

View from D.C.

Shannon Maher Bañaga, Director Federal Affairs, TECO Energy – An Emera Company

Previously at A&WMA 2016...



CLINTON
98.1%



TRUMP
1.6%

Photos: Getty

A screenshot of a news broadcast from MSNBC. The top left corner shows 'CLEVELAND 10:05 PM'. The main screen displays the word 'VOTE' in large, bold, black letters on a light purple background. To the right is a video inset of a male news anchor with glasses, wearing a suit and tie, speaking. At the bottom, a red banner reads '»» BREAKING NEWS' followed by 'PRINCETON SCIENTIST: CLINTON HAS 'GREATER THAN 99% CHANCE OF WINNING''. The MSNBC logo and '20 YEARS' anniversary are in the bottom right, along with the word 'LIVE'. At the very bottom, it says 'THE LAST WORD CAMPAIGN 2016'.

TRANSITION

Shannon M. Bañaga — another lobbyist whose role on the official transition team was cut short by Trump's directive — “I can't express to you how many man-hours were put into very specific ideas about what FERC should be working on in the next couple years; what DOE should and shouldn't be working on,” said Bañaga, an attorney who worked previously for both FERC and Energy and now serves as TECO Energy's director of federal affairs. (credit: RTO Insider)



Trump eyes energy lobbyist for FERC slot by Hannah Northey, E&E News

An energy lobbyist and former enforcement attorney at the Federal Energy Regulatory Commission is being considered for an open Republican commission seat, according to a source close to President-elect Donald Trump's transition team. Shannon Bañaga lobbies for Tampa, Fla.-based TECO Energy Inc., an energy-related holding company with regulated electric and gas utilities in Florida and New Mexico. Bañaga joins a growing list of people being considered to fill three open Republican seats at FERC.



GOVERNMENT

IF YOU THINK THE PROBLEMS WE CREATE ARE BAD,
JUST WAIT UNTIL YOU SEE OUR SOLUTIONS.

Where are we now?

- Executive Orders
- Regulatory Rollback...isn't it ironic?
- Spies Among Us
- Do More with Less...really less

Of 604 key positions requiring Senate confirmation ...

273 - No nominee

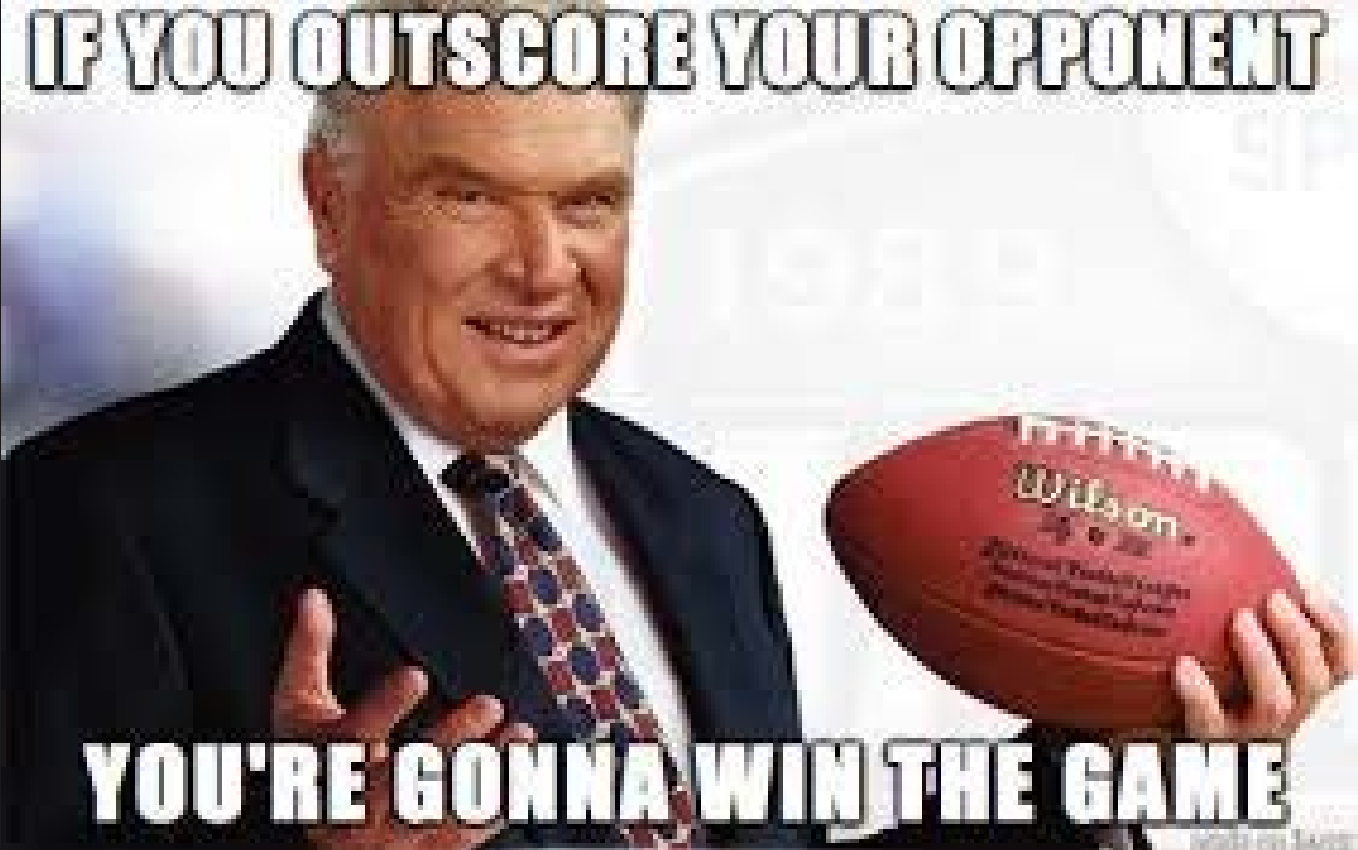
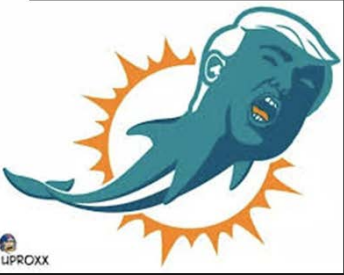
9 - Awaiting nomination

