

# Environmental Regulations in Flux: Keeping Up and Getting Ahead

**BALCH**  
& BINGHAM LLP

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**Emergency authorities**  
on energy, immigration,  
national defense

**Permitting** reforms

**Rare earth** minerals

Exiting  
international  
**climate** efforts  
and reducing  
domestic  
monitoring &  
incentives

**Spending**  
**cuts** and  
recissions

**Executive Orders**

Promotion of **fossil fuel**  
and domestic energy

# “FLOOD THE ZONE”

Retirements  
and dismissals  
of **federal**  
**employees**

**Environmental**  
**regulations**

**International markets**  
for U.S. mined and  
agricultural goods

**Tariffs** and  
trade deals

**Economic**  
**indicators**

**Military forces** for  
domestic policing

Dampened subsidies and  
tax incentives for  
**renewable energy**

**Appointments** and  
confirmations

**Lawsuits on all**  
**of the above**

# WHERE ARE WE HEADED? *AIR*

- Withdrawal from Paris Agreement
- Reconsideration of 2024 NAAQS for PM 2.5
- Restructure regional haze
- Reconsider “good neighbor” implementation
- Reconsider NESHAPs
- Approve pending SIPs
- Reconsider Clean Power Plan
- Reconsider EGU MATS
- Reconsider vehicle fuel economy standards
- ***Reconsider CO2 endangerment finding***
- Undo various monitoring programs & climate incentive

# WHERE ARE WE HEADED? *WATER, LAND, ETC.*

- Reconsider utility ELGs
  - Reconsider oil & gas wastewater discharge requirements
  - Narrow “take” enforcement under ESA & MBTA
  - Repeal CEQ’s NEPA regs and reconsider agency procedures
  - Redo scientific boards, advisory committees, and studies
  - PFAS regulation and enforcement
  - CCR – reconsider legacy rule
  - CCR – approve state programs
  - Undo DEI, environmental justice, and ESG initiatives
  - WOTUS rulemaking
  - Cuts to EPA budget and grants
  - Tax incentives for renewables
- ...buckle up, much more to come*

# WHERE DOES THIS GO?

- ***Litigation: Challenges to agency actions are inevitable***
  - Agency action—especially changes—must be supported by law, facts, reason
    - Administrative Procedure Act
  - Agencies will get less ***deference*** under *Loper Bright*
- **Federal personnel**
  - Policy staff, lawyers at agencies and DOJ
  - “Boots on the ground” at the and other agencies with a physical presence
    - Corps of Engineers, FEMA, National Park Service, etc.
  - Program funds
- **The economy**
  - How will the “Main Street” indicators fare? (jobs, trade, GDP, etc.)

# STRANGE THINGS CAN HAPPEN IN COURT

**Which of these is a “navigable water”?**

33 U.S.C. § 1362(7) (1972), 33 C.F.R. Part 329



Source: U.S. Army Corps of Engineers. | GAO-21-240R

# JUDICIAL DEFERENCE TO AGENCIES' *LEGAL* INTERPRETATIONS

- 1970s and 1980s: “Creative” judicial decisions
- 1984: *Chevron* case set a 2-step analysis for statutory interpretation:
  1. Is the statute ambiguous?
  2. If so, is the agency’s interpretation reasonable? (*mandatory deference*)
- 2024: *Loper Bright* case reestablishes judicial primacy to interpret law
  - Similar outcome likely for agency interpretations of agency regulations
    - Meaning, the trend suggests a similar outcome for “*Kisor / Aeur*” deference
  - Agencies still get discretion for decisions committed to them by law
    - “Arbitrary and capricious” standard for APA review of agency actions still applies

# WHAT HAPPENS WITH ALL THESE REGULATIONS, POLICIES, AND ACTIONS?

- ***Litigation is inevitable***
- ***Significant headwinds against defense of agency actions:***
  - Courts defer less to agencies under *Loper Bright*
  - Agencies have tougher standard to defend *change* in direction
    - Administrative Procedure Act, *State Farm* case
  - Federal agency capacity: personnel cuts, lower budgets
- Depending on the draw, the D.C. Circuit can be tough
  - 11 judges: **7 Biden & Obama, 4 Trump & Bush<sup>41</sup>**
  - 5 senior judges: **2 Carter & Clinton, 3 Reagan & Bush<sup>41</sup>**

# HOW DO WE KEEP UP AND GET AHEAD?

## *Keep up!*

- *Federal Register, trade press, trade associations, agency websites, etc.*

## *Engage with agencies & staff*

- Early communication is more effective
  - Hard for agencies to change direction once they are publicly committed

# HOW DO WE KEEP UP AND GET AHEAD?

## *Participate in rulemakings – respond to requests for comments*

- Federal judicial review is based exclusively on the ***administrative record***
  - *Say it now or it won't count*
- Documentation that a proposal is lawful and reasonable
  - *Don't assume the agency will cover everything*
  - *Shore up any shortcomings or flaws*
  - ***"Real world" data: Industry information, experience, costs, technology, field observations, practical considerations, feasibility***
  - *Review of statutes, regulations, case law (Loper Bright!)*
  - *Past regulatory preambles and policies*

