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Environmental **LAW**

President-elect Trump and the 2017 Environmental Agenda

Writing this column in December 2016, now a month past the surprising presidential election result, brings with it many uncertainties. Predicting environmental policy in new administrations is challenging under normal election conditions, but with a businessman about to assume the presidential office in January, the level of uncertainty is at an all-time high. However, based on numerous controversial Obama Administration environmental policies and recent nomination news, we can at least highlight key areas of focus in the coming year.

First, President-elect Donald Trump nominated Scott Pruitt to be administrator of the United States Environmental Protection Agency (EPA). Pruitt is Oklahoma's attorney general and has been a key challenger to President Obama's expansive environmental policies. He has been a leading state official pushing back in support of states' rights and in opposition to the expansion of EPA's regulatory agenda over the last several years.

In particular, he has participated in suing EPA to invalidate the Clean Power Plan (CPP). As reported on in this column, the Clean Power Plan was issued by the Obama EPA in August 2015 and sets limits on the carbon emission from power plants in this country. Following his nomination to head EPA, Pruitt was quoted in the *Washington Examiner* stating that "[t]he American people are tired of seeing billions of dollars drained from our economy due to unnecessary EPA regulations, and I intend to run this agency in a way that



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fosters both responsible protection of the environment and freedom for American businesses."

Another proposed appointment, Sen. Jeff Sessions as attorney general, is likely to bring about significant changes in U.S. environmental policy based on which cases will be brought and which

will be defended on behalf of the nation. Like Pruitt, Sessions is a former state attorney general (Alabama) with a healthy respect for federalism and the law. Hence, EPA programs which have been instituted through executive action or go beyond the clear bounds of environmental law, such as the Clean Air Act and Clean Water Act, are likely to face skepticism.

The EPA's current push to regulate in the area of climate change is going to be subject to swift challenge in the new administration. While it has been lauded by environmental groups, the business and energy communities have challenged the CPP as exceeding the authority of the Clean Air Act and imposing excessive costs on power plants. The CPP is currently subject to challenge by 28 states and was stayed by the U.S. Supreme Court in February 2016. The attorney general and Department of Justice will need to make a determination on further handling, and

potential defense, of the case. A decision not to prosecute the appeal could lead to the regulation being overturned. Similarly, even if defended, a new EPA administrator could seek to revise the regulations.

In other climate-related litigation under the Clean Air Act, 24 states have brought suit against the EPA's new source performance standards for carbon dioxide emission from new power plants. This recently adopted rule has generated significant opposition from the business community. Like the CPP, the manner in which the Department of Justice defends the challenges, as well as how new EPA management chooses to address the rule could significantly change.

The Paris Climate Accord, announced by the Obama Administration late in 2015, is also in doubt. Since the current administration attempted to avoid the need for Senate ratification of a treaty and adoption by simply taking executive action, a new administration may have a different view on compliance with the international consensus agreement.

Similarly, the waters of the United States rule issued by EPA in August 2015 dramatically expands the scope of jurisdiction over federal wetlands and waters under the Clean Water Act. The rule has been challenged by more than 18 states. The Sixth Circuit recently issued an injunction against enforcement of the rule. New EPA and Army Corps of Engineers management could withdraw support for

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the rule or substantially revise it in line with the limits of the Clean Water Act.

Federal energy policy is likely to change dramatically under a Trump Administration. The current administration has focused on solar, wind and green energy areas, largely with significant federal subsidies, while taking steps to heavily restrict energy development and production. Notably, through restrictions on energy development on federal lands, offshore drilling and hydraulic fracturing regulations. The recent announcement that Rick Perry, former Texas governor, has been nominated as Energy secretary is an indicator that policies may change profoundly.

The president-elect has stated an interest in moving forward with exploring and producing American energy by American

workers. This represents a significant change from the current administration. Also, the protracted review and ultimate denial of the Transcanada Keystone XL pipeline from Canada will likely be reversed with an approval being issued by the State Department. Exploration, development and transportation of the country's energy resources are likely to be a key focus of the new administration.

Finally, while it would be impossible to track all recently issued environmental- and energy-related regulations issued by the Obama Administration here, Congress may well play a key oversight role. Comments by Republican representatives suggest that Congress may employ the Congressional Review Act to evaluate and withdraw Obama regulations. With control of both chambers and the president's approval, it will be possible to invalidate rules

that Congress determines are inappropriate or beyond the bounds of existing law.

While the Trump Administration is likely going to bring profound changes to the approach to governing in all areas, the potential changes from an expansive and costly environmental program over the last eight years may be striking. Although it is certain to bring discontent from environmental groups, the re-calibration toward a more sensible and balanced environmental regulatory agenda may yield significant opportunities for business and employees in many industries.

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