
The Mystery of the Disappearing Air Regulations

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The theme of this issue of *Natural Resources & Environment*—Air Today, Gone Tomorrow—is particularly apropos to the focus of this article: the Obama administration’s efforts to pull back Clean Air Act (CAA) permitting and final rulemaking decisions made during the preceding Bush administration. This systematic effort is evident in nearly all aspects of CAA practice. For example, the Environmental Protection Agency (EPA) is currently at odds with the Navajo Nation over EPA’s recent decision to reconsider its earlier decision to issue a CAA Prevention of Significant Deterioration (PSD) permit for the construction of the Desert Rock coal-fired electric plant in New Mexico. In Alabama, EPA is considering whether to undo a final approval that it issued with respect to a revision of Alabama’s State Implementation Plan (SIP) dealing with opacity.

These efforts by the new administration go far beyond the traditional practice of a new presidential administration putting a halt on pending or proposed regulations. This administration is not just “stopping the printing presses” at the Office of the Federal Register (OFR)—it is unilaterally re-writing rules and approvals where the ink is long dry and the final rule is on the library shelf.

This effort has already tested the limits of a new administration’s power to withdraw final decisions of the previous administration without going through the statutorily prescribed process for revising or withdrawing existing permits or rules. Recently, in fact, the U.S. District Court for the District of Columbia rejected a comparable effort by EPA to undo a final stream buffer rule for coal mines through a “voluntary remand” without following existing statutory procedures for withdrawing or amending the rule. See *Nat’l Parks Conservation Ass’n v. Salazar*, No. 09-00115, 2009 WL 2497393 (D.D.C. Aug. 12, 2009). Some of the administration’s more controversial attempts to enact new air policy through voluntary vacatur or reconsideration of final rules and permits may be in jeopardy for the same reason.

Without a doubt, it is the prerogative of a new presidential administration to set policy for the various executive

agencies and to change existing policy expeditiously to meet commitments made during the incoming president’s presidential campaign. It is also true that where the policy goals of the incoming president differ from those of his predecessor it can be a difficult and drawn-out process to implement the new president’s policy prerogatives—the incoming administration may have to overcome administrative inertia and substantial procedural hurdles before implementing new administrative policy.

Knowing how difficult it is to “unring the bell” once proposed agency actions become final, it has become traditional practice of incoming administrations to suspend ongoing administrative action promptly following the new president’s inauguration. By memorandum dated January 20, 2009 (the Emanuel Memo), Rahm Emanuel, Chief of Staff for the incoming Obama administration, directed all executive departments and agencies to withdraw from the OFR all proposed or final regulations that had not been published in the *Federal Register* so that they could be “reviewed and approved by a department or agency head appointed or designated by the President after noon on January 20, 2009.” 74 Fed. Reg. 4435 (Jan. 26, 2009). The Emanuel Memo also directed all executive departments and agencies to “[c]onsider extending for 60 days the effective date of regulations that have been published in the *Federal Register* but not yet taken effect . . . for the purpose of reviewing questions of law and policy raised by those regulations.” Where such a determination was made, the department or agency “should immediately reopen the notice-and-comment period for 30 days.” The Emanuel Memo and its effect on federal CAA rulemakings in the pipeline were discussed in a previous article here in *Natural Resources & Environment*. See Gale Lea Rubrecht, *President Obama Halts Midnight Regulations*, 24 NAT. RES. & ENV’T. 47 (2009).

However, the Obama administration has also gone beyond the scope of the Emanuel Memo in its attempt to effect immediate changes in EPA air policy. Specifically, the administration has sought ways of pulling back *final* permits and rules, issued in the waning days of the Bush administration, without going through the time-consuming processes for amending or withdrawing permits or rules set forth under the CAA or the Administrative Procedure Act (APA). Two examples include EPA’s attempt to withdraw a PSD air permit issued to Desert Rock and EPA’s attempt to withdraw a final approval of an amendment made to Alabama’s SIP. As explained below, while case law supports the administration’s power to with-

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draw proposed actions that have not yet become final, case law may thwart the administration's efforts to withdraw final permits and rules without following more time-consuming, statutorily mandated procedures.