177 - Formally nominated

145 - Confirmed



It's a different ballgame.



Washington is Exhausted: 1104 days to go

Issues

- 23 environmental rules rolled back in first 100 days.
- Clean Slate = Erasing Past
- Clean Power Plan, 111(b), WOTUS, CCR, NAAQS, Paris, etc.
- Less slug, more:



Nuances

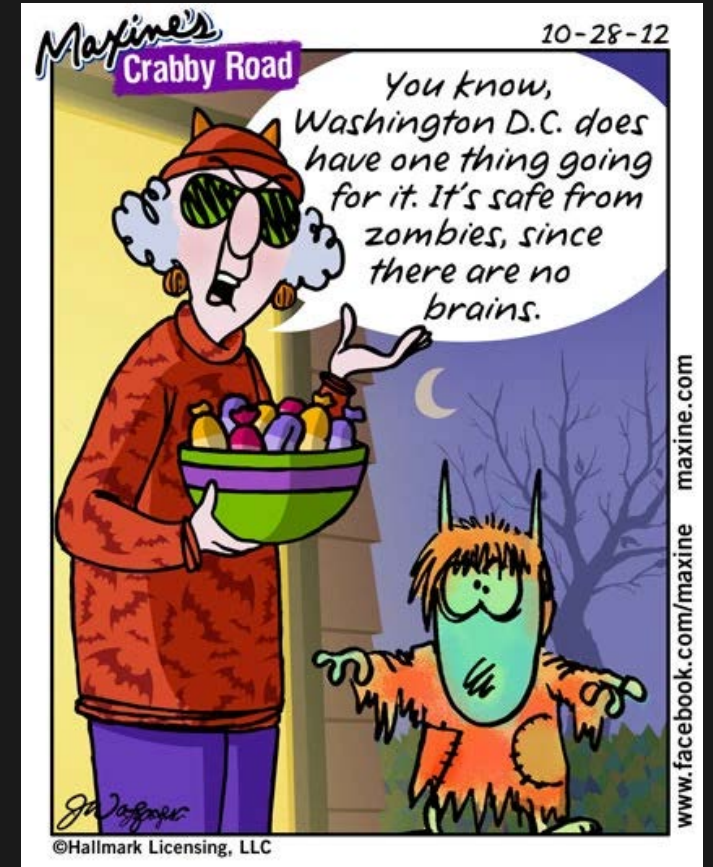
- Trade and Energy versus Environment
- Longevity – different players same trajectory
- Drain the Swamp continues
- Business Friendly - just enough or on steroids?
- Distraction
- Traditional Statutory Duties



Speaker Ryan: "Every morning I wake up in my office and I scroll through Twitter to see which tweets I will have to pretend I didn't see later on." Alfred E. Smith Memorial Foundation Dinner on Oct. 20

Frenemies

Trick or Treat?!



Thank you for
staying awake!



Shannon Maher Bañaga, Esq.

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* Standard disclaimer to ensure that I'm gainfully employed.

