

Environmental Law Under Trump

Annual Environmental Law Symposium

Lewis & Clark Law School

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What A Difference A Year Makes

- “All of the Above” Energy Strategy = Energy Dominance
 - EO 13783, Promoting Energy Independence and Economic Growth (Mar. 28, 2017) - review of “burdens on energy”, esp. oil, gas, coal and nuclear resources
- Deregulatory Agenda
- Fossil Fuel/Extractive Industry Project Emphasis; Elimination of Climate Policies
- Movement Away from Conservation; Reversal of Mitigation Policies
- Permit Streamlining and Infrastructure
- Role of the States; Cooperative Federalism

Federal Land Policy & Management Act § 202 - Planning

- BLM administers about 250 million acres of federal lands
- Use and observe the principles of “multiple use and sustained yield”
- “Resource management plans” establish goals and objectives to guide future land and resource management actions implemented by the BLM
- Key – future actions MUST be consistent with the plan
- Process is lengthy and inefficient – can easily take 7-10 years

Planning 2.0 – Goals of the Rule

- Promote efficiencies
- Enhance opportunities to use high quality information at the appropriate scale, including for landscape planning
- Front-load opportunities for public involvement
- Final Rule published on Dec. 12, 2016 (81 FR 89580) and became effective on Jan. 11, 2017

The Demise of Planning 2.0

- Opponents: “centralizes power in DC”; “dilutes the role of state and local government in the planning process”; redefines multiple use to prioritize conservation”; “will cause longer permitting delays”
- Resolution of disapproval under the Congressional Review Act (CRA) was signed into law as Public Law 115–12 on March 27, 2017 by President.
- Under the CRA, the rule is “treated as though such rule had never taken effect.” 5 U.S.C. 801(f).
- “May not be reissued in substantially the same form”; a new rule that is “substantially the same” may not be issued, unless specifically authorized by law. 5 U.S.C. 801(b).

What's Next for Planning?

- Secretary Zinke Memo dated March 27, 2017 – directed BLM to begin a focused effort to improve the Federal land use planning and NEPA processes
- Eliminate redundancies and inefficient processes
- Public input sought on a Goggle Form back in July 2017
- Report was to be delivered to the Secretary within 6 months
- Process appears to be bogged down within Interior

Deregulation

- EO 13771 – Reducing Regulation and Controlling Regulatory Costs
 - “2 for 1” in FY 2017
 - Budgets and “3 for 1” in FY 2018
 - Revisions to Regulatory Impact Assessments
- EO 13777 – Regulatory Task Force Review
- OMB/OIRA Guidance
- EO 13783 – Rollback of specific rules, climate analysis, compensatory mitigation and review of rules and policies that “burden energy”, esp. oil, gas, coal and nuclear resources

Oil & Gas

- Numerous oil & gas rules rescinded or delayed
- New Charter establishing a Royalty Policy FACA Committee (March 29, 2017).
- Enhanced emphasis on leasing: Secretarial Order No. 3354 (July 6, 2017)
 - Enhances access with quarterly onshore oil & gas sales
 - Requires a strategy to process large number of pending permit applications and improve the permitting process
- Revisions to BLM Instruction Memoranda
 - Revokes Master Leasing Plan reforms (Jan. 2018)

Coal

- Stream Protection Rule = CRA-ed
- Valuation Rule Repealed (Sept. 6, 2017)
- Secretarial Order 3348 (March 29, 2017) - Reverses Secretary Jewell's Order Limiting Coal Leasing Pending a Review of the Federal Coal Program; PEIS Cancelled
- Mine Waste Methane Instruction Memorandum Revoked
- No material improvements in coal markets due to competition from natural gas

Hardrock Minerals

- Executive Order 13817 - A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals (Dec. 20, 2017); Secretarial Order 3359 (Dec. 21, 2017)
 - Focus on Strategic Vulnerabilities: Both Economic and Military
 - Permitting Delays
 - Protracted Litigation
- EPA Decision that Financial Responsibility Requirements under CERCLA Section 108(b) for Hardrock Mining Industry Were Not Appropriate (Dec. 1, 2017)
- Proposed Mineral Withdrawals Allowed to Lapse – Ex., Sage-Grouse Focal Areas

Permit Streamlining – Presidential Action

- Many policies focused on permit streamlining, for example:
 - EO 13766, Expediting Environmental Reviews and Approvals For High Priority Infrastructure Projects (Jan. 24, 2017)
 - EO 13805, Establishing a Presidential Advisory Council on Infrastructure (July 19, 2017) [now disbanded]
 - EO 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure (Aug. 15, 2017)
 - President's Infrastructure Proposal

Permit Streamlining – Secretarial Action

- Many policies focused on permit streamlining, for example:
 - Secretarial Order 3354 (July 6, 2017) – Oil & Gas and Solid Mineral Leasing
 - Secretarial Order 3355 (Aug. 31, 2017) - Page and timing limits for NEPA review; for example, EIS: 150 pages, or 300 pages “for unusually complex projects,” excluding appendices; target completion of EIS within 1 year of Notice of Intent
 - Secretarial Order 3358 – Executive Committee for Expedited Permitting (Oct. 25, 2017)
 - Significant effort now underway; expect more categorical exclusions

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