

Rolling back EPA regulations is one of the Trump Administration's priorities. The most notable example is Obama's Clean Power Plan, which aimed to cut CO<sub>2</sub> emissions from power plants. The other rule that has gotten considerable attention is the so-called WOTUS rule, which defines federal jurisdiction to regulate wetlands and watersheds. But these are not the only rules in the crosshairs. EPA has announced plans to reconsider a rule limiting emission of toxic substances from power plants, rules dealing with methane emissions from oil and gas operations and from landfills, a chemical plant safety rule, and a rule dealing with water pollution from power plants. EPA plans to replace some of these rules and eliminate others altogether. Some of these rules are still the subject of litigation, so EPA is seeking to have the court proceedings put on hold, or to have the courts send the rules back to the EPA for reconsideration. But even without this additional procedural wrinkle, EPA faces a long and complicated process.

The press seems to think that Trump has accomplished something when he holds a press conference or sends a tweet demanding repeal of a regulation. But these don't have any legal significance. He's also issued executive orders about regulatory rollbacks, but those don't actually change the regulations. They just suggest that the agency start the process of actually making a regulatory change. (His immigration orders were different because Congress specifically gave him power to do certain things in that area — but environmental regulation is assigned entirely to agencies like EPA, not to the President.) The agency then faces a long, complicated road before there's actually a permanent change in regulations.

One lesson of the Trump experience, as I discuss in a forthcoming [paper](#), is that these procedural requirements are an important check on politicized decision-making.

If you look at the Administrative Procedure Act, the procedure for adopting or rescinding a rule looks straightforward. The agency first issues a public notice of its proposal, receives public comments, and then issues a final rule along with a concise explanation of its reasons. But due to a combination of Congressional mandates, executive branch requirements, and judicial interpretations, the actual process is far more difficult than it sounds.

Apart from the special requirements in some of the pollution laws, Congress has added several general requirements to all rulemakings, such as a requirement that the agency analyze the effect of a regulation on small businesses.

The executive branch has done its part to make the process more complicated. Every president beginning with Reagan has required agencies to submit a cost-benefit analysis of any major final rule to the Office of Information and Regulatory Affairs within the White House. That office (known to insiders as OIRA) nitpicks the cost-benefit analysis and often

demands changes in the agency's analysis or in the rule itself. OIRA also acts as a funnel for comments from other agencies--for instance, since many environmental regulations impact the domestic operations of the Defense Department, it often has comments.

Much of the complexity has been added by the courts, however. In order to allow meaningful public comment, the courts require agencies to provide the data and analysis on which it relies. When the rule is issued, an agency has to give a detailed response to any significant criticism of its analysis or any new evidence or arguments raised by industry or environmentalists. The agency also has to be very careful if it makes changes in response to comments- if the changes are too big, a court may hold that another round of notice and comment is necessary.

In reviewing an agency rule, courts look to see if all these procedures have been followed. But courts require that an agency do more than just check the boxes. Instead they require a reasoned explanation of all significant issues. Under the *Chevron* test, an agency's interpretation of a statute will be upheld if the statute is ambiguous and the agency's interpretation is reasonable. That gives the agency some flexibility, but an unsympathetic court may conclude that the statute just doesn't leave that much room for interpretation. Conservative judges have been talking about decreasing the amount of deference given to agencies - but that was under Obama, and it remains to be seen whether they will feel the same way about Trump's efforts.

The upshot is that a significant regulatory measure is a major undertaking. Environmentalists have been wont to complain of "ossification" of the regulatory process - but right now, all these hindrances may seem much more a benefit than a cost.

The Administration has been trying to short-circuit this process by temporarily suspending rules while they are under reconsideration, using a variety of statutory justifications to avoid the usual complexities of repealing a rule. The D.C. Circuit overturned one of those efforts. As I discussed in an earlier [blog post](#), the court was sharply critical of the weakness of EPA's arguments for putting the rule on hold. It remains to be seen what will happen with EPA's other efforts, which involve different statutory provisions, but I suspect that EPA will have a hard time justifying those delays as well. One open question is the extent to which a change in presidential policies can help support a change in an agency's general approach, but there's little indication that agencies are prepared to allow such considerations to eliminate the duty to ground a decision in the facts.

In short, EPA will probably find rescinding or replacing these EPA regulations a fraught process. The process may be even more of a challenge than usual, because Pruitt and the

other political appointees at EPA are trying to cut staff and have alienated many of those who will remain.

The Administration's goals are clear. It wishes to carry through on Trump's withdrawal from the Paris Agreement by eliminating restrictions on emitting greenhouse gases. It also aims to help industry by loosening air and water pollution regulations. With luck, the administrative process with some help from the courts will slow this process long enough for the political winds to shift.