Southern Company Environmental Outlook

A&WMA Conference

Scott Clouse
Environmental Policy &
Engagement Manager
October 25, 2017



Outline

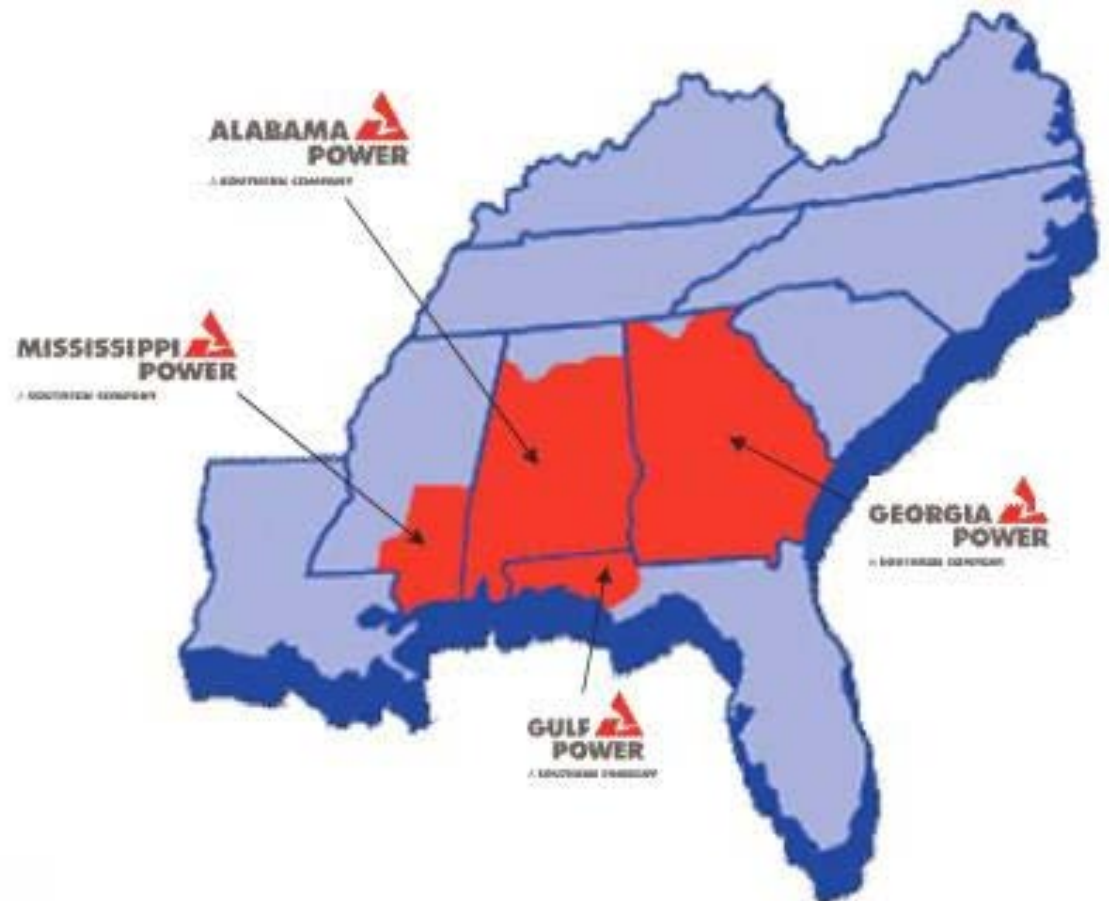


FWs balance economic clean **Company**
existing reliable federal regulation
ensure NEPA natural EPA standards
infrastructure regulatory benefits Southern costs
energy review regulations gas agency
resources species safe policies Order
habitat conservation environmental requirements

Southern Company Early 2000's



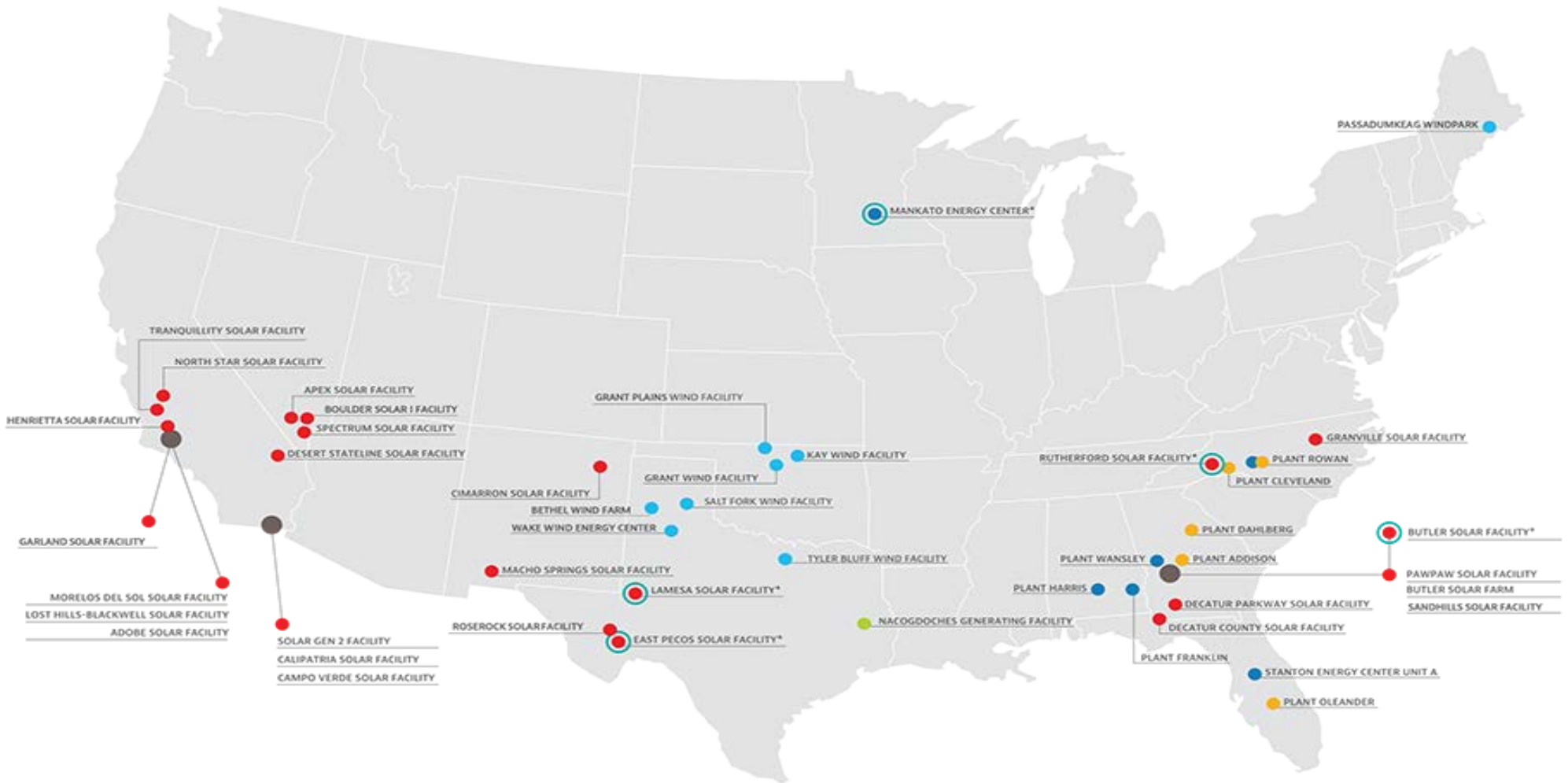
- **Southeastern** utility
- **4M** electric customers
- **37GW** of capacity
- **Coal** is primary fuel source
- **+25,000 miles** of high-voltage transmission lines



