing EO 13771. OMB provided additional guidelines on March 6, 2017,¹¹ for agencies to use in stating their regulatory plans in the upcoming – and newly renamed – *Unified Agenda of Federal Regulatory and Deregulatory Actions*, which formerly covered only new regulation. The new approach required agencies to submit a preliminary estimate of total costs and savings associated with each new rule expected for fiscal year 2018.

In response to the Presidential directives to the Commerce Department and agencies to identify regulations to be modified or eliminated, virtually every federal regulatory authority launched broad requests for comments, resulting in thousands of submissions over the ensuing months. Most agencies declined to publish their assessments of recommended changes, but the Commerce Department issued its required report in October 2017¹² identifying the top 20 regulatory targets for action, 14 of which – and nine of the top ten – were rules promulgated by the Environmental Protection Agency (“EPA”).

⁹ *Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled “Reducing Regulation”*. https://www.whitehouse.gov/sites/whitehouse.gov/files/briefing-room/presidential-actions/related-omb-material/eo_interim_guidance_reducing_regulations_controlling_regulatory_costs.pdf.

¹⁰ *Guidance Implementing Executive Order 13771, Titled “Reducing Regulation and Controlling Regulatory Costs”* (April 5, 2017), available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>.

¹¹ *Memorandum: Spring 2017 Data Call for the Unified Agenda of Federal Regulatory and Deregulatory Actions* (March 6, 2017), available at <https://www.whitehouse.gov/presidential-actions/memorandum-spring-2017-data-call-unified-agenda-federal-regulatory-deregulatory-actions/>.

¹² *Streamlining Permitting and Reducing Regulatory Burden for Domestic Manufacturing* (Oct. 6, 2017), available at https://www.commerce.gov/sites/default/files/streamlining_permitting_and_reducing_regulatory_burdens_for_domestic_manufacturing.pdf.

In other actions, the White House took aim at particular programs in the environmental and energy arenas that it condemned as unnecessarily burdensome. EO 13778, on *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States Rule,”*¹³ required the EPA Administrator and Secretary of the Army for Civil Works to review and reconsider the 2015 Obama Administration “WOTUS” rule that imposed an expansive interpretation on the scope of federal versus state jurisdiction under the Clean Water Act.¹⁴ EO 13783 on *Promoting Energy Independence and Economic Growth*¹⁵ instructed agencies responsible for regulating domestic energy production to submit plans to identify and remove regulatory barriers to U.S. energy independence and increased production. The order also directed revocation of the previous Administration’s climate-change focused Clean Power Plan and prohibited use of the “social cost of carbon” to estimate climate-related impacts of federal actions. EO 13795, titled *Implementing an America-First Offshore Energy Strategy*,¹⁶ charged the Secretaries of Interior and Commerce to take steps to encourage offshore energy production, opening up more of the Outer Continental Shelf to energy development and reversing the previous Administration’s ban on offshore leasing in the Arctic. Another EO, on *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*,¹⁷ followed on August 15, announcing the Administration’s signature “One Federal Decision” policy and goal of completing environmental reviews on infrastructure projects within two years of an initial notice, a further step in coordinating and expediting the federal permitting review process.

¹³ EO 13778, *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States Rule*, Feb. 28, 2017, 82 Fed. Reg. 12497 (March 3, 2017).

¹⁴ 33 U.S.C. §§ 1251 et seq.

¹⁵ EO 13783, *Promoting Energy Independence and Economic Growth*, March 28, 2017, 82 Fed. Reg. 16093 (March 31, 2017).

¹⁶ EO 13795, *Implementing an America-First Offshore Energy Strategy*, April 28, 2017, 83 Fed. Reg. 20815 (May 5, 2017).

¹⁷ EO 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*, Aug. 15, 2017, 82 Fed. Reg. 40463 (Aug. 24, 2017).

On a parallel track, the Republican-led Congress infused new life into the previously little-used Congressional Review Act (“CRA”),¹⁸ which allows Congress to disapprove federal rules within 60 legislative days of promulgation and prevents the proposal of any “substantially similar” new regulation in the future. In the first year of the Trump Administration, the House and Senate acted to overturn more than a dozen final rules, mostly environmental and energy regulations finalized in the last days of the Obama Administration. These included rules on stream protection that restricted coal mining, land use planning requirements viewed as impeding energy development, and prohibitions on drilling in the Arctic National Wildlife Refuge.¹⁹

Results of Regulatory Reform Initiatives

The Administration released statistics on the results of its regulatory reform efforts in its first two years in office. At the end of 2017, the White House reported that federal agencies had issued 22 deregulatory actions for every new regulatory rule (67 deregulatory actions – including CRA rule revocations – measured against a total of three new rules) and had achieved \$8.1 billion in lifetime net regulatory cost savings the equivalent of \$570 million per year.²⁰ Fiscal Year 2018 figures claimed an even larger \$23 billion in cost savings, based on 176 deregulatory actions at a rate of twelve “outdated, unnecessary, or duplicative regulations” for each new rule promulgated.²¹

¹⁸ 5 U.S.C. § 801(a)(1)(A). Prior to 2017, the CRA was successfully used only once to overturn a federal rule, see S. Dudley, *CRAzy After All These Years: Extending the Reach of the Congressional Review Act*, Forbes, March 7, 2017, available at <https://www.forbes.com/sites/susandudley/2017/03/07/crazy-after-all-these-years-extending-the-reach-of-the-congressional-review-act/>.