Desert Rock

On July 31, 2008, EPA issued a permit for Desert Rock, a 1,500-megawatt coal-fired electric plant, to be built by Sithe Global Power LLC and the Navajo Nation in northwest New Mexico (Desert Rock). In fact, due to delays in permitting, Desert Rock brought suit against EPA, leading to a consent decree requiring EPA to act on the Desert Rock permit application by August 1, 2008. However, after the permit was issued, the consent decree was never formally approved by the court.

New Mexico appealed EPA's issuance of the permit to EPA's Environmental Appeals Board (EAB) on October 2, 2008, requesting that the Board remand the permit for further consideration of the facility's effects on ozone, visibility, particulate matter, carbon dioxide, and hazardous air pollutants. New Mexico also argued that EPA had unlawfully issued the permit

mitment to issue a final decision by August 1, 2008. Desert Rock also pointed to the CAA's one-year deadline after filing a complete application (the source of the original consent decree) and to EPA's own regulations limiting the agency's power to withdraw a PSD permit to any time prior to the EAB's decision to grant review of a permit.

On September 24, 2009, the EAB decided to allow EPA Region 9 to reconsider the PSD permit it issued to Desert Rock. See *Desert Rock Energy, LLC*, 14 E.A.D. __ (2009). Despite Desert Rock's arguments to the contrary, the EAB agreed with EPA Region 9 that EPA has the complete discretion to withdraw and reconsider a PSD permit at any time prior to a final decision by the EAB on the merits of its review. Desert Rock will have to await a new, reviewable, final decision on remand before Desert Rock will have the opportunity to challenge the propriety of EPA's action in an Article III court. Until such time, EPA will undoubtedly continue to receive criticism from the regulated community.

Alabama's Opacity Rule

EPA has attempted something similar in the context of a final approval of an amendment to Alabama's SIP. On September 11, 2003, the Alabama Department of Environmental Management (ADEM) submitted a request for EPA to approve proposed revisions to the "Visible Emissions" portion of the Alabama SIP involving opacity. On April 12, 2007, EPA proposed to approve the revisions contingent upon Alabama submitting a revised SIP proposal addressing EPA's concerns regarding potential impacts of changes to the rule on attainment of the National Ambient Air Quality Standards (NAAQS). On August 22, 2008, ADEM submitted a revised SIP incorporating the changes requested by EPA. In an October 15, 2008, *Federal Register* notice, EPA approved Alabama's SIP revision as submitted on August 22, 2008. EPA's final approval became effective November 14, 2008.

On December 12, 2008, Sierra Club and other groups filed, with EPA, an administrative petition for reconsideration of EPA's final rule approving Alabama's SIP revision. On the same day, these groups filed a petition for judicial review of EPA's final approval with the Eleventh Circuit. *Alabama Environmental Council v. EPA*, No. 08-16961 (11th Cir.). In a letter dated January 15, 2009, EPA Region 4 denied the petition for reconsideration. That should have been the end of the matter, at least at the administrative level.

Following the change in presidential administrations, however, these groups filed a second petition for reconsideration with EPA on February 25, 2009, restating the same arguments that EPA had already considered and rejected. This motion was granted with a five-sentence letter that failed to mention the earlier denial. Shortly after granting reconsideration, EPA filed a motion for "voluntary remand," asking that the court remand EPA's final approval so that EPA could undertake a "reconsideration" proceeding.

The State of Alabama and Alabama Power Company, one of the companies subject to the new rule, opposed EPA's

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before completing a required consultation with the U.S. Fish and Wildlife Service in violation of the Endangered Species Act. On January 8, 2009, EPA filed a brief with the EAB defending its issuance of the permit.

In an abrupt turnaround, on April 27, 2009, EPA filed a motion for remand with the EAB requesting "a complete remand of the Final PSD Permit and administrative record." EPA's explanation was that it had independently decided to propose repealing certain rules relied upon by the agency in issuing Desert Rock's permit. Desert Rock argued in response that EPA cannot now avoid its consent decree-backed com-

