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Implications of Trump's Victory and the Republican Congress for Environmental, Climate and Bad as it Seems?

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The stunning results of the 2016 election have prompted headlines suggesting that Trump will, with Congress, dramatically reverse the Obama legacy on climate, energy and the environment. But how real the answer is: the picture is significantly more complicated, and markedly less bleak, than the headlines suggest.

While Trump may try to rescind a number of regulations, the process would be long, arduous and only any broad *legislative* attack on environmental statutes is unlikely to succeed without a filibuster-proof majority. Republicans do not have.

The analysis below is candid about the bad news (some of which is bad indeed) but also includes substantial legal, political, and practical obstacles a Trump-led regulatory rollback would face.

The Bad News

- **It is possible for Trump to withdraw unilaterally from the Paris Agreement on Climate Change.** (It is not an exercise of Executive power). Even without formal withdrawal, he could effectively abandon the U.S. leadership role, by making little effort to deliver on the U.S. pledge (to cut greenhouse gas emissions by 2025).
- **It is possible for Trump's EPA to try to rescind and replace certain climate, environmental or energy-** (It is not necessary to this process.) It is standard practice for an incoming administration to immediately issue "midnight" regulations—rules that may have been adopted in the last months of an outgoing administration.

and potentially rescind or amend them. The Trump White House would almost certainly do this, and president's pen.

In addition, a Trump White House could also initiate a more sweeping review of agency rules, even in the waning days of the Obama administration, to consider which to rescind and revise. One obvious candidate is the Clean Power Plan (see more on that below). But other environmental rules are also vulnerable. The high court's *Waters of the United States* (WOTUS) rule, which defines the government's jurisdiction to regulate wetlands (known as the "Waters of the United States" rule), now being challenged in the courts, could be rescinded and revised as well, perhaps to a more limited reach. During the campaign, Trump singled out the WOTUS rule, pledging to reverse it. And that has led to ongoing litigation over the rule.

- **It is possible for Trump's EPA/DOI/DOE, etc. to slow-walk any new or proposed regulations,** even if they are necessary and to likewise seek to hobble enforcement. This is a "rope-a-dope" strategy through which the agencies implementing the environmental laws while not in fact seriously doing so. For example, look for a Trump administration to abandon or slow-walk unfinished EPA efforts to regulate methane emissions from existing oil and gas operations on private and public lands), and to delay such routine things as updating DOE appliance efficiency standards.
- **It is possible for Trump to try to weaken regulations through centralized oversight of agency rules.** Under the Trump administration, the Office of Information and Regulatory Affairs (part of the White House Office of Management and Budget) could tighten its grip on the agencies, requiring more frequent agency cost-benefit analysis. A Trump OIRA could tighten its grip on the agencies.

Trump could, on his first day, issue a new Executive Order on cost-benefit analysis, imposing more frequent and strengthen centralized review, making the regulatory process more time-and resource-intensive, and increasing presidential control over it.

Pushing the envelope, Trump could seek to extend these centralized review requirements to independent agencies like the Federal Energy Regulatory Commission, which regulates the electricity sector and has adopted a cost-benefit analysis. No president has sought to do this, fearing a backlash in Congress and a legal fight over the extent of presidential control over independent agencies. But some scholars have argued that requiring agencies to justify economic justifications for their rules is constitutionally permissible. And there might be a limited backlash from Congress. Moreover, a newly comprised Supreme Court with a 9th Trump-appointed Justice could expand executive power.

A Trump OIRA could also reconsider its policy that federal agencies must calculate a "social cost-benefit analysis" (a calculation that seeks to capture the significant societal benefits from a

gases). A single federal court of appeals has held that all federal agencies must include a social cost-benefit assessments; a Trump White House could ignore that ruling as inapplicable nationally.

Trump could also withdraw the White House Council on Environmental Quality's "guidance" to incorporate greenhouse gases into their environmental impact analyses (which are required under the National Environmental Policy Act for all major federal actions with significant impacts on the environment).