¹⁹ For more information, the Regulatory Studies Center at the George Washington University Columbian College of Arts and Sciences has created a “CRA Tracker,” available at <https://regulatorystudies.columbian.gwu.edu/congressional-review-act>.

²⁰ White House Fact Sheet, *President Donald J. Trump is Delivering on Deregulation*, Dec. 17, 2017, available at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-delivering-deregulation/>.

²¹ White House Statement, *Regulatory Relief Efforts Deliver \$23 Billion in Regulatory Cost Savings*, Oct. 17, 2018, available at <https://www.whitehouse.gov/briefings-statements/regulatory-relief-efforts-deliver-23-billion-regulatory-cost-savings/>. For additional perspective on these statistics, see C. Raso, *What Does \$33 Billion in Regulatory Cost Savings Really Mean?* available at <https://www.brookings.edu/research/what-does-33-billion-in-regulatory-cost-savings-really-mean/>.

At the same time, a number of the Administration’s highest-profile measures quickly bogged down in litigation and some met with unfavorable court rulings. Environmental groups opposed EPA’s efforts to rescind and revise the WOTUS rule in multiple federal courts, and a decision by a U.S. District Court in South Carolina has left the 2015 rule in effect in 22 states, while an injunction applies in the remaining 28 states as EPA continues developing a replacement.²² Another EPA rule targeted for repeal and replacement governs methane emissions from oil and gas operations on federal and tribal lands; opponents successfully challenged Interior Department and EPA efforts to suspend Obama-era regulation, and courts in the District of Columbia and Northern California have required federal enforcement of the 2016 rule until a new one is finalized.²³ In another ruling in 2018, the D.C. Circuit remanded portions of EPA’s rule regulating coal combustion residuals as insufficiently protective.²⁴ Conflicting outcomes in cases in the Fourth and Ninth Circuits are awaiting a ruling on a petition for Supreme Court review of the applicability of the Clean Water Act to pollutants traveling through groundwater; the Court recently requested that the Administration submit a brief on its position on the issue.²⁵ Two recent Fourth Circuit decisions²⁶ on pipelines vacated a permitting determination as contrary to requirements under the National Environmental Policy Act (“NEPA”)²⁷ and invalidated a right-of-way determination as “arbitrary and capricious” because it did not adequately apply criteria required by the Endangered Species Act.²⁸

Despite these setbacks, a number of significant regulatory changes have been instituted, many in environmental, energy, and land use programs. As noted above, EO 13766 began a process for

²² *South Carolina Coastal Conservation League v. Pruitt*, 318 F.Supp.3d 959 (D.S.C. 2018).

²³ *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017); *Sierra Club v. Zinke*, 286 F.Supp.3d 1054 (N.D. Cal. 2018).

²⁴ *Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414 (D.C. Cir. 2018).

²⁵ *Hawai’i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018); *Upstate Forever v. Kinder Morgan Energy Partners*, 887 F.3d 637 (4th Cir. 2018).

²⁶ *Sierra Club v. U.S. Forest Service*, 897 F.3d 582 (4th Cir. 2018); *Sierra Club v. Department of Interior*, 899 F.3d 260 (4th Cir. 2018). Updates are available at “Scotusblog,” see <http://www.scotusblog.com/case-files/cases/kinder-morgan-energy-partners-l-p-v-upstate-forever/>.

²⁷ 42 U.S.C. § 4321 et seq.

²⁸ 16 U.S.C. § 1531 et seq.

streamlining federal environmental review and authorization procedures under NEPA that was reinforced by EO 13807's direction to the Council on Environmental Quality ("CEQ") to develop a list of actions that could be taken to facilitate these changes.²⁹ In response, in June 2018 CEQ solicited comment on a broad-ranging array of potential reforms to the NEPA process and scope of review, principally focused on clearer regulatory definitions, tighter deadlines, improved interagency coordination, and reduced paperwork requirements.³⁰ Anticipating some of these developments, the Interior Department moved in August 2017 to impose timeframes and page limits on NEPA permitting approval processes within its purview.³¹ Interior also reversed previous policies that required "compensatory mitigation" as a routine permit condition for public land use,³² rescinded restrictions on hydraulic fracturing ("fracking") on public lands,³³ revoked the prior Administration's moratorium on the federal coal leasing program,³⁴ and published a proposal that would substantially expand the offshore energy³⁵ leasing program. Other regulatory initiatives have proposed changes to implementation of the Endangered Species Act that would clarify requirements and improve interagency coordination and efficiency of the review process.³⁶

²⁹ See notes 6 and 17, *supra*, and related text.

