

National Affairs and Legislation Committee
The Garden Club of America
110th Congress, 2nd Session — November 6, 2008
Update # 19

• **Last Minute Regulatory Juggernaut**

It has been “standard operating procedure” for administrations approaching the end of their tenures to lock in as many of their policy positions as possible before leaving office. One way they do this is to issue regulations that will govern the way federal programs are administered in the future. These end-of-term maneuvers use the regulatory process policy to achieve changes the administration had been unable to accomplish through the legislative process¹

The January 12, 2001 Forest Service “roadless rule” promulgated at the end of the Clinton administration is a good example. It was written to take effect May 12, 2001, four months into the Bush administration.² Among the many other Clinton end-of-term regulations were rules dealing with arsenic in drinking water, pollution runoff in rural areas, pollution-reporting requirements for manufacturers of lead compounds and a proposed ban on snowmobiling in Yellowstone National Park.



It comes as little surprise, therefore, that the out-going Bush administration is churning out more than 90 regulations, and expediting them on a fast-track schedule so they become effective before the end of the presidential term on January 20. As enormous as this cascade of proposed new regulations seems, it actually involves fewer regulations than President Clinton approved at the end of his administration.

There is nothing secret about what is going on. In May, White House Chief of Staff Joshua Bolten issued a memo that set deadlines for expediting regulations during the remaining months so that economically significant final rules would be published by November 20 and other less significant rules by December 20. For the Bush administration to lock in its regulations, these dates are critical: economically significant rules become effective only after a 60-day congressional comment period, and less significant rules after a 30-day period.³

There is a steep price to be paid for waiting too long, as the out-going Clinton administration learned the hard way in 2001. Even while Bush inaugural festivities were in full swing on the afternoon of January 20, 2001, the fledgling administration issued a government-wide memo blocking implementation of Clinton “midnight regulations” that had not yet taken legal effect. More than 250 Clinton regulations were put on a two-month hold pending decisions whether to withdraw, modify or scrap them. The outgoing Bush administration is driving hard to make sure its final batch of regulations doesn’t meet the same fate.

¹ President Carter issued so many regulations at the end of his administration—amounting to 24,531 pages in the Federal Register between Election Day and Inauguration Day—that the term “midnight regulation” was coined. President Clinton’s regulations during the “midnight” period totaled 26,542 pages.

² It would have banned most road construction and reconstruction and most timber cutting in 58.5 million acres of inventoried forest roadless areas and would have improved habitat for threatened, endangered, proposed, or sensitive species and reduced the risk of wildfire and disease. The Bush administration initially postponed the effective date of the roadless area rule, but then allowed it to be implemented in a version that allowed individual states to request piecemeal protection of roadless areas rather than establishing a national basis for complete wilderness protection. In the meanwhile, a series of court battles ensued. In July, 2004, the Bush administration proposed a new general roadless rule, leading to a final rule published in May, 2005.

³ “Final” and “effective” are different stages. Regulations are final when published in the Federal Register, but federal law requires agencies to wait 30 or 60 days before making the rules effective.

Scores of business and industry advocates, trade associations and corporate officials have been huddling with White House and agency personnel, making the case for easing rules that complicate their businesses or increase their costs. Among the 90-odd regulations currently in the pipeline, many are aimed at environmental programs and run counter to long-standing environmental protection principles. Here are three particularly distressing examples.

1) New Source Review (NSR)

Background: Under the 1972 Clean Air Act, grandfathered aging coal-fired power plants, refineries, paper mills, smelters and other industrial facilities were exempt from the requirement to install state-of-the-art anti-pollution equipment. The thought was that these old facilities soon would be replaced by cleaner and more efficient modern installations. However, if the old facilities were modernized, upgraded, or modified in a manner that increased their capacity or extended their useful life, they were deemed to have added a “new source” of emissions, and then were required to install extremely expensive anti-pollution equipment. Therefore, the determination of whether maintenance, repair, upgrade, or modification of an existing facility constituted a “new source” became very important. Frequently industries and utilities said such changes were minor while enforcement officials said they were substantial additions of new sources of emissions. More than 50 power plants and scores of refineries were sued by federal and state authorities under the New Source Review rules promulgated toward the end of the Clinton administration.

Bush administration: When the Bush administration took office, the President’s energy task force headed by Vice President Cheney focused on the impact NSR was having on power plants, about half of which are coal-fired, and gave EPA a mid-August, 2001 deadline for reporting on whether NSR was discouraging companies from installing more energy-efficient equipment. The other shoe dropped in June, 2002 when EPA proposed lenient new rules to give utilities more leeway in expanding power plant generating capacity without also being required to install or improve pollution-control equipment.