motion for voluntary remand and argued that the proposed purpose of the remand—for EPA to “reconsider” its final approval of Alabama’s SIP revision—is unlawful. In fact, Alabama Power filed a separate petition for review challenging EPA’s decision to conduct a second “reconsideration.” Specifically, its argument is that if EPA seeks to change the Alabama SIP to reflect new EPA policy, there are specific procedures in the CAA for doing so. Under the CAA, in order to amend an existing SIP found to be deficient to meet the NAAQS, EPA must issue a “SIP Call”—a notification to the state that it must amend its SIP to meet EPA standards. Eleventh Circuit precedent is clear on this point. See *Sierra Club v. Georgia Power Co.*, 443 F.3d 1346, 1354–55 (11th Cir. 2006) (holding that EPA must go through the “formal SIP revision” process “[i]f it believes that its current interpretation of the Clean Air Act” requires a state to modify an approved SIP); *Sierra Club v. TVA*, 430 F.3d 1337, 1348–49 (11th Cir. 2005) (holding, with respect to the rulemaking at issue in this case, that Alabama must follow “the rigors” of the formal SIP amendment process to change the terms of an approved SIP and that to do otherwise would be “an impermissible end-run around the SIP revision process”). For its part, EPA has strenuously defended its power to withdraw a final approval of a SIP amendment—whenever it chooses to do so—based on the agency’s “inherent authority” to reconsider previous agency actions and has not directly addressed this Eleventh Circuit precedent.

On September 28, 2009, the Eleventh Circuit granted EPA’s motion for a voluntary remand, but retained jurisdiction over the matter. The court dismissed Alabama Power’s separate petition for review but made no mention of the parties’ respective arguments about EPA’s authority to pull back a final SIP approval, preserving that issue for subsequent proceedings before the court.

EPA, apparently anxious to undo its prior final approval, did not wait for the court’s remand order. On September 10, 2009, EPA proposed either to affirm the previous rulemaking (which approved the revisions) or, alternatively, to amend its previous rulemaking (i.e., disapproving the revisions). See 74 Fed. Reg. 50,930 (Oct. 2, 2009). Comments on this novel alternative proposal were due December 16, 2009. EPA’s new decision could come at any time. One thing is for sure—the Eleventh Circuit will have the opportunity to decide if EPA can pull back a final SIP amendment without invoking the SIP Call process provided for in the statute.

Existing Precedent

The Obama administration’s attempt to withdraw from the OFR all proposed or final regulations that have not been published in the *Federal Register*, and to delay the effective date of regulations that have been published, is not without precedent. For example, on January 29, 1981, the incoming Reagan administration issued a memorandum ordering that the effective dates of all regulations which were final but not yet effective be postponed for a period of sixty days from the date of the memorandum. See 46 Fed. Reg. 11,227 (Feb. 6,

1981). Pursuant to a subsequent executive order, the effective date of certain regulations was postponed indefinitely. See Exec. Order 12,291, 3 C.F.R. §§ 127, 131–32 (1982), *reprinted as amended* in 5 U.S.C. § 601.

That order led to a lawsuit filed by the Natural Resource Defense Council (NRDC) challenging EPA’s indefinite postponement of the effective date of certain regulations concerning discharges of toxic pollutants into publicly owned treat-

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ment works. See *Natural Res. Def. Council v. EPA*, 683 F.2d 752 (3d Cir. 1982). In that case, the Third Circuit determined that EPA’s action in indefinitely postponing the effective date of the regulations at issue fit the definition of a “rule” under the APA, requiring EPA to act in accordance with the APA’s rulemaking procedures. The court found that the “effective date” of a rule is “an essential part” of the rule itself. Without an effective date, a rule could have no “future effect” and could not serve to “implement, interpret, or prescribe law or policy.” Furthermore, without an effective date, “an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date.” However, the APA specifically provides that a repeal of a rule is a rulemaking subject to rulemaking procedures. As a remedy, the Third Circuit granted NRDC’s petition and remanded the case to EPA with instructions to reinstate all of the regulations, effective as of March 30, 1981, sixty days from the original effective date set forth in the final rule.

A similar situation arose during the first year of the Clinton administration. After the D.C. Circuit remanded certain CERCLA regulations to the Department of the Interior (DOI) concerning natural resource damages, the outgoing Bush administration approved new revised regulations and submitted them to OFR for publication on the final full day of the Bush administration. See *Kennecott Utah Copper Corp. v. DOI*, 88 F.3d 1191, 1200 (D.C. Cir. 1996). Two days later, a DOI employee, under the direction of the new acting secretary for

Policy, Management and Budget, called OFR to withdraw the document. OFR terminated processing of the document prior to publication and returned all three copies that it had received to DOI. Several months later, DOI reopened the comment period on the regulations, while simultaneously recommending further revisions to the proposed rule. New final regulations were issued in March 1994.