Southern Power forms in 2001



47 facilities operating or under construction in **11** states with more than **12,700 MW** of generating capacity

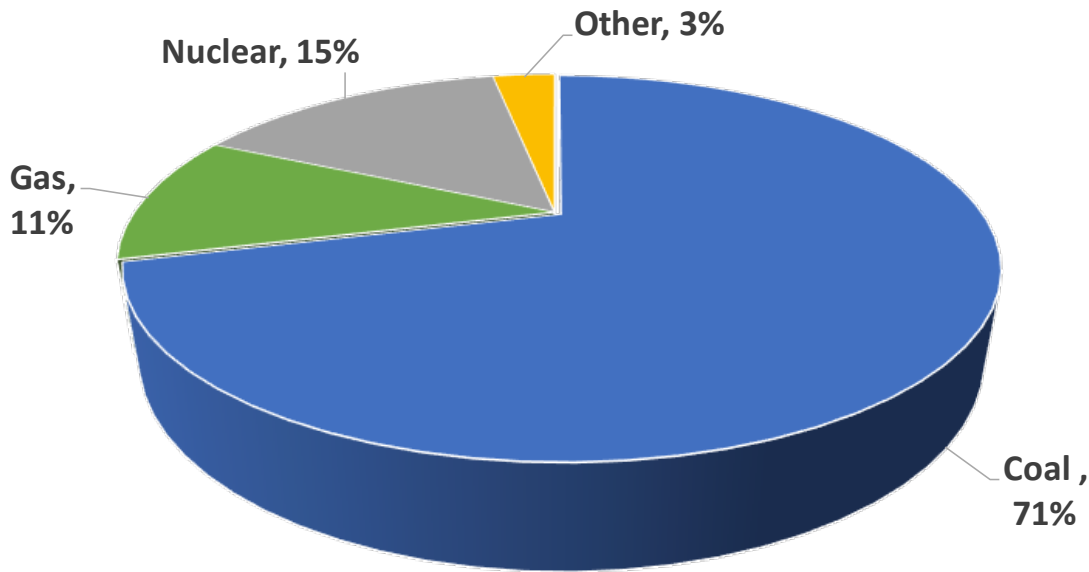


- Combined Cycle Plant
- Peaking Plant
- Biomass Plant
- Solar Plant
- Wind Plant
- Under Development*

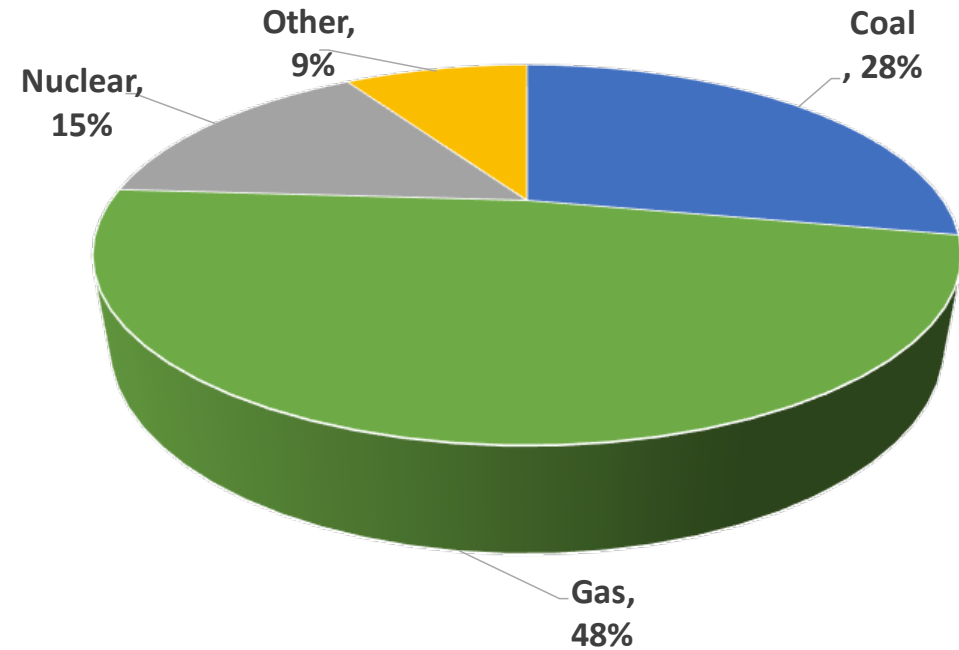
Southern's Decade of Change



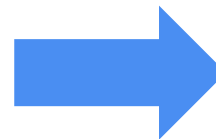
Mid 2000's Generation Mix



2017 Generation Mix



- New **environmental** regulations
- Decrease in **natural gas cost**
- Decrease **replacement generation** technology cost

