Legal Challenges to Environmental Regulations

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What I Will Cover Today

- Water of the United States (WOTUS)
- Clean Power Plan (CPP)
- Ozone Rule
- EPA Methane Rule
- There are so many more…
Overview

- Obama’s big accomplishments particularly in the last part of his tenure were regulatory.
- Regulations are vulnerable to a court determining they exceed the scope of the statute they are interpreting and repeal using the Administrative Procedure’s Act rule-and-comment process by the next administration.
- Before Trump became President WOTUS and CPP were fast-tracked to the Supreme Court based on overreach.
- The Trump administration is now attempting to repeal CPP and WOTUS.
- Delay has been the strategy used for the ozone and methane emissions rules.
Waters of the United States

• In one sentence...
  • Defined the term “Waters of the United States,” as used in the Clean Water Act, more broadly, meaning more water would be federally protected
  • States regulate water as well; some states (and most local governments) would prefer to a more narrow definition
Waters of the United States

• What we know for sure
  • Supreme Court will hear jurisdictional challenge (district v. court of appeals)
  • Two-step process to get new rules in place
    • Step one: reinstate the pre-Obama WOTUS definition
    • Step two: propose a new WOTUS rule following the Scalia opinion in *Rapanos*
  • Both steps will be challenged legally
    • Agencies have inherent authority to revise, replace or repeal to extent permitted by law and supported by “*reasoned explanation*” – *Fox Television Stations v. FCC* (2009)
WOTUS: A Timeline

- May 2015: WOTUS final rule issued
- October 2015: Sixth Circuit issues temporary nationwide injunction of WOTUS rule
- January 2017: SCOTUS agrees to decide whether the Sixth Circuit had jurisdiction to decide that the WOTUS rule exceeds the authority of the Clean Water Act
WOTUS: A Timeline

- February 2017: Trump EO calls for “rescinding or revising” the WOTUS definitional rule
- April 2017: EPA meets with state and local government national organizations to inform them of the two-step process leading to a new WOTUS definition
WOTUS: A Timeline

• July 2017: EPA Unified Agenda says a new proposed definition of WOTUS will come out in December
• July 2017: EPA issues a proposed rule to recodify the pre-Obama WOTUS rule: comments due August 28
• October 2017: SCOTUS to hear jurisdictional challenge
Why Did the Sixth Circuit Issue An Injunction?

• Short answer: the 2015 rule didn’t follow the definition of WOTUS in Justice Kennedy’s opinion in *Rapanos*
What is the Jurisdictional Challenge All About?

• EPA actions “approving or promulgating any . . . other limitation” on discharges or “issuing or denying any permit” are reviewable by a federal court of appeals

• How does the definition of WOTUS have anything to do with “issuing or denying any permit”?

• It doesn’t but in the Sixth Circuit “issuing or denying any permit” is read as broadly as possible
EO Suggesting a Rewrite Raises A Red Flag

• “Assistant Secretary shall consider interpreting the term ‘navigable waters,’ as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in Rapanos v. United States, 547 U.S. 715 (2006)”

• Rapanos was a 4-1-4 opinion

• Justice Kennedy is the “1”

• His opinion is widely considered controlling because it is the narrowest
Million Dollar Questions

• What exactly will the new WOTUS definition say?
• How will a court (the Supreme Court) view this definition?
• Note: our newest Justice (Gorsuch) does not like deferring to federal agency interpretation of regulations
  • Which could be bad news for any administration’s definition of WOTUS
Clean Power Plan

- President Obama’s signature climate change measure
- In one sentence…
  - Intended to transform our existing energy production from coal to natural gas to renewable energy
- According to the EPA: “When the Clean Power Plan is fully in place in 2030, carbon pollution from the power sector will be 32 percent below 2005 levels”
- States must come up with a plan (or standards) to achieve state-wide goals
Clean Power Plan

• What we **finally** know for sure
  • A **repeal** is planned
  • This repeal (no matter how good its reasons are) will be litigated
    • Agencies have inherent authority to revise, replace or repeal to extent permitted by law and supported by “**reasoned explanation**”— *Fox Television Stations v. FCC* (2009)
Clean Power Plan Timeline

- August 2015: CPP rules are final
- February 2016: SCOTUS stays CPP pending decision by D.C. Circuit
- September 2017: D.C. Circuit heard oral argument in this case
Clean Power Plan Timeline

- March 2017: EO instructs EPA to “if appropriate [and] as soon as practicable . . . publish for notice and comment proposed rules suspending, revising, or rescinding” the Rule
- April 2017: D.C. Circuit agrees to hold case in abeyance for 60 days with 30 day updates
- June 8 2017: EPA proposal goes to OMB (typically 60 day process)
- July 2017: EPA Unified Agenda says: “This action proposes to withdraw the Clean Power Plan on grounds that it exceeds the statutory authority provided under section 111 of the Clean Air Act”
We Don’t Know the Precise Basis for the Repeal

• But we can guess based on the litigation
• Not technically accurate but makes the point…”generation shifting” is at the heart of the CPP
  • Before EPA said put a scrubber on a smoke stack; now EPA is saying get rid of the smoke stack and put up a wind generator
Lack of Statutory Support for CPP

• Is generation shifting permissible?
  • No clear statement in the Clean Air Act compelling the Clean Power Plan
    • “Transformative expansion in EPA’s regulatory authority” based on a “long-extant statute” requires “clear congressional authorization” *UARG v. EPA* (2014)
    • Could EPA just zero out use of fossil fuels?