Industry groups filed petitions challenging the new 1994 CERCLA rules in the D.C. Circuit on various grounds. Among other things, industry petitioners argued that the Federal Register Act (FRA) required OFR to publish the revised rule submitted to OFR by the outgoing Bush administration and that OFR had violated the Act by returning the relevant documents to DOI. The court rejected this argument, determining that the FRA mandated no such result. Instead, “[a]llowing agencies to withdraw documents during the relatively brief processing period is consistent with the statute’s purpose.” And “[b]y permitting agencies to correct mistakes

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and even to withdraw regulations until virtually the last minute before public release, the government’s approach helps assure that regulations appearing in the Federal Register are as correct as possible in both form and substance.”

The court in *Kennecott Utah Copper* also rejected petitioners’ argument that DOI’s withdrawal of the Bush administration CERCLA regulations required DOI to comply with the APA’s notice-and-comment requirements. The court held that because an unpublished rule is not a “rule” yet, an agency is free to pull the rule without complying with the APA’s rule-making requirements. The court reasoned that “[i]n discarding the 1993 Document, the agency was in no sense ‘formulating’ a rule. Instead, it rejected a document that had not yet been published.” In addition, DOI did not “‘amend[]’ or ‘repeal[]’ a rule because the 1993 Document never became a rule subject to amendment or repeal.”

This existing case law stands for the proposition that a new administration may amend, revoke, or delay a final rule prior

to its publication in the *Federal Register*. After publication, the agency may need to initiate notice-and-comment rulemaking before making any substantive changes to the published rule. Even a postponement of the effective date of a rule may, in some cases, require notice-and-comment rulemaking.

The question, however, remains as to whether executive agencies have any remaining “inherent” authority under administrative law principles giving them the authority to reconsider their previous final actions. Controlling Supreme Court precedent has recognized this power only in so far as allowing agencies to correct “inadvertent ministerial errors” in adjudicatory contexts. See *Am. Trucking Ass’n, Inc. v. Frisco Transp. Co.*, 358 U.S. 133, 145 (1958). The Court has emphasized, however, that such power may not be used to implement policy changes. And, it is not enough for an agency to claim a correction is clerical rather than policy based; that fact must be reflected in the original record. Beyond this limited power, the Court has emphasized agencies’ limited powers as creatures of Congress. See *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961). While agencies may amend their actions prior to their effectuation, after the effective date agencies may only reconsider final actions in the specific manner provided by statute. While some courts of appeals have subsequently been more flexible in allowing agencies to reconsider adjudicatory actions, courts have generally prohibited agencies from reconsidering final rulemaking decisions, particularly in the context of a comprehensive regulatory program such as the CAA.

There should therefore be little surprise that the U.S. District Court for the District of D.C. recently thwarted the Obama administration’s attempt to undo an existing final rule through a voluntary vacatur and remand. *Nat’l Parks Conservation Ass’n v. Salazar*, No. 09-00115, 2009 WL 2497393 (D.D.C. Aug. 12, 2009). Specifically, in *Nat’l Parks Conservation Ass’n v. Salazar*, an environmental group sued EPA and DOI challenging a final rule concerning stream buffers for coal mines. The agencies filed a motion for voluntary remand of the rule and dismissal. As grounds, the agencies argued that “Secretary Salazar has confessed serious legal deficiencies in that rulemaking and a vacatur will not result in disruptive consequences.” An intervenor in the case, the National Mining Association, opposed remand and argued that the case should be decided on the merits. The court denied the agencies’ motion for voluntary remand and held that ordering remand would “wrongfully permit the federal defendants to bypass established statutory procedures for repealing an agency rule.”

As in *Nat’l Parks Conservation Ass’n v. Salazar*, EPA is on a crash course with states and industry in its attempts to implement its new CAA policies. The Obama administration is wasting no time and is employing new techniques to bring about change. This aggressive approach could pay off and bring about new rules faster than previous administrations have been able to accomplish. Or it could backfire, as in *Nat’l Parks Conservation Ass’n v. Salazar*, and wind up wasting more time and resources than if the agency had simply followed the traditional processes from the start. Only time will tell the result. 🌲