³⁰ *Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*; Advance Notice of Proposed Rulemaking, 83 Fed. Reg. 28591 (June 20, 2018).

³¹ Dep't of Interior, Secretarial Order No. 3355, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*, Aug. 31, 2017, available at https://www.doi.gov/sites/doi.gov/files/uploads/3355_-_streamlining_national_environmental_policy_reviews_and_implementation.pdf.

³² Dep't of Interior, *Instructional Memorandum 2019-018*, Dec. 6, 2018, available at <https://www.blm.gov/policy/im-2019-018>.

³³ Dep't of Interior, *Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands*; Rescission of a 2015 Rule, 82 Fed. Reg. 61924 (Dec. 29, 2017).

³⁴ Dep't of Interior, Secretarial Order No. 3348, *Concerning the Federal Coal Moratorium*, March 29, 2017, available at https://www.doi.gov/sites/doi.gov/files/uploads/so_3348_coal_moratorium.pdf.

³⁵ Bureau of Ocean Energy Management, *2019-2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program*, Jan. 2018, available at <https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024/>.

³⁶ Fish and Wildlife Service, *Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants*; Proposed Rule, 83 Fed. Reg. 35174 (July 25, 2018).

For its part, EPA has aggressively pressed for regulatory changes to Obama Administration Clean Water and Clean Air Act initiatives. Although efforts to rescind the WOTUS rule stalled in court, as noted above, EPA has moved ahead to propose a replacement, which the agency released in December 2018.³⁷ Earlier in 2018, EPA issued a memorandum directing changes in the use of its “veto authority” under section 404(c) of the Clean Water Act, which had “raised significant concerns” as applied to permit applications, particularly for mining projects.³⁸ High-profile initiatives under the Clean Air Act include an October 2017 announcement of plans to repeal and replace the previous Administration’s Clean Power Plan³⁹ and a proposed revision published for comment in August 2018,⁴⁰ along with EPA’s recently announced proposal to reconsider the cost justification for its controversial Mercury and Air Toxics Standard, which could lead to major changes in approaches to cost-benefit analysis for new regulation involving air pollution and climate change.⁴¹

With mixed success in defending its regulatory reform initiatives in court, the Administration is showing increased signs of caution at the two year mark in its term, advising those who favor change to come forward with credible data to support proposed revisions. Revocation of existing rules is fully

³⁷ Dep’t of Defense and EPA, *Revised Definition of “waters of the United, States”*; Proposed Rule (signed Dec. 11, 2018), pre-publication copy available at https://www.epa.gov/sites/production/files/2018-12/documents/wotus_2040-af75_nprm_frn_2018-12-11_prepublication2_1.pdf.

³⁸ EPA, *Updating the EPA’s Regulations Implementing Clean Water Act section 404(c)*, June 26, 2018, available at https://www.epa.gov/sites/production/files/2018-06/documents/memo_cwa_section_404c_regs_06-26-2018_0.pdf. The U.S. Army Corps of Engineers released a separate Memorandum on Section 404 permitting authority, allowing states and tribes expanded ability to regulate oil, gas, and mining operations within their boundaries. U.S. Army Corps of Engineers, *Memorandum for Commanding General, Clean Water Act Section 404(g) – Non-Assumable Waters*, July 30, 2018, available at <https://www.army.mil/e2/c/downloads/525981.pdf>.

³⁹ EPA, *Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 82 Fed. Reg. 48035 (Oct. 16, 2017).

⁴⁰ EPA, *Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility General Unites; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program*, 83 Fed. Reg. 44746 (Aug. 31, 2018).

⁴¹ EPA, *National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units -- Reconsideration of Supplemental Finding and Residual Risk and Technology Review* (signed Dec. 27, 2018), available at <https://www.epa.gov/mats/proposed-revised-supplemental-finding-and-results-residual-risk-and-technology-review>.

subject to court challenge as arbitrary and capricious under the Administrative Procedure Act,⁴² and to pass muster, any new rule must demonstrate why its provisions are in the public interest and solidly based on evidence in the administrative record considered by the agency. Even before the recent government shutdown, federal agencies faced declining budgets and substantial personnel reductions, and those with the most aggressive reform agendas have limited band-width for developing complex new rules that can withstand judicial scrutiny. As a general rule, promulgation of a new rule takes 18 months, and time is growing short for the Administration's first term, particularly given reinvigorated interest in use of the CRA, which could be used by a new Administration holding opposite views to reverse rules finalized at the end of a predecessor's term. And all indications suggest that House Democrats will use their new majority powers to question Trump Administration programs at every possible turn. Regardless of these challenges, additional regulatory reform is certainly possible in the next two years, and pressure will mount to complete high priority initiatives as well as act on others that may lend themselves to more targeted, quicker promulgation. The process will definitely be worth watching.

⁴² 5 U.S.C. §§ 551 et seq.

This paper was originally published by the Rocky Mountain Mineral Law Foundation in the manual of the Special Institute on Natural Resources Development and the Administrative State: Navigating Federal Agency Regulation and Litigation (2019).