• Coal-fired plants are already regulated by another regulation under the Clean Air Act and can’t be regulated by the section the Obama rule relied on
Ozone Rule

• In one sentence…
  • 2015 rule lowered the allowable concentration of ozone to 70 parts per billion, from 75 parts per billion beginning October 1, 2017
  • Strongly defended by environmentalist, children’s health advocates; strongly opposed by business groups and some states
  • Both sides sued (which is unusual)
  • States had to come up with plans to deal with “nonattainment” areas
Ozone Rule

• What we know for sure
  • For now, implementation of the ozone rule has been delayed for one year (until October 2018)
Ozone Rule Timeline

• October 2015: Ozone rule finalized
• October 2016: States submit recommendations to deal with nonattainment areas
• April 2017: D.C. Circuit agrees to postpone oral argument in lawsuit challenging the regulations while Trump administration “reviews” ozone rule
• June 2017: Federal Register notice the ozone rule will be delayed for one year (until October 1, 2018)
• July 2017: Environmental groups sue over the delay
Why the Delay?

- Following the recent change in administrations, the agency is currently evaluating a host of complex issues regarding the 2015 ozone NAAQS and its implementation, such as **understanding the role of background ozone levels and appropriately accounting for international transport**. The Administrator has determined that he **cannot assess whether he has the necessary information to finalize designations until additional analyses** from this evaluation are available. In addition, pursuant to language in the recently-enacted Fiscal Year 2017 omnibus bill, the Administrator is **establishing an Ozone Cooperative Compliance Task Force** to develop additional flexibilities for states to comply with the ozone standard. It is possible the outcome of that effort could identify flexibilities that could impact the designations process. In light of the analyses currently underway at the agency, the Administrator has determined he needs **additional time to consider completely all designation recommendations provided by state governors** pursuant to CAA section 107(d)(1)(A), including full consideration of exceptional events impacting designations, and determine whether they provide sufficient information to finalize designations. We also note that **new agency officials are currently reviewing the 2015 ozone NAAQS rule**. The Administrator has determined that in light of the uncertainty of the outcome of that review, there is insufficient information to promulgate designations by October 1, 2017.
Is the D.C. Circuit Likely to be Sympathetic?

• Clean Air Act allows EPA to delay nonattainment designations by up to one year only when it “has insufficient information to promulgate the designations”

• Environmental groups argue:
  • But EPA nowhere identified any insufficiency of information of the sort that, under the statute, is the sole permissible basis for a delay. The factors EPA cited are extraneous to the statutory criterion, instead addressing EPA’s desire to reconsider the standards and to examine compliance issues. EPA also failed to explain why, assuming it had explained what relevant information was lacking for any area, it was delaying designations for the entire country for an entire year, despite the Act’s mandate for expeditious designation promulgation.

• What do you think?
Methane and Waste Prevention Rule

• In one sentence…
  • Intended to reduce methane emissions in the oil and natural gas industry from new and modified sources
  • EPA’s first standard for methane emissions from the oil and gas sector
  • Leaks had to be identified by June 3, 2017
  • If you think carbon dioxide is bad you haven’t met methane
Methane Rule

• What we know for sure
  • The rule is in effect as of July 31st
  • Trump administration is free to take it off the books using the Administrative Procedure’s Act notice-and-comment process
Methane Rule Timeline

- June 2016: Final rule
- April 2017: EPA implements a 90-day stay of the June 3, 2017 compliance date
- June 2017: EPA implements a 2-year stay and says it will “reconsider” the rule
- July 3, 2017: D.C. Circuit vacates the stay
- July 31, 2017: D.C. Circuit orders the rule to go into effect
D.C. Circuit Court Reasoning

- Clean Air Act says a final rule can be reconsidered if it was:
  - **Impractical** to raise the objection during the comment period
  - The objection is of central relevance to the outcome of the rule
- Final rule must be a “logical outgrowth” of the proposed rule
- Industry groups claimed they received inadequate notice of four issues
- Court disagreed on all accounts
- Example: industry groups said they had inadequate notice low-production wells would be included; but the proposed rule excluded them and asked for comments on whether the exclusion was warranted