Environmental litigation in the Trump administration: The first two years

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President Trump came to office promising to remove regulatory burdens that "unnecessarily encumber energy production, constrain economic growth, and prevent job creation." Two years into his administration, it is difficult to generalize about the success of its deregulatory agenda in court: The administration's environmental litigation record so far is decidedly mixed, but many of the administration's key initiatives are not yet final. For these legacy-defining rules, the inevitable litigation has yet to begin.

The big four (power plants, federal waters, fuel efficiency, and ethanol)

Perhaps most important politically, the Affordable Clean Energy (ACE) Rule to regulate greenhouse gas emissions from power plants was proposed by then-U.S. Environmental Protection Agency (EPA) Administrator Pruitt in August 2018. When it is finalized, the new rule will replace the Obama administration's more stringent Clean Power Plan, which the U.S. Supreme Court stayed before it could go into effect. The ACE Rule is likely to be challenged in court by environmental organizations that oppose EPA's reversion to a traditional interpretation of the "best system of emission reduction." The newly proposed standards could be satisfied by making efficiency upgrades within individual power plants, short of the Clean Power Plan's anticipated shift to less carbon-intensive energy sources.

Another as-yet un-litigated initiative of the Trump administration is its proposed repeal and replacement of a 2015 rule interpreting the phrase "waters of the United States" in the Clean Water Act. The Obama EPA had enlarged its jurisdiction over "navigable waters" to include lands that contain water only when it rains. That interpretation is currently in effect in about half the states and blocked in the other half, thanks to competing injunctions of the 2015 Obama Rule and a February 2018 Trump Rule suspending it. In December 2018, EPA and the Army Corps of Engineers proposed a new definition—inspired by Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006)—that limits "waters of the United States" to six categories of waters that are "physically and meaningfully connected to traditional navigable waters." Environmental organizations that stand to lose an important tool for protecting wetlands from development will surely sue when the new rule is finalized.

A third signature deregulatory effort of the Trump administration is its Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule, jointly proposed by EPA and the U.S. Department of Transportation in August 2018. The proposed rule's preferred approach would freeze 2020 fuel

economy and greenhouse gas standards in place through model year 2026. When the rule is finalized, California and other states will likely join environmentalists in suing to preserve the Obama administration's increasingly stringent (and costly) standards and to defend California's own greenhouse gas standards against the administration's claim that they are preempted by the Clean Air Act and the Energy Policy and Conservation Act of 1975. California and other states have already petitioned for judicial review of a related Mid-term Evaluation of the old standards, but the D.C. Circuit is unlikely to conclude that report is a reviewable final agency action.

EPA has also committed to act on White House instructions to consider allowing the year-round sale of gasoline containing higher levels of ethanol and increasing transparency in the market for Renewable Identification Numbers (RINs), which fuel producers use to demonstrate compliance with the Renewable Fuel Standard. The forthcoming rule, which has not yet been proposed, is of great interest to ethanol producers, corn growers, and other biofuel feedstock producers who want the chance to compete for a bigger share of the liquid fuel market. But the rule may be opposed by petroleum industry participants, who are reluctant to see any more of their market share go to ethanol.

Water pollution and food (but really jurisdiction)

Although the Trump administration's deregulatory agenda will be judged according to the success of these major environmental rules, some less important agency actions have already been adjudicated.

The administration's wins against environmental plaintiffs include jurisdictional holdings in cases involving effluent limitations under the Clean Water Act. In *Clean Water Action v. Pruitt*, the District Court for the District of Columbia held that EPA had successfully mooted a challenge to EPA's indefinite stay of the Obama administration's 2015 effluent limitations for steam electric power plants. After Clean Water Action filed suit, EPA withdrew the stay and replaced it with a final rule in September 2017 that amended the Obama administration's 2015 rule, resetting the compliance deadlines. "Because the stay was withdrawn, there is nothing for the Court to vacate, and a declaratory judgment would be an impermissible advisory opinion."

