The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2018
PHILADELPHIA, FRIDAY, MAY 11, 2018 VOL 257 • NO. 92 An ALM Publication

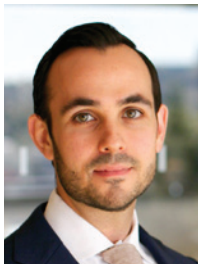
ENVIRONMENTAL LAW

Pushing Pause: Staying and Delaying Environmental Regulations

BY MICHAEL DILLON
Special to the Legal

Deregulation has been atop President Donald Trump's agenda since assuming office, particularly within the environmental sector. Some of the Trump administration's earliest actions include issuance of executive orders aiming to ease the burden of existing regulations, and high-profile rollbacks of major Obama-era rules like the Clean Power Plan and Waters of the United States Rule. In addition, the Trump administration has sought to delay the implementation of a host of other rules that were published during the later years of President Barack Obama's second term.

Though much has been made of the current administration's deregulatory efforts, Trump is not the first president to try to undo or delay the previous administration's work. Just last month, the U.S. Court of Appeals for the D.C. Circuit in *Air Alliance Houston v. Environmental Protection Agency*—a case challenging EPA's delay of certain amendments to the Risk Management Program under the Clean Air Act (CAA)—ordered EPA to produce a list of pre-Trump examples where a federal agency sought to delay a previous administration's final rule.



MICHAEL DILLON *is an attorney with the environmental and energy land use law and litigation firm of Manko, Gold, Katcher & Fox, located just outside of Philadelphia. He can be reached at 484-430-2335 or mdillon@mankogold.com.*

EPA's response to the order included more than 20 EPA actions alone, and an additional 16 actions by other federal agencies, most of which occurred after presidential transitions.

Considering that political change is an American constant, does the EPA's filing suggest that the regulated community is always one election away from facing potentially new or different standards, or possibly avoiding such standards altogether? Although the executive enjoys wide latitude to revise existing regulations, a spate of challenges to agency action would suggest that more than just the stroke of a pen is needed.

As a fundamental matter, federal agencies do not have carte blanche authority to promulgate or revise rules. As creatures of statute, federal agencies are bound both by their limited statutory authority and the obligation to make reasoned decisions. Recent case law focused on agencies' authority to stay or delay rules is further defining the extent of agency authority in this regard.

In *Clean Air Council v. Environmental Protection Agency* (July 2017), the D.C. Circuit considered the EPA's CAA stay authority in the context of the EPA's stay of certain portions of the 2016 Oil & Gas Rule. After final publication of the rule, several trade groups filed petitions with the EPA seeking reconsideration pursuant to CAA Section 307(d)(7)(B), which sets forth the factors that require the EPA to convene a reconsideration proceeding, including: the impracticality of raising an objection during the notice-and-comment period; and the objection is of central relevance to the final rule.

In June 2017, the EPA granted the reconsideration petitions and issued a 90-day stay of the rule pursuant to CAA Section 307(d)(7)(B), which permits the EPA to stay the effectiveness of a reconsidered rule "for a period not to exceed three months." The EPA's notice identified four aspects of the rule being reconsidered. Shortly thereafter, several environmental organizations filed an emergency motion asking the D.C. Circuit to vacate the stay. In granting the motion, the court stated that the EPA was required to point to something in the CAA or Administrative Procedure Act (APA) that authorized the stay. The

EPA pointed only to Section 307(d)(7)(B) of the CAA, which the court read narrowly, holding that a 90-day CAA stay is only lawful where the EPA is required to grant reconsideration.

According to the court, the EPA was not required to convene the reconsideration process because the issues identified in the reconsideration notice had been raised during public comment. Though the full impact of *Clean Air Council* is not yet known, the opinion clearly limits the EPA's CAA stay authority to instances when reconsideration is required. However, the court noted that the EPA had separately proposed a longer-term delay of the rule, and expressly declined to reach the question of whether such a delay could be accomplished via notice-and-comment rulemaking. Interestingly, the court's conclusion is based on a rather expansive reading of some specific comments in the administrative record, with some of the court's references only generally or tangentially related to the concerns raised in the industry groups' petitions for reconsideration. The court's broad reading of the administrative record could signal to petitioners that they will face a higher burden to convince the EPA of the impracticality of raising an objection during the public comment period, which may lead to "kitchen sink" style comment letters that attempt to identify every conceivable issue out of fear of failing to preserve an issue for judicial review without the safety net of reconsideration to fall back on.

The primary issue in the case was the meaning of the term 'effective date.' Plaintiffs argued that the stay clearly violated APA Section 705 because it was issued after the rule's published effective date.

While *Clean Air Council* deals specifically with CAA stays, *Becerra v. Department of the Interior* (August 2017), provides some detail about the scope of a federal agency's stay authority under APA Section 705, which states that a federal agency "may postpone the effective date" of a rule "pending judicial review." In July 2016, the Office of Natural Resources Revenue (ONRR) within the Department of the Interior published a rule for valuing oil, gas, and coal on federal and Indian lands, with an effective date of Jan. 1, 2017. The first substantive requirements of the rule, however, were to begin in February 2017. In December 2016, industry groups challenged the rule in the U.S. District Court for the District of Wyoming. In February 2017, after the presidential transition, ONRR stayed the rule pursuant to APA Section 705 due to the pending litigation. ONRR then petitioned the court to hold the industry challenges in abeyance, indicating that it planned to ultimately repeal the rule. In April 2017, several states attorneys general filed a suit in the U.S. District Court for the Northern District of California challenging the stay as impermissible under APA Section 705.

The primary issue in the case was the meaning of the term "effective date." Plaintiffs argued that the stay clearly violated APA Section 705 because it was issued after the rule's published effective date. ONRR argued that the term "effective date" should be read to also include a rule's compliance dates, and because the first compliance date was not until February 2017, the stay was proper. ONRR further argued that permitting an APA Section 705 stay only before the published effective date often would preclude an agency from using the APA because statutory deadlines for challenging an action often run beyond such dates.

The court ruled in favor of plaintiffs, holding that the rule's plain language authorizes postponement only of effective dates, not compliance dates. Therefore, under *Becerra*, an agency may only grant an APA Section 705 stay before a rule's published effective date passes. The court further chided ONRR for "blocking judicial review" by requesting a stay of the industry group challenges after having already invoked Section 705. *Becerra*, therefore, should serve as caution to practitioners who obtain an APA Section 705 stay and may wish to not otherwise diligently pursue their underlying judicial challenge.

Together, *Clean Air Council* and *Becerra* clarify the landscape of federal agency stay authority and limit the available avenues for agencies seeking to pause a rule. Both also make clear, however, that an agency may change the effective date in a rule through typical notice-and-comment rulemakings; and such an action will be subject to judicial review. Time will tell if the courts continue to view agency stay authority with a narrow focus. •

MANKO | GOLD
KATCHER | FOX LLP
AN ENVIRONMENTAL AND ENERGY LAW PRACTICE