When these rules became final late at the end of December, 2002, they were greeted with a bipartisan storm of protest from senators and governors, a class action lawsuit brought by nine northeastern states and many localities that wanted strict enforcement to protect the health of their citizens, and later by 10 states asking the U.S. Court of Appeals for an emergency stay preventing EPA from implementing the rule. On Christmas Eve, 2003, two days before the new NSR rule’s effective date, a three-judge panel granted a stay against the new rule (in effect blocking it).

Undaunted, EPA proposed a different rule in 2005 that would require NSR permitting and enforcement only if a plant increased its pollution measured on an *hourly* emission rate, rather than the more stringent *annual* emissions test used previously. EPA argued that any potential emissions increases from the hourly rule would be mitigated or offset by the requirements of the Clean Air Interstate Rule (CAIR).⁴

Now fast forward to April, 2007. The Supreme Court unanimously rejected a lower court's ruling that would have allowed utility Duke Energy Corp. to modernize aging coal-fired power plants without reducing air pollutants. The decision set aside a ruling by the Fourth Circuit Court of Appeals that Duke did not need a permit from the U.S. Environmental Protection Agency because *hourly* emissions from Duke's plants in North and South Carolina would not increase.



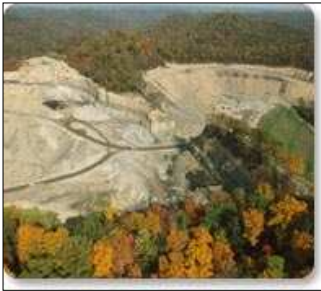
Latest developments: Given this history, it should be no surprise that the Bush administration ordered EPA staff to speed up work on NSR regulations so they could become effective before January 20, 2009. Three NSR regulations are moving through the pipeline that would: 1) let power plants avoid installing state-of-the-art anti-pollution equipment so long as their emissions did not exceed the highest levels produced by that plant measured on an *hourly* basis; 2) ease limits on emissions from coal-fired power plants near national parks; and 3) allow increased emissions from oil refineries, chemical factories and other industrial plants with complex manufacturing

⁴ Wrong! Last summer, the D.C. Circuit Court of Appeals vacated CAIR, leaving Clean Air Act enforcement in limbo.

operations. Senators Boxer (D-CA), Chairman of the Environmental and Public Works Committee, and Carper (D-DE), Chairman of the Subcommittee on Clean Air, wrote to EPA Administration Stephen Johnson on October 24, 2008 protesting the hour rule proposal, saying that if EPA goes ahead and promulgates the rule, the Senate Committee may be compelled to undertake extensive investigation of EPA's and its officials' conduct and actions in connection with the rule.

2) Mine Dumping Rules

A 1983 Reagan-administration rule (revising a 1977 Carter-administration rule) barred mining companies from dumping huge waste piles known as "valley fills" from strip mines within a 100-foot buffer strip along any intermittent or perennial stream if the disposal adversely affected water quality or quantity. Strip mining companies have protested this rule for the 25 years it has been in existence even though it has not been strictly enforced. (More than 724 miles of Appalachian streams were buried between 1984 and 2001.) Mining groups mounted a strong lobbying effort to get the pro-coal Bush administration to ease or eliminate the rule so that they would no longer need to prove that their activities did not adversely affect water quality.



The strip mining lobby's concerns were heard. On August 24, 2007, the Interior Department's Office of Surface Mining (OSM) published a proposed rule in the Federal Register that would allow mining to alter a stream's flow as long as a mining company minimized the debris it dumped "as much as possible" and reduced the amount of wastes. Valley fills allowed under the old, 1983 regulations would still be permitted, but the volume of rock that could be displaced to get to the surface of a coal seam and the area where that rock is put could be "no larger than needed."

As expected, environmental groups criticized the rule as legitimizing mountaintop removal and putting valley fill and sludge into streams. Ironically, mining groups were also unhappy: they were distressed that they would be required under the rule to minimize mining waste.

The original October 23, 2007 public comment deadline was extended to November 23, 2007. Derry MacBride, Chair of the GCA National Affairs and Legislation Committee, and Claire Caudill, Chair of the GCA Conservation Committee, wrote on November 16, 2007, to the Office of Surface Mining to urge that the proposed regulations be withdrawn. Their letter stated that the proposed rule would "exacerbate rather than remediate a form of energy extraction which is already severely damaging to the environment." Their comment joined more than 2,000 other public comments that were filed on the proposed rule.

