Uncertainty is the New Certainty

Evaluating the EPA in the New Administration

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Every new presidential administration takes office with plans to implement its own governing philosophy through changes in the federal agencies it takes over. This period of transition, as a new administration moves in and gears up, causes some uncertainty as businesses try to figure out how the new approach may affect them.

Scott Pruitt, the new Environmental Protection Agency (EPA) administrator has promised a "results-driven approach to managing the agency, with a goal of creating greater certainty for businesses and direction for the states."[1] Administrator Pruitt is also emphasizing his belief that environmental protection can co-exist with economic expansion and that he will look for opportunities for the EPA to support economic growth.[2]

It is still very early, but the new administration has laid down some markers on how the EPA intends to operate differently in the Trump administration. They include:

- 25% budget cut with large cuts to enforcement, compliance, regional programs and grants
- Discussions of eliminating at least one field office (Region 5 in the Great Lakes states)
- Reduced staff and early retirement buy-outs to experienced senior personnel
- Emphasis on economic growth in evaluating environmental protection
- "Pay as you go" and "one in, two out" executive order
- Withdrawing from the Paris Climate Accord

Congress has also signaled it intends changes to the EPA, with the House potentially re-considering the "Secret Science Reform Act" that would place restrictions on the kinds of scientific studies the EPA could rely on in its rulemaking.[3] The intent from both Congress and the administration is an EPA that has a smaller footprint and smaller staff, with fewer rules and regulations that are more limited in scope and sensitive to economic data.

"Rolling back the regulatory state" is the framework for the changes.[4]

What to look for?

In the immediate term, there may be increased uncertainty as the structural changes are implemented. The agency has yet to staff up with many of the leadership roles still vacant under Pruitt. If the proposed buy-outs are successful, the agency may lose much of its institutional knowledge and expertise – perhaps a good thing for implementing structural change, but in the short term may lead to inefficiencies in the permitting process, mistakes in rulemaking procedures and some initiatives just withering away.

The reduction in force at the federal level, including the elimination of at least one regional field office, could result in more regulatory efforts at the state and city level – thus subjecting businesses in multiple jurisdictions to enhanced differing jurisdictional enforcement. However, the budgetary elimination of most grant and financial support for states and cities means they may not have the funds to take it on.

Trump's executive order requiring the elimination of two regulations for each new regulation proposed, with zero incremental cost, may be harder to implement than expected. First, the procedures for eliminating and/or replacing an enacted rule require significant periods of time to complete. Second, the proposed changes are likely to draw multiple legal challenges that could tie up any actual change for a long time. Administrator Pruitt should be familiar with this strategy as he deployed it against the EPA prior to becoming its administrator.

Following Paris

Finally, even though the President has withdrawn the United States from the Paris Climate Accord, governors, mayors and businesses have stepped forth stating their intention to continue to participate and to move forward with the actions called for to reduce carbon emissions. The states of California, New York and Washington have formed a coalition to comply with the Paris Climate Accord and Michael Bloomberg, the former mayor of New York, along with other philanthropic members will pay the $15 million the U.S. would have paid to the Climate Secretariat at the United Nations.

The upshot is that while the EPA will not likely be enforcing any greenhouse gas emission reduction programs, companies doing business in the U.S. (and most certainly internationally) likely will be subject to reduction targets both in the U.S. and abroad.

What is clear is that this EPA will be far less proactive than under the previous administration. Both the President and the EPA's administrator seem focused on reducing the role of the agency generally, more so than using it as a tool to implement any particular policy objective. It remains to be seen if the idea of using the EPA as a tool for economic growth essentially means having the EPA do nothing.

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[1] Scott Pruitt, EPA administrator, at the Faegre Baker Daniels 2017 Energy & Environmental Symposium, May 15, 2017.

[2] Id.

[3] H.R. 1030 – Secret Science Reform Act of 2015, Rep. Lamar Smith, R-TX-21

[4] Scott Pruitt, at CPAC, February 24, 2017.