# HOW DO WE KEEP UP AND GET AHEAD?

**Work with *states* to promote stability**

**Participate in litigation**

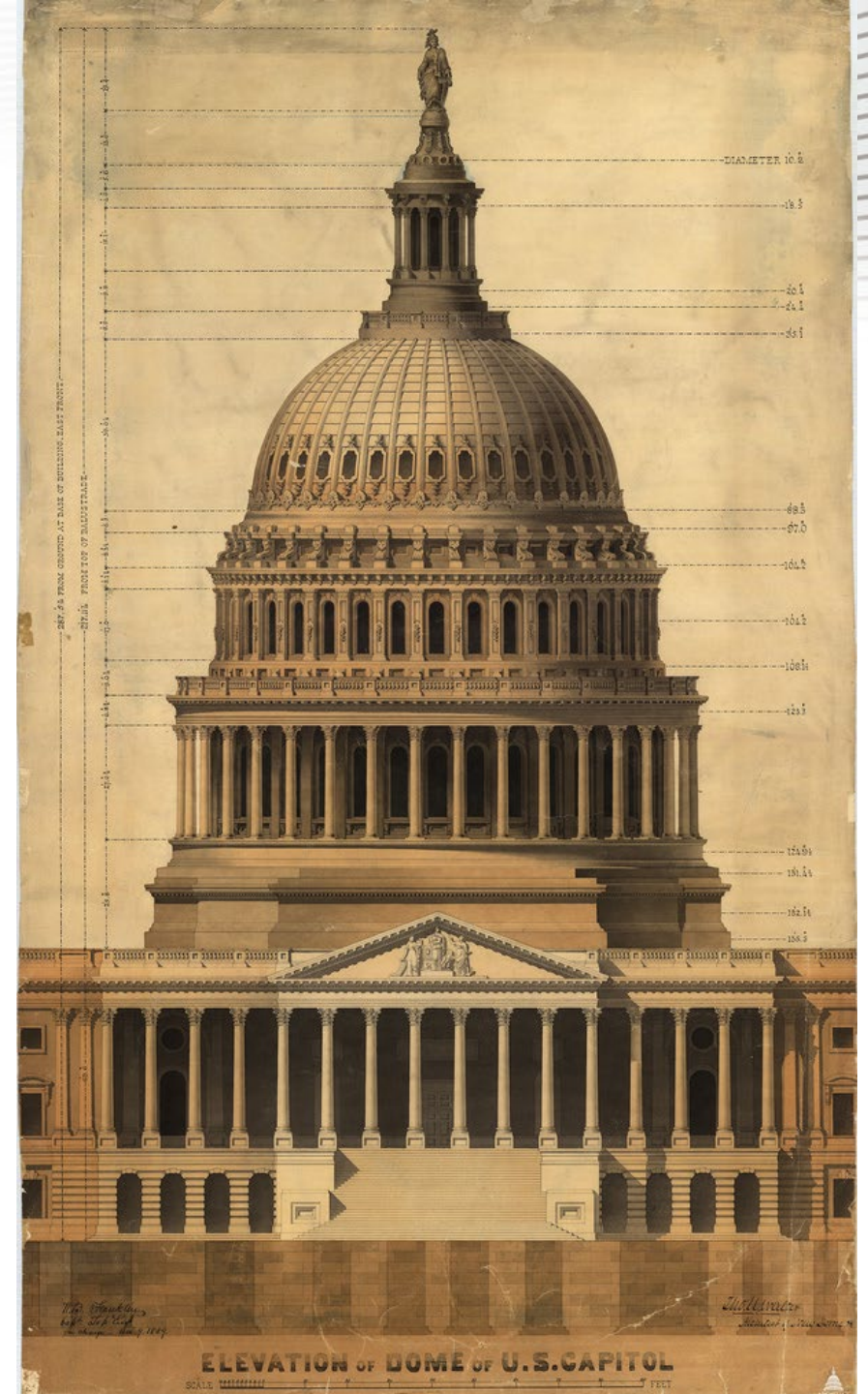
- DOJ's environmental division in flux
- File or support amicus briefs
- Intervene as a party

**Trade associations**

- Pluses and minuses

# Can **CONGRESS** remember how to engage substantively?

- Oversight
  - Letters
  - Hearings
  - Reports
  - Appropriations process
- Legislation
  - Must be either “must pass” or very bipartisan



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## 5 STEPS TO PROMOTE DURABLE, PRO-INDUSTRY ENVIRONMENTAL REGS

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The U.S. Environmental Protection Agency's March 12 announcement of 31 deregulatory initiatives may seem like a major shift.

But most of these actions require reconsideration of existing rules – a process that is governed by the Administrative Procedure Act, and that takes time to unfold through notice-and-comment procedures and judicial review.

Changes are just getting started. And the situation poses a dilemma for industry. Many businesses welcome the EPA's action in substance, but they are also concerned about the durability of deregulation.

Will today's regulatory relief still stand four years from now, after a new administration has taken office and the courts have weighed in? Recent history shows



# TAKEAWAYS

- Be vigilant
- Assume nothing, leave nothing to others
  - If it matters, participate actively in policy development
- Agencies need your data and reasoning to build durable policy
- Participate in litigation on agency rules and decisions

# Thank You!

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