The Better News

- **Trump cannot unilaterally abolish the EPA.** Presidents don't have the authority to abolish agencies but they do need Congress to authorize him to do so. It's true that EPA was created by an executive order, but that authority was later confirmed by Congress. Congress had delegated authority to the president to reorganize the executive branch (within certain limits) and that authority has since lapsed. And since then, Congress has passed many environmental statutes delegating broad authority to the president to set air and water pollution standards, among other things. These duties come from statute and Trump would need Congress to do so of course. He could also ask Congress for a skeletal agency but he can't zero out agency budgets on his own either. In reality, a president who wants to eliminate an agency would need a majority of the House, 60 votes in the Senate and the ability to overcome vehement opposition from the public health community. It's not going to happen.
- **It is not as easy as Trump and others have made it sound to rescind and replace agency rules.** This is not a simple stroke of a pen. A President cannot do it, for example, by Executive Order.

History suggests that while new administrations make a grand show of reviewing their predecessor's rules, they rarely do so closely at those still pending, or those rushed through at the last minute — they rescind very few. President Clinton repealed only 9% of George H.W. Bush's midnight regulations, and George W. Bush repealed only 1% of Clinton's. (Indeed, 82% of Clinton's midnight rules were not even amended by Bush.)

At a minimum, rescinding and replacing any rule takes some time. And litigation would be inevitable. A new rule—a Trump EPA, say— would need to go through a notice and comment process, which typically takes 60 days, often two, and sometimes longer. Challengers inevitably would sue over these actions, and the agency would have to defend them in litigation, mustering enough evidence to persuade a reviewing court that the agency is not being arbitrary.

While it is true that agencies are allowed to change their minds, and may do so in part for political reasons, they must justify any new rule as rational. (The applicable case is *FCC v. Fox*, which requires the agency to defend the new rule against the original.) This can be difficult to do, especially when the new rule does a complete about-face, and there is a strong or lopsided record supporting the original rule. **It would be extremely difficult, if not impossible, to rescind an "endangerment finding"** (the determination that greenhouse gases endanger health and welfare).

regulating these pollutants under the Clean Air Act), given the comprehensive scientific record E finding, which it made in 2009 and which the D.C. Circuit has upheld and the Supreme Court decline It might be easier to rescind other rules, however—where, for example, a Trump EPA can argue th can defend its new interpretation as at least as reasonable as the prior administration's. This r revisiting the Clean Power Plan (see more on that below).

Still, past experience with incoming administrations seeking to revoke already-final rules (as the G did with the “roadless” rules issued by the Forest Service under Clinton), suggest a bumpy road a same strategy. Inevitably, the agencies seeking to rescind these rules would be sued, and they woul by the courts.

Moreover, some rules are mandated by statute. They are non-discretionary and the agency cannot This is the case with the proposed rule to control methane emissions from existing oil and gas inf compels it.

- **Rescinding rules that are already final and partially implemented can be especially difficult** to the ext already has invested in compliance. In such circumstances, the industry itself may resist change bec additional expense from the uncertainty or volatility posed by rescission. An example of such a rule i standards adopted by the Obama Administration doubling the fuel efficiency of cars and trucks by 20 negotiations, garnered the support of the entire auto industry. Vehicles designed to comply with thes been rolling off the assembly lines, and product plans for later years are already underway. (It is pos of standards for the outer-most years, however, since the agency already has committed to do a mic
- **Trump efforts to expand White House control over agency rules could easily overreach, and would i** the things OIRA might do to tighten its grip over agency regulations would be perfectly lawful, there benefit or other requirement directly conflicts with an agency's statutory mandate, the statute govern adjudicate such conflicts, and generally try to give effect to both executive orders and statutes wher override environmental laws in this indirect way would clearly invite legal challenge and run a signific courts.

So too any effort to extend White House regulatory review over independent agency rulemaking— might bristle at a new president's effort to exert more control over agencies that Congress purpo from presidential control. And members of Congress know they will one day again face a Democrat this power. A lawsuit is guaranteed.