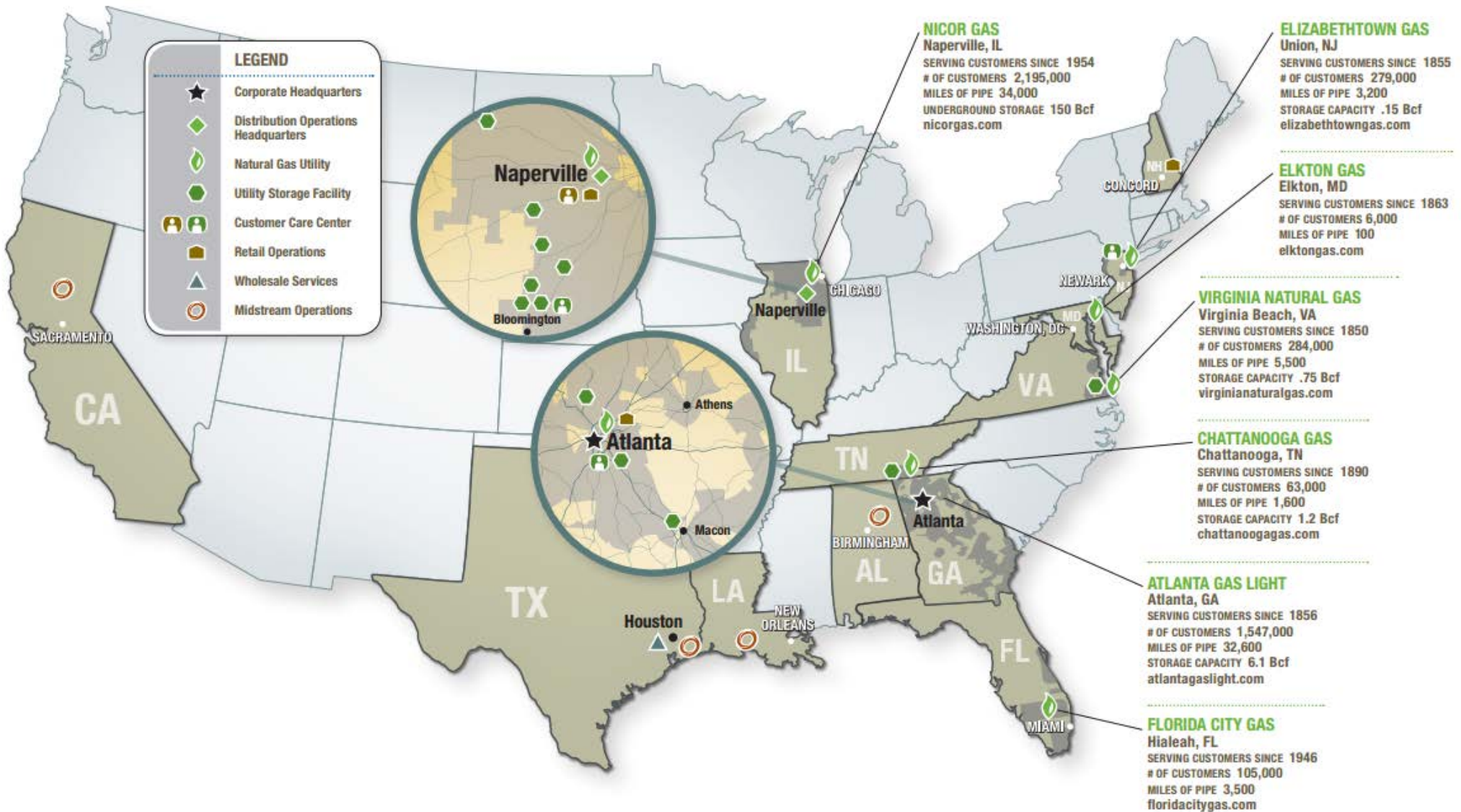


- **4,200 MW** of coal retirements
- **3,000 MW** of coal converted to natural gas
- Deployment of **5,500 MW** of renewable technologies

Southern Gas Acquisition in 2016



Seven natural gas utilities serving **4.5 million utility customers** and **over 1 million retail customers**



