

# Updates on Litigation and Policy Changes Under the Trump Administration

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April 30, 2019

West Michigan A&WMA  
Spring Conference



# Legal Disclaimer

- This presentation is educational and does not constitute legal advice or legal opinions based on specific facts
- Please consult an attorney before acting on any information discussed or referenced in this presentation

# Presentation Overview

- Did you hear about the 2016 election?
- Approaches for instituting reform
- Review key changes impacting Clean Air Act permitting, compliance, and enforcement
- Some useful reminders

# Did you hear about the 2016 election?

- The transition from President Obama to President Trump has—to the surprise of nobody—resulted in different policy priorities (i.e., read “reversals”)
- The Trump Administration has used a number of methods to promote its goals, with mixed results
- This presentation focuses on the strategies employed to shape environmental litigation and policy, focusing on the Clean Air Act

# The Trump Approach

- Liberate the economy from burdensome environmental regulation and enforcement
  - Minimizing federal regulatory interference
  - Scale back federal enforcement
- Hitting “reset” on cooperative federalism, with an emphasis on state rights and responsibilities
- When in doubt, ask “what would President Obama do,” and then pursue the opposite

# Different Strokes

- President Trump: Mandate
- Former EPA Administrator Pruitt: Identify the desired outcome (using blunt force)
- Current EPA Administrator Wheeler: Work within the system in place (using finesse)
- EPA Assistant Administrator (OAR) Wehrum: Learn from past efforts and strategically work within the current system to effect change
- Similar savvy from OECA head Susan Bodine

# Varied approaches to instituting reform

- Allocation of resources (i.e., budgets)
- Oversight of state and local agencies
- Positions taken in litigation and petitions
- Rulemaking
  - Changing course (Utility NSPS, WOTUS)
  - Speeding up (e.g., RTRs and NAAQS)
- Policies and guidance
- Doing nothing

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# Key changes impacting Clean Air Act practitioners (like us!)

Among the many options, we will focus on:

- Federal enforcement
- Policy reforms
- NAAQS program issues



# So, for today, we are skipping over:

- The Paris Agreement (climate accord)
- The Clean Power Plan repeal
- MATS and CSAPR policy shifts
- Regulating oil-and-gas operations
- Federal motor vehicle standards
- California's motor vehicle standards
- Updates for self-disclosed violation policies
- The back-and-forth over issuance of § 114 info requests (HQ v. regional)
- The back-and-forth over sue-and-settle consent decrees
- Limiting the use of guidance documents to drive enforcement
- Tax policy for environmental compliance vs. penalty costs
- Reforms to Cost-Benefit analyses
- DOJ policies regarding compliance tools CDs
- Various other Executive Orders
- Game of Thrones fallout or theories
- Discussing time travel in the MCU

# Key Changes – Federal Enforcement

- Drastic reduction in *new* enforcement cases brought by EPA
  - EPA HQ now reviews any EPA Region request for a DOJ referral (3/23/18 Bodine Memo)
  - National Enforcement Initiatives moving to National Compliance Initiatives (8/21/18 Bodine Memo)
  - Unclear how ongoing “reorganization” at EPA Regions will impact

# Key Changes – Federal Enforcement

- Existing CAA cases reflect a mixed bag
  - Greater leniency reflected in some settlement negotiations (Harley)
  - NSR *litigation* positions seem static
    - *Ameren Missouri* - 8<sup>th</sup> Circuit CoA
    - *Luminant Generation* – 5<sup>th</sup> Circuit CoA
- Possible reversal on Obama-era SIP Call to eliminate SSM affirmative defenses
- RMRR guidance this summer?

# Key Changes – Federal Enforcement

- The “cooperative federalism” mandate has extended deference to enforcement
- More coordination and local deference
  - 1/22/18 Bodine Memo (“the EPA will generally defer to authorized States as the primary day-to-day implementer of their authorized/delegated programs”)
  - 10/30/18 Wheeler Memo (“general deference to states and tribes in state- and tribal-implemented programs”)

# Key Changes – Policy Reforms

- 12/7/17 Pruitt Memo re NSR “Actuals” Test
  - Post-project emission management ok
  - Focus on post-project actual emissions
  - “Predominant cause” to link emissions
  - No second guessing a company’s projections (absent “clear error”)
- 3/13/18 Pruitt Memo re NSR Project Emissions Accounting (f/k/a “project netting” in *Hovensa*)
  - Step 1 vs. Step 2 netting (enforceable)
  - Project definition critical

# Key Changes – Policy Reforms

- “Common control” again means actual control, not mere influence or control of an “activity”
  - 4/30/18 *Meadowbrook* letter (to PaDEP)
  - 10/16/18 *Ameresco* letter (to WDNR)
- Adjacency in 9/4/18 Wehrum DRAFT memo
  - Physical proximity (except for O&G - ¼ mile)
- Once-In, Always-In – 1/25/18 Wehrum Memo
- Title V challenges now limited from reaching the merits of prior construction permits (no 2<sup>nd</sup> bite)

# Key Changes – NAAQS Program Issues

- Streamlining goals
  - 4/12/18 Trump memo (“Promoting Domestic and Job Creation ...”)
  - 5/9/18 Pruitt memo (“Back to Basics”)
- Accelerated NAAQS reviews
  - Completed 5-yr reviews (kept primary NO<sub>2</sub> & SO<sub>2</sub> NAAQS)
  - But CASAC pushback on PM<sub>2.5</sub> review

# Key Changes – NAAQS/Ozone Issues

- Ozone and PM2.5 SILs Memo
  - 4/17/18 Tsirigotis Memo + legal back-up
- 12/6/18 Ozone Implementation Final Rule at 83 Fed Reg 62,998
- Greater flexibility proposed by EPA for evaluating outside impacts
  - Beyond exceptional events – 4/4/19 memo
  - Background/International – § 179b(b)



# Some useful reminders

- States are generally free to regulate more strictly than the federal government
  - But note Michigan’s “No Stricter Than Federal” law
  - Compare AQD-022, which often “requires” air dispersion modeling that is not required by federal law
  - How may EGLE differ from the MDEQ in its views?
- Federal rules must reach administrative completeness and survive judicial review in order to truly take lasting effect
- Federal policies may have a short shelf life given the 2020 presidential election, so ...

# One last reminder ...

“You can’t keep the Democrats out of the White House forever and when they get in, I’m back on the streets!”

- Sideshow Bob, *The Simpsons*

# Questions?

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