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New York Law Journal

Whiplash: Litigating Abrupt Changes to Federal Environmental Policy

April 16, 2025

Federal officials have announced their intent to make sweeping changes to a slew of environmental regulations, particularly those impacting fossil fuel production and use. While there is nothing unusual about a new administration reversing a predecessor's policies, here, the depth and breadth of what the EPA has proposed is unprecedented.

The agency proposes to repeal, replace or otherwise reconsider over 31 regulations, orders and decisions that regulate air quality, water quality and greenhouse gas emissions, among other things.

If the targeted regulations were weakened or repealed there would be effects on mercury levels in fish, asthma-causing pollutants in air and acid-rain causing chemicals. Federal steps to reduce greenhouse gas emissions would end.

Last week Donald Trump took this deregulatory agenda further, with a flurry of executive orders designed to benefit fossil fuel production and use, including one directing regulating agencies to adopt sunset dates of no more than five years on most regulations.

All this follows on the heels of a Feb. 19, 2025 Executive Order that directed all agencies to identify, by April 18, 2025, regulations for repeal or non-enforcement for reasons ranging from being "unlawful" to being out of step with the administration's policy priorities.

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The Administration's big ambitions are likely to run into roadblocks. Courts reviewing agency regulatory moves under the federal Administrative Procedures Act (APA) are generally hostile to abrupt changes that lack sufficient factual, scientific or legal justification.

However, past precedent will not necessarily be determinative; in June 2024, the Supreme Court overruled the seminal *Chevron* doctrine, and with it any deference to a federal agency's interpretation of its governing statutes. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

In other words, courts, not agency experts, will decide what, for example, the Clean Air Act requires, and courts will decide whether old rules being cast aside and new rules being proposed adhere to those interpretations.

Though the administration will no doubt invoke *Loper Bright* to claim old regulations went too far, opponents will likely use the same argument to challenge regulatory repeals and revisions as inconsistent with underlying statutes.

The New Administration Is Attempting to Reverse Agency Rulings on Several Fundamental Environmental Matters

On March 12, 2025, EPA Administrator Lee Zeldin announced plans to withdraw or modify 31 EPA regulations, formal agency determinations and policies. One of the most significant proposals is to rescind the agency's 2009 endangerment finding for greenhouse gases under Section 202(a) of the Clean Air Act.

The Act *requires* the EPA to regulate air pollutants that it finds endanger public health and welfare. The agency's endangerment finding is therefore the underpinning of greenhouse gas limits on power plant emissions, vehicles and factories.

Beyond the removal of climate change regulations, the other 30 proposals include changes to mercury emission limits on power plants; wastewater pollution limits for oil and gas development; particulate matter (e.g., PM2.5) emission limits; coal ash disposal regulations; cross-state air pollution regulations; and the agency's advisory boards like Science Advisory Board and Clean Air Scientific Advisory Committee, among others.

A major goal of the changes is to increase U.S. energy production from fossil fuel sources, including coal.

To date, the agency has not provided specific details on the process by which it will rescind or revise regulations, particularly those founded on over a decade of agency fact-finding related to the dangers of power plant emissions of greenhouse gases, mercury, particulate matter, nitrogen dioxide and other pollutants.

On April 9, 2025, however, Donald Trump issued two new related executive orders. The first directs federal agencies to insert "a sunset provision into their regulations governing energy production to the extent permitted by law, thus compelling those agencies to reexamine their regulations periodically to ensure that those rules serve the public good."

The second directs all agencies to review regulations to determine whether any are now "unlawful" in the wake of ten specific Supreme Court decisions, including *Loper Bright*.

Courts Have Historically Been Hostile to Abrupt Regulatory Changes

The White House and Congress have a few tools to halt regulations finalized at the tail end of a previous administration.

Under its executive authority, the White House can order a halt to the publication of any proposed final rule in the Federal Register, or delay the effective date of a rule that had not yet gone into effect, and multiple presidents, including Trump in 2017 and 2025 and Biden in 2021 have imposed such "Regulatory Freezes."

Under the 1996 Congressional Review Act, Congress can overrule a regulation within 60 "legislative days" from its final publication in the Federal Register. These two laws can claw back rules finalized in the final months of a prior presidential administration.

Beyond that, however, to rescind or amend a rule the agency must follow the same process under the APA as required to issue any new regulation—development of a sound administrative record, publication, public comment, response to public comment and publication of a proposed final rule. Any failure to closely follow APA procedures and develop a full administrative record is vulnerable to challenge.

Under 5 U.S.C. §706, courts have broad authority to review administrative action or inaction. Although reviewing courts must defer to an agencies' factual findings that are supported by substantial evidence, where actions are not supported by the administrative record, exceed statutory or constitutional authority, or fail to follow mandatory procedures, courts must "hold unlawful and set aside" such actions.

Courts may also compel action "unlawfully withheld or unreasonably delayed."