Southern Company Today



Operations in
19 States

11
Electric & Natural
Gas Utilities

32,500
Total Employees

9 Million
Utility Customers

More than
1 Million
Retail Customers

Approximately
44,000 MW
of Generating Capacity

Nearly
200,000
Miles of Power Lines

More than
80,000
Miles of Natural
Gas Pipelines

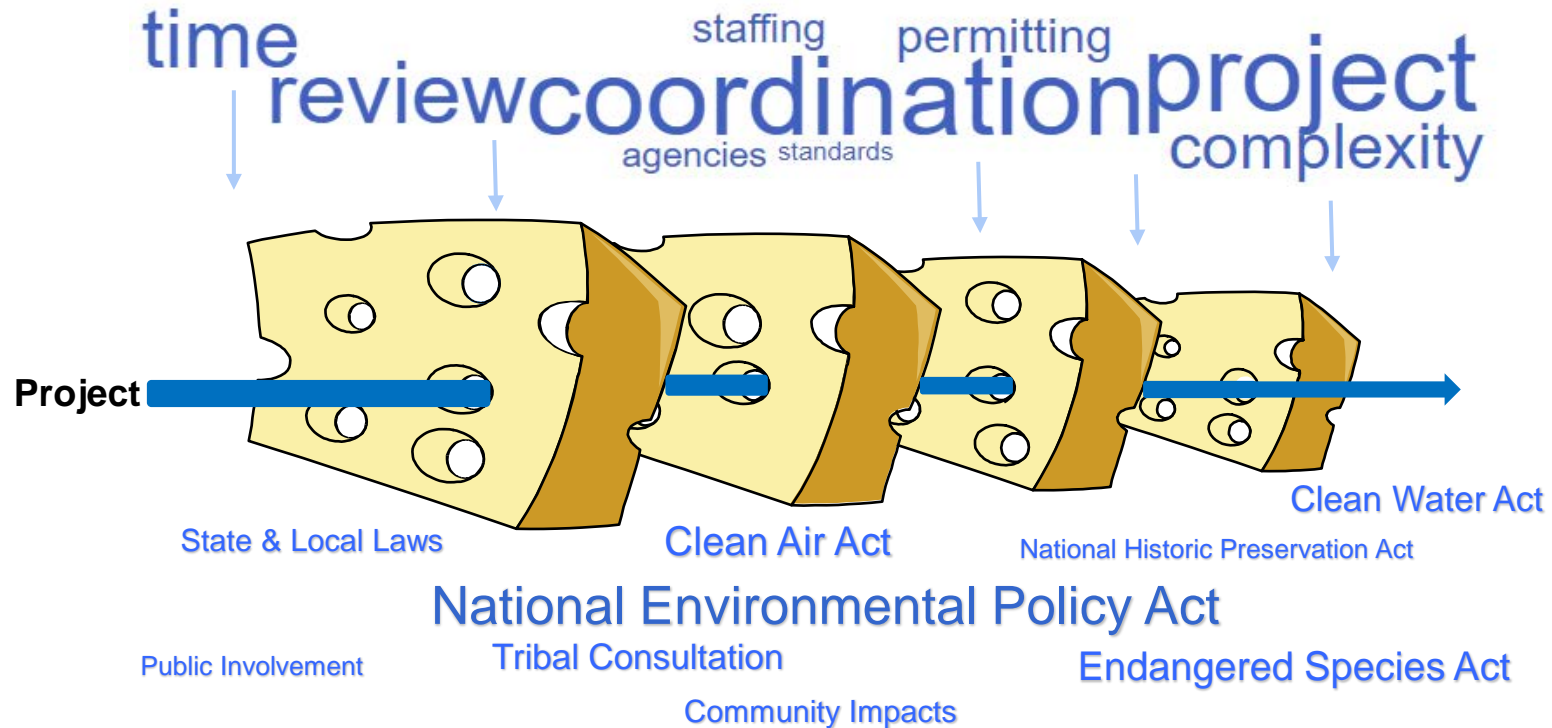
190 Bcf
of Natural Gas
Storage Capacity

Regulatory Reform Guideposts



- ✓ **Constructive regulation:** Regulations should provide constructive solutions to real problems affecting people, the environment and the economy.
- ✓ **Regulatory certainty:** For many regulated industries, including our industry, regulatory certainty is essential to inform the long-term business planning and substantial capital investments required to effectively operate today and plan for tomorrow.
- ✓ **Cooperative federalism:** Regulation is most effective when the federal government works in partnership with the states rather than imposing one-size-fits-all federal regulations. Agencies should defer to the states with regard to matters for which the states have traditionally been delegated authority.
- ✓ **Realistic assessments of costs and benefits:** Analyses of proposed or existing regulations must properly weigh the relevant costs and benefits imposed by those rules.
- ✓ **Realistic technology-based standards:** The Agency should not adopt standards based on unsupported conclusions or on unproven, unreliable or excessively costly technologies.

Balancing Infrastructure and the Environment: Energy Generation & Transmission



- ✓ **One Federal Decision** – lead agency works with other cooperating agencies for a single record of decision
- ✓ **Predictable Schedule** – permitting timetable for environmental reviews and authorizations, and agencies will be held accountable to those timetables through performance measures and financial penalties
- ✓ **Shorter Review Times** – reduction from seven to two-year goal across all agencies to process environmental reviews and permit authorizations

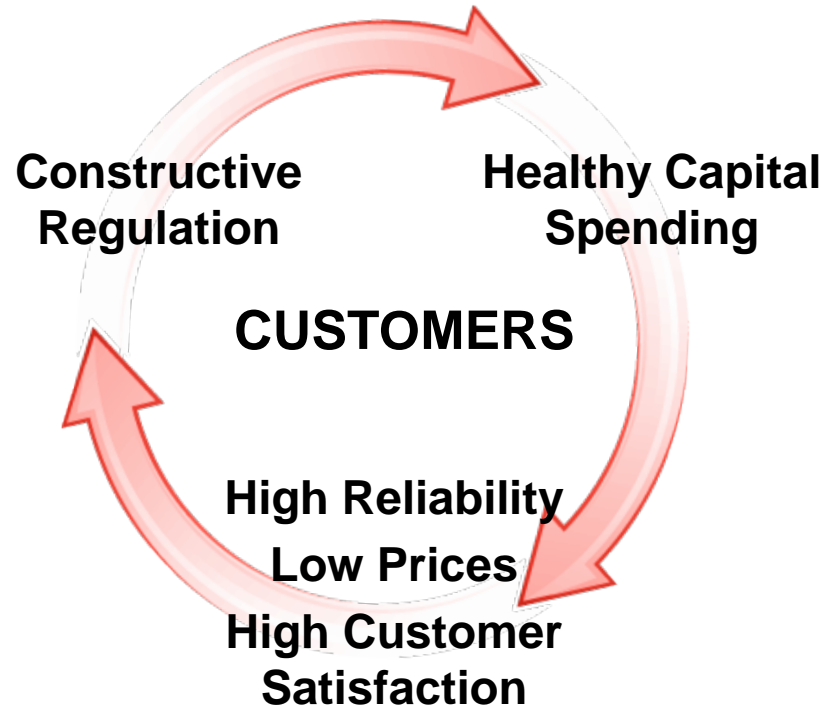
Regardless of business model, we are facing critical decisions with tremendous uncertainty



