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# The Right Tools for the Right Jobs: Options for Reversing the Bush's 'Midnight Regulations'

*By Rena Steinzor and James Goodwin*

## **Overview**

The options for reversing a particular regulation are dictated by how far the regulation has progressed through the rulemaking process. Virtually all regulations must pass through the same highly regimented rulemaking process before they can take effect. Generally speaking, the further along a regulation has progressed through this rulemaking process, the harder it is to reverse the regulation.

Two milestones in the rulemaking process are particularly important for determining the options for reversing a regulation: (1) publication of a final rule in the *Federal Register* and (2) the final rule's effective date. All regulations must go through some form of rulemaking procedures before they can be published in the *Federal Register*. Generally, the final regulation's effective date must be at least 30 days after its publication in the *Federal Register*. For rules defined as "major rules" by the Congressional Review Act, however, the effective date must be at least 60 days after their publication or their submission to Congress for review.

Regardless of the option chosen, however, implementation will likely be slow and ineffective if mid- and high-level appointees at the EPA and other relevant agencies are not in place to carry them out. Thus, an incoming president must make it a high priority to complete these appointments as early as possible in his new administration.

## **Regulations That Have Not Been Published in Final Form in the *Federal Register***

These regulations are still in a relatively early stage of the rulemaking process, and thus are the easiest to reverse. To halt any regulations that are still in this stage, **an incoming President can simply impose a moratorium on new regulations.** This option has been exercised by Presidents Reagan, Clinton, and George W. Bush at the beginning of their respective administrations. This moratorium should not be indefinite, however, so that it does not prevent agencies from promulgating new, beneficial regulations.

The option of imposing a regulatory moratorium would apply to a number of Bush midnight regulations, including EPA's preliminary regulatory determination to not regulate perchlorate (a rocket fuel component that has been linked with thyroid problems in children) in accordance with the Safe Drinking Water Act.

## Published Final Regulations That Have Not Gone Into Effect

Because they are further along in the rulemaking process, these regulations are more difficult to reverse. There is little **an incoming President can do except postpone the effective dates for the final regulations** by some defined amount. This option has only been employed by President George W. Bush at the beginning of his administration.

**Congress, however, can overturn these regulations through the regular legislative process, pursuant to the Congressional Review Act.** Under the Act, members of Congress have up to 60 days to pass joint resolution of disapproval. As with any other legislation, the joint resolution of disapproval must pass in both houses of Congress and then signed by the President (although, if the President vetoes the joint resolution of disapproval, Congress may also override the veto with a two-thirds vote in both houses of Congress).

The options of postponement and use of the Congressional Review Act would apply to a number of Bush midnight regulations, including the new Department of Interior rule that would allow federal agencies to make their own determination of whether a proposed project would harm endangered species, rather than requiring independent scientific review as in the past.

## Published Final Regulations That Have Gone Into Effect

These regulations have gone through the complete rulemaking process, and as such are the most difficult to reverse. **An incoming President can only reverse these regulations by directing the relevant executive agency to go through the rulemaking process again.** Because of the need for a rigorous rulemaking process (*i.e.*, to screen out the bad regulations from the good), initiating a new rulemaking can be an expensive, labor-intensive, and time-consuming task. The task of promulgating new and better regulations will not be insurmountable, however, if mid- and high-level political appointees at the various agencies are in place and committed to accomplishing this task. The most egregious examples of drawn-out rulemakings in the past—which often involved reversals of policies or changes that were debated a long time, making the regulatory alternatives obvious—can be easily avoided if adequate and committed leadership is in place.

**If a particular midnight regulation has been challenged in court, an incoming President can direct the Department of Justice to seek to settle the case** for either of two reasons. First, the incoming President could argue that the regulation should be withdrawn, because some procedural violation occurred while the regulation was being put through the rulemaking process. The problem with this option is that a party that benefits from the challenged regulation is free to join the litigation as an intervenor (*i.e.*, a party to a litigation who was not among the original listed parties in the litigation, but which can nevertheless join the litigation and stand on equal footing with the original listed parties in terms of how the litigation is conducted) if it can demonstrate that it has some right or interest that the Department of Justice will not adequately protect. The addition of an intervenor in such a case could delay a settlement or prevent it altogether. Second, the incoming President can agree to initiate a new rulemaking to rescind the challenged rule. As stated above, however, this can be an expensive, labor-intensive, and time-

consuming task that would not guarantee success if the new rule was successfully challenged in federal court.

Finally, **Congress can seek to limit the effects of one of these regulations through the appropriations process.** In particular, Congress can include provisions in appropriations bills that restrict the implementation or enforcement of a particular regulation. While these restrictions can have a substantial effect on agency rulemaking activity, they do actually nullify existing regulations as is the case when Congress passes a joint resolution of disapproval pursuant to the Congressional Review Act.

The options of reinitiating the rulemaking process, court settlement, and appropriations restrictions would apply to a number of Bush midnight regulations including a new EPA rule that narrows the definition of “navigable waters” as the term is used in the Clean Water Act to regulate the discharge of oil (the oil discharge provisions of the Clean Water Act apply only to “navigable waters”).

*If you have any further questions about the materials in this document, please contact Rena Steinzor or James Goodwin at 202-747-0698.*