- **It is obviously possible for a Republican Congress to try to weaken environmental statutes, but any such effort is unlikely to succeed.** With only 51 members, the Republican Senate does not have a filibuster-proof majority. An effort that was successful even 6 years ago is that just about all of the moderate Democrats (who might cross the aisle to support climate and environmental issues) are now gone.
- It is obviously possible for a Republican Congress to try to defund agency programs or initiatives. (For example, to prohibit agency expenditures for anything related to greenhouse gas regulation.) Such measures, though, although they may be easier to slip into appropriations bills, or omnibus packages, which Democrats are opposing.

The Fate of the Clean Power Plan in Particular

- The D.C. Circuit court of appeals is currently considering the legality of the Clean Power Plan. The Court has not decided the case at any time, but realistically given the complexity of the issues is unlikely to do so before December or January. If the Court decides the case before Trump's inauguration, it is possible that, immediately afterward, **the new Trump administration could ask the D.C. Circuit not to decide the case, and instead to remand the case back to the new EPA.** If the Court grants this request, the new Trump EPA could then rescind and modify the rule.
- If the D.C. Circuit already has decided the case by the time Trump assumes office (or if the Court has already decided the case and rejects the request for remand) *and* if the Court *strikes down* the Clean Power Plan, a Trump Department of Justice *may opt not to appeal it*, signaling that it wishes to leave it dead. However, all of the state and environmental groups in the litigation on EPA's side would appeal it. The Supreme Court would decide whether to grant review.
- If the D.C. Circuit were to decide the case and *uphold the Clean Power Plan*, and if the state and environmental groups in the litigation were to appeal that decision to the Supreme Court, a *Trump Department of Justice may opt not to appeal it*. In that instance, the state and environmental intervenors who support the rule would defend it. At the same time, the Trump Department of Justice could ask the Supreme Court to lift the stay it has imposed on the rule's implementation in light of the D.C. Circuit's decision, something that a Court still tied at 4-4, or even a newly complete Supreme Court, with a Trump-appointed Justice is unlikely to grant.
- **Ultimately, a new Supreme Court with a Trump-nominated conservative 9th Justice would likely have the Clean Power Plan rendered moot.** Not to mention that a Trump EPA could just rescind the rule—see more on that possibility in the next section, rendering any Supreme Court decision moot.

- **To rescind the rule, a Trump EPA would claim that it has the discretion to adopt a less stringent approach** because the Clean Air Act is ambiguous in key respects. For example, a Trump EPA could define “baseline reduction” for greenhouse gases more narrowly than the Obama EPA has done, requiring only modest reductions from electric generating units on-site, rather than setting higher standards based on the variety of measures available. It would argue that the statute leaves room for more than one interpretation, and that its newly adopted rule is at least reasonable, thus entitling the agency to deference.
- **Setting aside legal constraints, there are other, real-world limitations on a complete retrenchment of utility industry** is already investing in a transition to cleaner energy because of *separate state and federal independent market conditions* e.g., cheap natural gas. In addition, Congress has already locked in investments in energy—to 2019 for wind, and into the 2020s for solar. Plus, many states intend to push forward with measures to reduce greenhouse gases and other air pollution, promote renewable energy, and invest in energy efficiency. The complexity of these measures might ultimately nudge the utility industry to ask the federal government to promote uniformity and predictability. Thus, in view of all of these dynamics, it may be hard to reverse the Obama Power Plan, even if the rule itself is struck down or rescinded.

In Sum

A determined and united effort by Trump and a Republican Congress could certainly deal a substantial blow to climate, energy and environment. Most immediately, Trump singlehandedly could renounce U.S. leadership in international negotiations, which would stall momentum for the Paris Agreement. But any effort to fully unravel the regulatory initiatives of the last 8 years will be long, complicated, difficult—and in the end likely only partially successful because of legal, political, and practical barriers to doing so.

There will be many twists and turns to come in the months and years ahead, as this process plays out in the agencies, and the courts. The country is very likely looking at a partial rollback, but the reality is that a full reversal suggests.

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