Considerations

- EPA Regulations
 - Air (CO₂)
 - Water (ELGs)
 - Waste (Coal Ash, Gypsum)
 - Renewables
- Customer demand
- Litigation
- Commodity Costs
 - Natural Gas
 - Coal
- Construction Issues
 - Cost Uncertainty
 - Labor Cost/Availability
 - Materials
 - NIMBY (Transmission issues)
- Technology
 - Emission Controls
 - Reserve Margins
 - Renewable Advancements
 - CCS
 - Disruptive Technology

Circle of Life



Decisions

- Retire/Retrofit Coal Units?
- Add Transmission?
- Install or Switch to Gas?
- Build Nuclear?
- Invest in Energy Efficiency?
- Invest in Renewables?
- Hedge Fuel Prices?



Southern Company

Thank You!

U.S. EPA Region 4 Air Quality Update

**Air and Waste Management Association
Florida Section Annual Conference and Exhibition
*Tallahassee, FL***

October 25, 2017

**Ken Mitchell, Ph.D.
U.S. Environmental Protection Agency
Atlanta, GA**



Today's Topics

Administrative Update

Air Programmatic Update

- **NAAQS Implementation**
- **Air Quality Models Guideline**
- **Startup, Shutdown and Malfunction**
- **Recent Rulemaking Updates**
- **Advance Program**
- **Southeast Diesel Collaborative**
- **Volkswagen Partial Settlement**



Plans for FY18 and Beyond

- The Strategic Plan charts the course for advancing EPA's priorities and mission to protect human health and the environment
 - EPA's new Strategic Plan (FY18-22) is open for review through **October 31, 2017**, finalized early next year
- National Program Manager (NPM) Guidances provide detailed information on activities that EPA and States perform to implement the Strategic Plan
 - The FY18-19 NPM Guidances were finalized on 10/2/17

EPA Strategic Plan 2018-2022

This draft Plan advances the Administrator's priorities and identifies three strategic goals:

- Goal 1: Core Mission
- Goal 2: Cooperative Federalism
- Goal 3: Rule of Law and Process

<https://www.epa.gov/planandbudget>



Update: EPA-related EOs and Memos

- **EO 13771** (Reducing Regulatory and Controlling Regulatory Costs)
- **EO 13777** (Enforcing the Regulatory Reform Agenda)
- **EO 13783** (Promoting Energy Independence and Economic Growth)

<https://www.whitehouse.gov/briefing-room/presidential-actions>



EPA-related EOs and Memos (cont.)

Presidential Memorandum on Permit Streamlining

- On 10/6/17, the Department of Commerce released the *Streamlining Permitting and Regulatory Burdens for American Manufacturers report*
 - Gathered input from domestic manufacturers and industry stakeholders
 - Identified 20 sets of regulations and permitting issues as being a top priority for reform and immediate action

https://www.commerce.gov/sites/commerce.gov/files/streamlining_permitting_and_reducing_regulatory_burdens_for_domestic_manufacturing.pdf



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Air, Pesticides & Toxics Management Division

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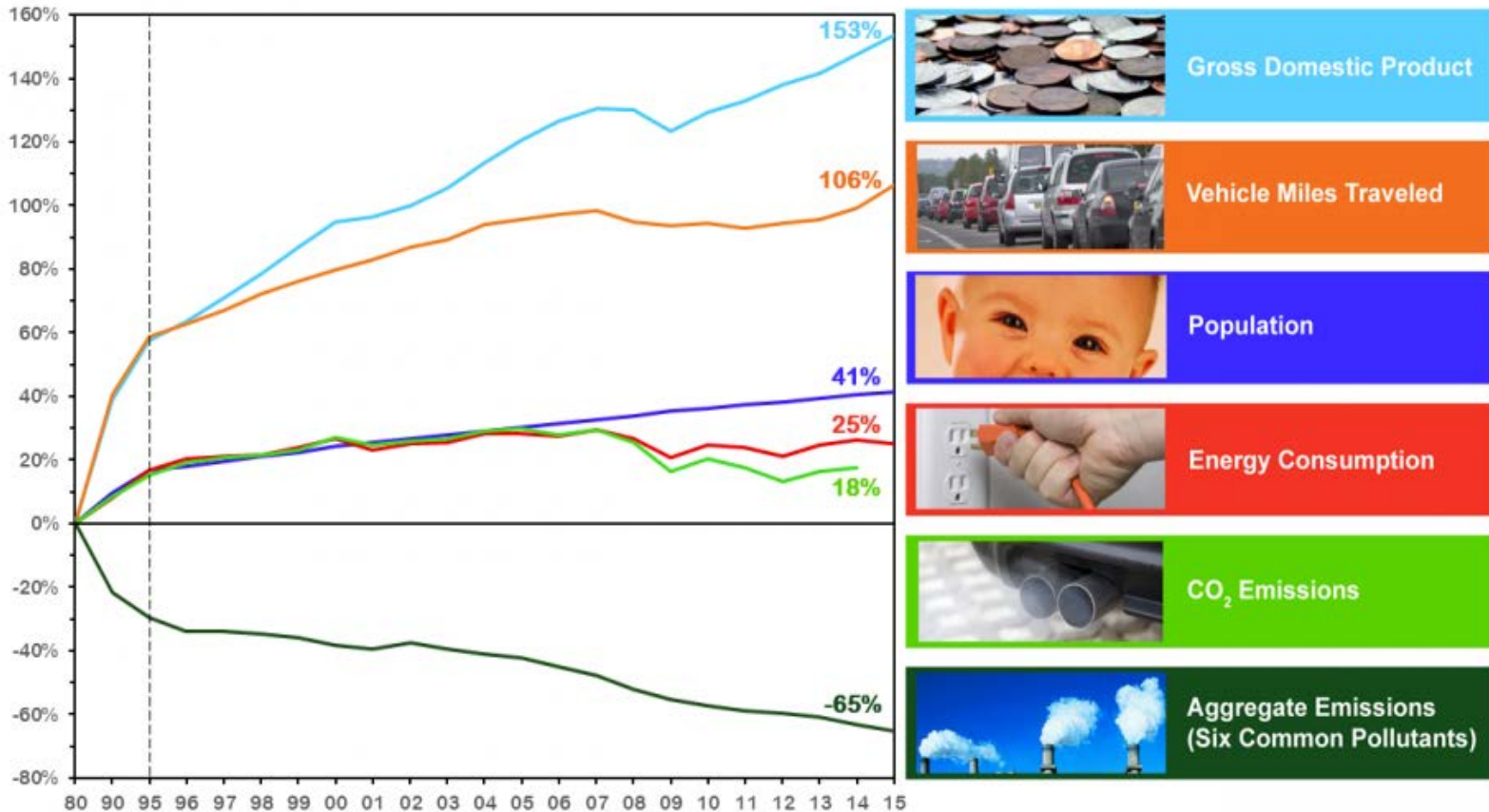
Donnette Sturdivant

