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**GOVERNMENT AFFAIRS**

A former senior attorney with the Department of Justice examines and assesses the consequences of the Trump Administration's dual—and sometimes dueling—agendas of deregulation and deconstruction. The author, now senior counsel at Perkins Coie LLP, also forecasts how these priorities may affect agency action going forward.

**INSIGHT: Deregulation and Deconstruction—An Insider's  
Perspective on Trends in Natural Resource Law in the Trump Era**

BY BRADLEY H., OLIPHANT

Every administration brings disruption. For one thing, a host of new political appointees arrives to take the helm of a vast federal bureaucracy of some three million civilian employees, and comprised of fifteen Cabinet-level departments and hundreds of agencies, boards, bureaus, and commissions. In this sense, the Trump Administration was not unique. Nor was it remarkable in calling for deregulation. Cutting regulations has been a hallmark of the modern conservative movement, which has for decades sounded alarms over the burden of federal regulations on the American economy.

Yet, while many have also called for the reduction of what they see as a bloated and out-of-touch federal workforce, this Administration has gone further. In February 2017, then White House Chief Strategist, Steve Bannon, declared that the White House would be engaged in a daily battle for “deconstruction of the administrative state,” and that all Cabinet heads would be chosen with that priority in mind. This core priority, as Mr. Bannon articulated it, went beyond typical talking

points about cutting regulations and instead envisioned a fight with an inherently hostile entity engineered by the left to advance its agenda.

Until two months ago, I served as a Senior Trial Attorney in the U.S. Department of Justice, Environment and Natural Resources Division, Wildlife & Marine Resources Section. There, I defended the actions of numerous federal agencies that either had authority over, or interacted with, protected species and habitat. In other words, for much of the past decade, I was an attorney in the administrative state, for the administrative state. Now, approximately 17 months into this Administration, I can better assess the consequences of the Administration's dual—and sometimes dueling—agendas of deregulation and deconstruction, and forecast how these priorities may affect agency action going forward.

**The Administrative State**

The basic model of the American government is straightforward: three co-equal branches provided for in the U.S. Constitution—the legislative (Congress); the executive (the president); and the judicial (the U.S. Supreme Court and lower federal courts).

This model is as well-known as it is inadequate in capturing the reality of our modern system of government. Because, beyond these three branches lies the enormous federal bureaucracy, created by Congress and tasked with carrying out statutorily-defined missions and administering hundreds of laws enacted by Congress and signed by the president. While administrative agencies have long existed, today they are ubiquitous, and are largely responsible for the day-to-day administration of our government—crafting more bind-

ing rules than Congress and adjudicating more disputes than the judiciary.

To its admirers, the administrative bureaucracy is the ballast of our ship of state, exemplified by humble technocrats, untainted by politics, who carry out virtuous missions like delivering social security checks, protecting endangered species, and ensuring safe air and clean water. Rather than political authority, they exercise rational authority and the essential technical expertise needed to administer our complex, modern democratic state.

Others, however, worry about this general approach to modern governance, where by and large, federal laws that govern us come not from Congress with the president's signature, but from regulations promulgated by unelected bureaucrats. Some perceive the problem as a matter of degree—the federal bureaucracy has simply grown too big and become overly burdensome. Others see a more fundamental, constitutional issue, where life is controlled by an unelected fourth branch of government that is not directly accountable to the president or Congress, is insulated from public opinion, and operates largely outside of political rule. As reflected in their deregulation and deconstruction agendas, the Trump Administration harbors both concerns.

## The Deregulation Agenda

At bottom, the Trump Administration recognizes that the federal bureaucracy is how the government executes its policies. To that end, in its first year and a half, it has taken several steps toward its goal of ensuring that government, while setting and enforcing the rules of the road, does not stop traffic completely. In so doing, the Administration (and a supportive Congress) has shown a readiness to rescind, rewrite, or reinterpret regulations. In the enforcement context, it has exhibited less appetite to construe enforcement powers broadly.

More specifically, in the first months of 2017, numerous Obama-era regulations were rescinded through the little-used Congressional Review Act, a Clinton-era law that gives lawmakers 60 legislative days, with a simple majority vote in each chamber of Congress, to revoke any regulation imposed during the final six months of the previous administration. In this legislative window, Congress overturned more than a dozen rules, including one that limited how mining operations dumped debris when clearing earth, and another that banned the hunting of bears in Alaska using aircraft. Congress also rescinded an Obama-era rule requiring energy companies to disclose payments made to foreign governments and a rule requiring internet service providers to get their subscribers' permission before selling their online information.

