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PERSPECTIVE

## Will Trump unravel the EPA?

By Jeffrey Dintzer and Eric Cohen

Donald Trump ran on a simple platform — Make America Great Again. But the president-elect has offered few clues as to what specific changes we can expect from his presidency. Plans for the U.S. Environmental Protection Agency are no exception. Early in his campaign, Trump claimed he would demolish the EPA entirely, but he has since backed away from that position. So what will the EPA look like under President Trump?

When asked during an appearance on Fox News Sunday if he intends to take a wrecking ball to President Barack Obama's legacy, the president-elect responded, "I just want what's right. EPA, you can't get things approved. People are waiting in line for 15 years before they get rejected, okay? That's why people don't want to invest in this country. ... So we're going to clean it up. We're going to speed things up."

Clearly then, even though the EPA may not be eliminated, Trump intends to steer it in a very different direction. Which specific regulations and practices the president-elect hopes to modify or revoke, and of those, which to prioritize, remains to be seen. But by considering the probable strategies Trump will utilize against the EPA to effectuate his deregulatory agenda, we can begin to paint a picture of the EPA's next four — or more — years.

First and foremost, Trump has promised to slash the EPA's budget, a target he has expressed particular ire against in his grander scheme to eliminate waste in the federal government. As a frame of reference, when President Ronald Reagan took office in 1981 — with a divided Congress — the EPA's budget was reduced by over one-third. Thus, with the backing of a Republican Congress that is outwardly hostile to EPA's recent initiatives, substantial budget cuts are likely in the works. EPA budgetary constraints will therefore play a more significant role during the Trump administration, which could limit the vigor with which the agency could pursue formal deregulation.

Second, and most obviously, Trump's administration can amend and rescind disfavored regulations. "Midnight" regulations — those adopted in the waning days of an outgoing administration and not yet implemented — can be rescinded easily and immediately. At the other end of the spectrum, to rescind or amend already-final rules requires the same notice-and-comment procedures as needed to implement them. Consequently, rescission through the rulemaking process is much more involved, requiring the investment of significant time and



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*Scott Pruitt, attorney general of Oklahoma, arrives at Trump Tower on Fifth Avenue in New York, Dec. 7, 2016. President-elect Donald Trump has selected Pruitt, a close ally of the fossil fuel industry, to run the Environmental Protection Agency, a transition official said.*

resources. Additionally, the agency's decision to rescind an old rule must be "rational," which in some cases could be difficult to sustain, especially if a substantial agency record was relied upon to promulgate the rule in the first instance. Formal rulemaking also invites litigation, further delaying new rules (and the rescission of old ones). As a result, the most obvious strategy for deregulation is also the most resource-intensive and time-consuming to implement. On the other hand, this approach also carries a permanence lacked by the other strategies — to readopt rescinded rules, a subsequent administration would need to undergo the same arduous rulemaking process again. Thus, regulated industries would undoubtedly prefer formal deregulation, and to the extent feasible, President Trump will probably direct limited EPA resources toward that endeavor. Even so, depending on the size of budget cuts, the EPA may simply not have enough resources to pursue formal rescission of large swaths of rules.

Given the sluggishness of the rulemaking process, President Trump will probably look toward more immediate options. To that end, a third strategy — deregulation through non-enforcement — may be utilized. An agency's decision not to bring an enforcement action cannot be effectively challenged in court, and therefore informal enforcement policies not to bring certain cases effectively nullify certain regulations.

An example from President George W. Bush's administration is illustrative. When the Clean Air Act was amended in 1970 and 1977, the amendments grandfathered already-existing stationary sources of pollution, permitting such sources to pollute at historical levels, with one caveat — any "modified" source would lose

its grandfathered status and become subject to the amendments' stringent requirements. The Bush administration published a new rule that substantially increased the number of facilities that would qualify for an exception to the modification provision, but the rule was struck down in court. So instead, the EPA simply stopped bringing enforcement actions against modified sources, effectively implementing its prohibited rule through an informal policy. Similarly, while deregulation through formal rulemaking could take years, Trump could deregulate in the interim by instructing the EPA not to bring enforcement actions for violations of rules he wants to eliminate.

Considered in concert, a clearer picture of Trump's EPA comes into focus. What can be seen is an agency with limited resources, with a not insignificant proportion of those resources bogged down in rulemaking, working to undo years of stringent regulation. Under the influence of informal policies, and limited further by resource shortages, enforcement actions should decline significantly during the Trump administration. Taken together, the future of the EPA should be a boon to business activity in many parts of the country.

A final word of caution though — that in many areas, states are allowed to impose more rigorous environmental regulations than the federal standard. Consequently, less stringent EPA regulations will likely reduce procedural hurdles, but, in some states, costly and burdensome regulatory actions may still continue as a result of aggressive state enforcement. However, one thing is clear: Trump's administration will undo many years of federal red tape that have restricted the ability of domestic corporations to compete in the international marketplace.

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