

Keep on Rolling: Rolling Back Regulatory Rollbacks

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A Dynamic Status Quo

- Trump Administration “rolled back” nearly 100 environmental rules.
 - When were those rules promulgated?
 - Were they all “rules”?
- What about the underlying statutory obligations?
 - Court challenges to rulemaking
 - Court interpretation in a world without (or sometimes with) rules

Biden Continues the Status Quo!?

- Core executive action
- Policies and guidance
- Rulemaking
- Litigation

Core Executive Action

- Solely within the purview of the executive
- Authorized by legislature or constitution
- Enforcement discretion (but citizen suits and nondiscretionary duties)
- “Binding” yet entirely discretionary and usually beyond judicial review (and functionally typically beyond Congressional review)
- Presidential Permits
- Foreign policy (Paris Agreement)
- Certain federal lands decisions (e.g., breach leases, designate national monuments)

Policies and Guidance:

- Not law
- No procedural hurdles to changes
- No reliance
- Yet “deference”
 - *Compare* Chevron – Court must defer to formal, reasonable agency interpretation of ambiguous provision of law
 - Skidmore – Court will defer to administering agencies *informal* interpretation depending on persuasiveness of agency’s justification
 - Auer and the Kisor five-step– Court may defer to agency’s fair and considered judgment (cannot be post hoc), unless plainly erroneous

Rules

- Force and effect of law
- Notice and comment rulemaking
- Regulatory ossification
 - Some “rollbacks” were new rules, which require new rules to replace them
 - Don’t want to just rescind rules and leave a gap
 - At least 2-3 years, with hurdles along the way
- Legal and technical analysis
 - Things have changed, so can’t just re-use the Obama-era stuff
 - Reduced staff and resources
 - Lots of rules at play
- Opportunities for challenge
 - Statutory authority
 - Adequate explanation

Litigation

- Many Trump rules are still subject to challenge and could be overturned
- New rules would be subject to challenge

The Near-Term Focus for Practitioners

- Enforcement discretion matters
- Existing precedent is sometimes on point
- Deference to policy and guidance is still important, especially if 'old' rules are ambiguous and statute and caselaw arguably answers the question

More Change to Come (Eventually)

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