In his first year and half, President Trump issued Executive Orders to impose both targeted reforms and across-the-board regulatory constraints. Executive Order (EO) 13771, for example, directed agencies to repeal two existing rules for every new rule promulgated, and to meet a \$0 net regulatory cost target for fiscal year 2017. Similarly, EO 13777 directed agencies to examine which regulations may be appropriate for repeal, replacement, or modification. By the end of 2017, the Administration claimed to have formally revoked 67 rules, withdrawn 635 planned regulations, placed 244 regulations on "inactive" status, and "delayed" 700 regulations.

The Administration also used another obscure Clinton-era law, the Illegal Immigration Reform and Immigrant Responsibility Act, to waive all applicable environmental laws "to ensure expeditious construction of barriers" along the U.S. border, and has proposed amending various environmental laws and regulations to streamline infrastructure permitting decisions. Its infrastructure plan, for instance, calls for a "One Agency, One Decision" environmental review structure that builds on the new framework—known as "One Federal Decision"—set forth in EO 13807. That order seeks federal agency cooperation on environmental review and permitting for major infrastructure projects, and directed federal agencies to use a single, coordinated process to comply with the National Environmental Policy Act (NEPA) and other federal environmental laws. It also directed that the NEPA process be completed within an average of two years from its formal start to the government's decision to approve a project. The order further directed all federal permits for the approved project be issued within 90 days of the government's decision. In April, the heads of a dozen federal agencies executed a memorandum of understanding (MOU) on implementing EO 13807, which directed agencies to expedite environmental review and permitting for major infrastructure projects. The Office of Management and Budget and the Council on Environmental Quality also issued a guidance memorandum to accompany the MOU.

The Administration, principally led by the Department of the Interior, has also taken steps to steer implementation of federal wildlife statutes. In the Endangered Species Act (ESA) context, Interior issued Secretarial Order 3349, which directed a reexamination of mitigation policies and practices across the department, as well as a guidance memorandum regarding when an incidental take permit may be appropriate for projects that modify habitat of ESA-listed species. This guidance emphasized that the permit process is purely voluntary, and it set a standard that a permit is needed for habitat modification only where it "actually kills or injures wildlife." Interior is also examining amendments to its ESA Section 4 and Section 7 regulations, which will likely take a more restrictive view of what species are afforded protection when listed as "threatened," and what actions will trigger procedural and substantive obligations under ESA Section 7. Similarly, Interior recently reversed a longstanding federal position and stated that the Migratory Bird Treaty Act (MBTA) does not impose liability for the incidental take of protected birds.

These examples illustrate that the Administration is attempting to carry out its commitment to reducing what it sees as excessive regulatory burdens and speeding up federal decision-making. And, through actions like Interior's guidance on habitat modification and its recent MBTA opinion, it has also indicated a decreased appetite to read enforcement powers broadly.

## The Deconstruction Agenda

The above changes cannot be fully understood without also considering the Administration's deconstruction agenda, which essentially looks to unmake the federal bureaucracy. According to the Partnership for Public Service, a nonpartisan group working to make government more effective, more than a year into the

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Trump Administration, over half of the 656 most critical positions across the government are unfilled. Attrition is also up, with large numbers of federal employees choosing to leave the government. In the first nine months of the Administration, more than 79,000 full-time workers quit or retired—a 42 percent increase over that period in the Obama Administration. Perhaps relatedly, Administration officials have expressed frustration with career civil servants they oversee. Interior Secretary Ryan Zinke, for instance, ordered the involuntary reassignment of dozens of the department's most senior civil servants and claimed that nearly a third of his staff was disloyal. He also promised a “huge” change by restructuring staff positions and moving decision-making points, and stated that he wanted to get rid of 4,000 Interior employees, either through layoffs, attrition, or buyouts.

These actions have consequences. Gaps in permanent senior leadership, coupled with increased attrition and qualitative changes like greater uncertainty and lower morale within the ranks of the civil service, may impact the Administration's ability to focus and coordinate resources toward the type of decision-making that it desires. These factors may also affect project proponents' efforts to work cooperatively with agency staff in undertaking actions necessary for resource manage-

ment and development and in ensuring that federal actions are defensible if challenged.

## Conclusion

To date, the Trump Administration has demonstrated a commitment to both its deregulation and deconstruction agendas. These efforts bring opportunities. Yet the Administration's objectives also interact in complex and potentially conflicting ways, which makes it difficult to predict future agency activity with precision. But all stakeholders should expect, at a minimum, continued political interest in regulatory reform and increased speed in decision-making on the one hand, and staff-level concerns about attrition, the loss of institutional knowledge, and lower morale by career civil servants charged with implementing existing agency missions and higher-order changes, on the other.

## Author Information

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