Unfortunately, the administration is pushing ahead, intent on putting the new rule into effect before January 20, 2009. A 1,768-page final environmental impact statement for the stream buffer rule was issued by the OSM on October 17, 2008. Comments on the final environmental impact statement are due by November 23.⁵ A final rule is expected very shortly after that.

Assuming the new rule takes effect, how it will play out in the future will be interesting. Both presidential candidates Obama and McCain said they wanted to stop strip mining in Appalachia. President-elect Obama's campaign expressed "serious concerns about the environmental implications" but stopped short of demanding a ban on mountain top removal mining.

3) Endangered Species

The Endangered Species Act of 1973 (ESA) requires that before a federal agency can begin a road, dam, waterway dredging or logging operation or other similar project, it must first consult with experts at the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) to determine whether a project might adversely affect any of the 1,353 listed species of plant or animal or their habitats. Between 1998 and 2002, the

⁵ The statement is available on line at <http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&d=OSM-2007-0008-0553> (Click on "views".)

FWS conducted some 300,000 consultations. NMFS conducts about 1300 reviews annually. When these reviews determine that a listed species might be harmed, a more rigorous review of the proposed project is made and the resulting give-and-take between agencies and the FWS or NMFS usually leads to modifications that allow the project to proceed in a manner that minimizes harm to listed species.

This consultative process can take time, and there are backlogs and cost increases. Agencies chafe at the delay. So do local or regional beneficiaries of the delayed projects. In response, former Rep. Pombo (R-CA) mounted a concerted drive in the 109th Congress to “streamline” the consultation process. His bill passed the House but died in the Senate. Now the outgoing Bush administration is using the regulatory process to accomplish what could not be done through legislation.

A second factor also motivated the administration to change ESA rules. In May, 2008, after months of procrastination and a court-imposed deadline, the administration reluctantly listed polar bears as a threatened species due to the impact of global warming on bear habitat. The Interior Department simultaneously stated, however, that the listing would not impede the development of oil and gas in the Arctic. And it rejected any link between the listing and federal climate policy.



On August 15, the administration proposed a new rule designed to streamline ESA consultations and also to ensure that ESA would not become a back door to regulate greenhouse gases. The rule would eliminate the requirement that agencies consult with FWS or NMFS when a proposed federal project might harm a listed species. If an agency voluntarily consulted FWS or NMFS, a response would be required within 60 days after which the project could proceed without their analysis. The Interior Department maintains that such consultations are no longer necessary because federal agencies have developed their own expertise to review construction and development projects.

The comment period was initially set for 30 days but then was extended another 30 days to mid-October due to the overwhelming public response. Among the more than 300,000 mostly negative comments was a September 21, 2008 letter from NAL Chair Derry MacBride and Conservation Chair Claire Caudill protesting that the proposed rule would seriously weaken ESA and critically endanger fish, wildlife, plants and their ecosystems on an increasingly fragile planet.

It usually takes months to review public comments on a proposed rule, and by law the government must respond before a rule becomes final. The final rule *already* has been sent to OMB for interagency review. In the meanwhile, FWS officials scrambled to assemble an unprecedented team of 15 people called to Washington from the field to review the cascade of public comments.⁶ It is now only a question of days until the final rule is printed in the Federal Register, well in advance of November 20 which guarantees that the rule will take effect before Inauguration Day.

President-elect Obama said in August that he would throw out the new Bush-administration rule, but this cannot be accomplished overnight if the rule already has become effective. It will take time.

- **What Can be Done?**

Congressional Review Act: (CRA)

The Congressional Review Act of 1996 established an expedited procedure through which Congress could review and overturn recently-promulgated federal regulations. Rarely used, it has succeeded only once, in 2001, when the new Republican 107th Congress overturned a Clinton administration ergonomics regulation. The most recent failed attempt was aimed at 2005 regulations promulgated governing emissions of mercury. (See 109th Congress Update #53.)

⁶ A record-setting marathon 32-hour review occurred at the end of October. An aide to Rep. Rahall, Chair of the Natural Resources Committee, calculated that 6,250 comments would have to be reviewed every hour, requiring on average each team member to review at least seven comments per minute.