The APA is, in sum, intended to protect citizens from an arbitrary and capricious form of government. While federal courts are generally deferential to a new president's right to change policy direction, they tend to be hostile to abrupt changes in federal policy and regulations that lack sufficient factual or scientific basis.

The U.S. Court of Appeals for the D.C. Circuit summed up the judicial approach to sharp changes in federal regulation in *International Union, United Mine Workers of America v. United States Department of Labor*, 358 F.3d 40 (2004). That case involved the Mine Safety and Health Act, which empowers the Department of Labor and its Mine Safety and Health Administration (MSHA) to adopt regulations to protect miners from air pollutants that are demonstrated to harm health.

In 1989 the agency proposed and in 1994 finalized a suite of regulations to limit exposure to pollutants with effects that "may range from allergic reactions to systemic toxicity… [to]… cancers, central and peripheral neuropathies, lung disease, liver and kidney damage, birth defects, and other systemic effects."

In 2002 (early in the change of administration from President Clinton to President Bush), the agency proposed a rescission of the regulations because of a change in "agency priorities," that the government attributed to an Eleventh Circuit court case regarding labor regulations issued by OSHA (in an entirely different statutory context), and the "staleness" of the decade-old scientific record.

While the D.C. Circuit acknowledged MSHA's statutory power to change regulatory course, it quickly rejected the three agency grounds for trying to rescind its regulations. It found the excuse "changes in agency priorities" too vague to ever provide a basis for regulatory rescission. The alleged adverse effect of a competing appellate decision in an unrelated OSHA context was also too vague to provide a basis.

The court therefore directed the agency to carefully explain and document its position that data supporting the current regulation was too stale or had changed, concluding "MSHA failed to provide an adequate explanation for its decision to withdraw the Air Quality proposal. Absent such an explanation, the agency's action was arbitrary and capricious" under the APA.

All this is to say that the EPA has a large task ahead of it to lawfully unwind two decades of scientific research showing that greenhouse gases, mercury, particulate matter and other pollutants resulting from fossil fuel production and consumption are deeply harmful to human health and the environment.

Courts Decide What A Law Means, Not the President or Executive Agencies

Over four decades ago, in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984) the Supreme Court affirmed longstanding appellate and district court deference to federal agency interpretations of ambiguous terms in their governing statutes.

The so-called *Chevron* deference doctrine never sat entirely well with some constitutional lawyers. And in 2024, the Supreme Court took its chance to review and overturn the doctrine entirely in *Loper Bright*.

The court cited back to the seminal 1803 decision in *Marbury v. Madison*, where Chief Justice

John Marshall stated "[i]t is emphatically the province and duty of the judicial department to say what the law is."

Writing for the majority two hundred years later in *Loper Bright*, Chief Justice John Roberts similarly stated: "the role of the reviewing [federal] court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits."

Environmentalists widely decried *Loper*, anticipating (correctly) that it would be invoked, to dismantle environmental regulations that, in a court's view, stretch the meaning of environmental statutes too far. But there may be a silver lining in *Loper*.

It could prove to be a powerful tool in challenges to the EPA's (and other agencies') coming wave of withdrawals of and amendments to important environmental regulations, permits and policy decisions.

Most crucially, federal courts are likely to view with skepticism any attempt to quickly rescind agency regulations and decisions covering emissions from the burning of fossil fuels, where the unambiguous terms of the Clean Air Act mandate the regulation of pollutants that have been the subject of a prior and extensively documented "endangerment" finding.

Every change in presidential administration brings new policy objectives. In this case, the new administration seems intent on limiting the nation's transition away from fossil fuels and in fact increasing fossil fuel production and use. Courts have no role in judging this sharp policy shift however troubling it may be to many.

But the White House faces a time-consuming process of withdrawing or amending regulations, particularly the heavily documented endangerment findings under the Clean Air Act that trigger the requirement to regulate greenhouse gases, particulate matter, lead, nitrous oxide, and more.

The Administration is Looking for Shortcuts Around the APA

Faced with the demanding requirements of the APA, the White House is clearly looking for shortcuts to enact its deregulatory agenda. In fact, a few weeks ago the EPA struck upon a new shortcut.

It invited a variety of heavy industries, including coal-fired energy generators, that have historically emitted hazardous air pollutants as that term is used in Section 112 of the Clean Air Act, to send an email seeking "presidential exemptions" under Section 112(i)(4) from a slew of recent emissions rules promulgated by the previous administration to improve air quality and protect public health, like the Mercury and Air Toxics Rule finalized in May of 2024.

Such an exemption may be granted "if the president determines that the technology to implement such a standard is not available and that it is in the national security interests of the United States to do so." This week the White House announced that dozens of companies had applied for and been granted such exemptions.

It remains to be seen whether a reviewing court would conclude that the President made adequate findings under Section 112 before granting the exemption, but the brevity of the solicitation and review process (just over two weeks) indicates a highly cursory review.

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