EPA also prevailed in a subsequent challenge to its September 2017, amendment of the 2015 effluent rule. In *Center for Biological Diversity v. Pruitt*, the District Court for the District of Arizona granted EPA's motion to dismiss on the ground that the Clean Water Act grants federal appellate courts exclusive jurisdiction over all challenges to effluent limitations.

EPA may snatch yet another jurisdictional win from the jaws of defeat in *League of United Latin American Citizens (LULAC) v. Wheeler*. In that case, the U.S. Court of Appeals for the Ninth Circuit granted a petition for review of EPA's 2017 order denying a petition to revoke "tolerances" for the pesticide chlorpyrifos in food. Over a dissent, the panel rejected EPA's argument that the court lacks jurisdiction under the Food, Drug, and Cosmetic Act. On the

merits, the court held that EPA's decision to maintain a tolerance for chlorpyrifos was unjustified, because the agency's own risk assessment found evidence of neurodevelopmental damage to children, and EPA pointed to no existing evidence to the contrary. EPA petitioned for, and the Ninth Circuit granted, rehearing *en banc* on the jurisdictional question. By the time this article is published, the case will have been heard before an 11-judge panel.

Endangered species

The Trump administration lost a few trial court cases involving endangered species.

In *Indigenous Environmental Network v. Department of State*, the District Court for the District of Montana held that the U.S. Department of State's approval of the Keystone XL Pipeline violated the National Environmental Policy Act and the Endangered Species Act, because the State Department's Environmental Impact Statement did not adequately consider several factors including greenhouse gas emissions and the potential impact of oil spills on listed species. The court remanded the matter to the State Department. The intervening pipeline builder's appeal is pending before the Ninth Circuit.

In *NRDC v. Ross*, the environmental plaintiffs persuaded the Court of International Trade to issue a preliminary injunction requiring the government to ban, pursuant to the Marine Mammal Protection Act, the importation of fish from any Mexican fishery that uses an illegal fishing technique known to kill vaquita porpoises.

And in *Crow Indian Tribe v. United States*, the District Court for the District of Montana vacated a U.S. Fish and Wildlife Service (Service) rule delisting the Greater Yellowstone grizzly bear from Environmental Species Act protection. The court held that the Service had arbitrarily and capriciously failed to evaluate the legal impact of the action on other grizzly bears in the continental United States.

Administrative delay

Although few significant merits cases have reached final judgment, the administration racked up several early losses in cases that challenged the administration's power to delay implementation of Obama-era environmental regulations. These include *South Carolina Coastal Conservation League v. Pruitt*, which enjoined EPA's two-year suspension of the 2015 WOTUS rule, *Air Alliance Houston v. EPA*, vacating EPA's delay of a Chemical Disaster rule concerning risk mitigation plans for chemical plants, *Piñeros y Campesinos Unidos Del Noroeste v. Pruitt*, vacating EPA's delay of a pesticides rule, and *Clean Air Council v. Pruitt*, vacating EPA's stay of the methane new source performance standards for the oil and gas industry. Many of these delay cases were litigated before the Trump administration had fully staffed EPA's Office of the General Counsel and the U.S. Department of Justice's Environment and Natural Resources Division.

On the other hand, the administration persuaded a district court to delay adjudication of the Obama administration's methane waste prevention rule while suspending its implementation deadlines in *Wyoming v. Department of Interior*. The Bureau of Land Management was working on its own proposed revision rule, and the District Court for the District of Wyoming concluded that a stay would "provide certainty and stability for the regulated community and the general public while BLM completes its rulemaking process."

Looking ahead

The Trump administration's environmental litigation record so far is mixed, but none of the cases that has been decided in the administration's first two years will be remembered long. The true test of the administration's deregulatory agenda will be the success of its signature rules on greenhouse gas controls for power plants, the interpretation of "waters of the United States," fuel economy and greenhouse gas standards for new vehicles, and market access for higher-ethanol fuel blends. Each of these rules will rise or fall in court based on the quality of EPA's legal analysis and the thoroughness of its regulatory process.