CRA procedures are quite narrow and specific. The agency promulgating the rule must submit a copy to the Congress. If Congress passes a joint resolution disapproving the rule, and the resolution becomes law, the rule cannot take effect or continue in effect. The agency may not reissue either that rule or any substantially similar one, except under authority of a subsequently enacted law.

CRA requires that a disapproval resolution must be submitted in either house within 60 days after Congress receives the rule. Then there are various deadlines for committee and floor consideration and special expedited procedures spelled out for the Senate. *Significantly, CRA has a special election-year provision that gives the 60-day period a fresh start in each House beginning on the 15th day of session after a new Congress has been convened.*

This means that the 111th Congress can use the fast-track CRA process to consider any rules promulgated at the end of 2008. The Obama administration would most likely approve any CRA resolution passed by Congress. In fact, the Obama transition staff is undoubtedly tracking these late-breaking regulations and will indicate to Congress which regulations should receive top priority for CRA action.

Conventional legislative action:

The 111th Congress that will begin in January could enact legislation that spells out precisely how ESA, the Clean Water Act and the Clean Air Act are to be administered. Regulations provide the detailed instructions for how to comply with the requirements and directives contained in a law. If legislators think the outgoing administration's regulations have gotten it wrong, they can amend the laws to provide a more precise roadmap.

Generally this is not the best option because there are so many unknown and unanticipated possible applications and situations. Micromanagement through the messy legislative process is not ideal. If Congress tries to enact laws to undo the regulations, it will contend with the myriad conflicting forces, interests, and groups interested in or affected by the regulations. Members from both sides of the aisle will try to accommodate the concerns of business, industry, and environmental groups in their constituencies. But when the alternatives are harmful emissions from old power plants continuing for decades, mountain streams and valleys destroyed by mining waste and endangered species are at risk from federal projects, then Congress might attempt to enact bills to reverse the latest regulations.

Appropriations Rider:

Appropriations bills offer another vehicle for rendering regulations ineffective. Language can be inserted in the bill to the effect that "none of the money hereby appropriated can be used to implement "X" regulation." If the president signs the appropriation, then the language can prevent the regulation from being enforced since no federal personnel can work on enforcing it, or making sure that program managers follow it.

Attaching such a rider can be done in committee or on the floor by amendment. But either way, it is necessary to have a strong majority opposed to the regulation. Appropriations tend to be more bipartisan than other legislation because so many states, districts, interests, industries, and groups are affected.

In recent years, the divided government with a Republican administration and a Democratic congress has led to massive continuing resolutions (CRs) rather than the customary dozen agency appropriations bills. A CR for Fiscal Year 2009 has already been enacted, effective through March 6, 2009, without any such riders. The 111th Congress is expected to extend this CR, with changes and adjustments. Thus far there has been no discussion of using the CR as a means of undoing the Bush-administration regulations.

Presidential action on "midnight regulations":

When Barack Obama takes office on January 20, he could do what most recent previous presidents have done: suspend any midnight regulations for a review period. Knowing that this could happen, the Bush administration is striving to make sure that its final round of regulations do not fall into this "midnight" category – i.e. that they all have become effective before January 20, 2009. However, any that miss the deadline will be fair game.

How you can help:

Write to the president-elect or a member of his team:

There are more than 500 people who “advised” the Obama campaign on environmental issues. Before Thanksgiving, it is possible that a procedure will be in place for public input from everyday citizens and groups like the Garden Club of America.

Contact your legislator:

You can tell your representative and senators about your concern over the blitz of late-in-the-game regulations that undo so many years of progress in improving environmental protection. Ask your legislators for help in rolling back the regulations that most concern you.

How to contact your legislators:

To send e-mail to your representative, go to <https://writerep.house.gov/writerep/welcome.shtml> Click on your representative’s name, and then look for the “contact” box and follow the directions for sending e-mail.

To send e-mail to your senator, go to

http://www.senate.gov/general/contact_information/senators_cfm.cfm?OrderBy=last_name&Sort=ASC.

Then click on the link to your senator’s web form.

To telephone any representative or senator: Call the Capitol switchboard: 202-224-3121. Ask for your legislator’s office. When the phone is answered, say that you want to leave a message about a new regulation. A young aide will take the message or send you to the legislator’s voice mail. This seems impersonal, but is nevertheless effective—legislators keep track of how many calls come in on different issues and the direction in which sentiment is running. Even a relatively small number of calls are enough to warrant serious consideration of the view expressed.

NAL updates serve in an advisory capacity, based on committee research. **Individual clubs and members may act on any issue as they choose.**

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