Pesticides Section

Kimberly Bingham



Comparison of Growth vs Emissions, 1980-2015



Note: CO₂ emissions estimate through 2014 (Source: [2014 US Greenhouse Gas Inventory Report](#))

Gross Domestic Product: [Bureau of Economic Analysis](#)

Vehicle Miles Traveled: [Federal Highway Administration](#)

Population: [Census Bureau](#)

Energy Consumption: [Dept. of Energy, Energy Information Administration](#)

Aggregate Emissions: [EPA's Air Pollutant Emissions Trends Data](#)



Progress on Ozone and PM_{2.5} Attainment in Region 4

OZONE	1997 NAAQS (2004 Designations)	2008 NAAQS (2012 Designations)
Initial Nonattainment Areas	14	5
Areas Redesignated to Attainment	14	5
Current Nonattainment Areas	0	0

PM _{2.5}	1997 PM _{2.5} NAAQS (2005 Designations)	2006 PM _{2.5} NAAQS (2009 Designations)	2012 PM _{2.5} NAAQS (2015 Designations)
Initial Nonattainment Areas	11	2	0
Areas Redesignated to Attainment	11	2	0
Current Nonattainment Areas	0	0	0



2010 SO₂ Designations Process

Round 1 – Completed August 2013 – EPA Region 4 designated 5 areas nonattainment based on existing monitors violating the standard

On March 2, 2015, EPA entered into a consent decree with Sierra Club and Natural Defense Council in the U.S. District court for Northern California which “triggered” the following designation deadlines:

Round 2 – Completed June 30 and November 29, 2016 – EPA designated 65 areas in 24 states based on air dispersion modeling and 2013-2015 violating monitors (6 areas designated in Region 4)

Round 3 – By December 31, 2017 – EPA must complete an additional round of designations for all remaining undesignated areas **except** where states have deployed new monitoring networks by January 1, 2017 **if** executed under the SO₂ Data Requirements Rule (DRR)

EPA proposed intended designations on August 22, 2017

Round 4 – By December 31, 2020 – EPA must complete designations for all remaining areas (based on 2017-2019 monitoring data)



Revision to the Guideline on Air Quality Models

- On 12/20/16, EPA finalized several additions and changes to its *Guideline on Air Quality Models* (Appendix W to 40 CFR Part 51)
 - Published on 1/17/17, original effective date of 2/16/17
 - Delayed until May 22, 2017, by Presidential Directive
 - The rule is now effective
- Used by the EPA/ states/tribes/industry to prepare/review permits for new sources of air pollution and by States/tribes to inform SIPs and TIPS
- Appendix W revisions and model enhancements will increase efficiency and accuracy of regulatory modeling demonstrations

EPA Region 4 contact: Rick Gillam
404-562-9049; gillam.rick@epa.gov
www.epa.gov/ttn/scram/appendix_w-2016.htm



Startup, Shutdown, and Malfunction (SSM)

- On May 22, 2015, EPA issued a final rule to ensure states have plans in place that require industrial facilities across the country to follow air pollution rules during times when the facility is starting up or shutting down, or when a malfunction occurs
- Air pollution emitted during these periods may adversely impact the health of people nearby and contribute to smog and other problems in communities that are further downwind
- The 2015 SSM SIP Action
 - Restated EPA's SSM Policy as it applied to SIPs with one change regarding affirmative defense (AD) provisions
 - Included SSM SIP Call that applied to 36 states (45 jurisdictions)
- Judicial review of the SSM Action is pending before the D.C. Circuit, but the case is currently being held in abeyance to allow for review by the Administration

www.epa.gov/air-quality-implementation-plans/startup-shutdown-malfunction-ssm-emissions-industrial-facilities



Clean Power Plan

- On October 10, 2017, the EPA Administrator signed a Notice of Proposed Rulemaking (NPRM) to repeal the Clean Power Plan (CPP), by determining that the CPP exceeds the Agency's statutory authority
- *Federal Register* notice announcing the proposed repeal was published on Monday, October 16, 2017
- The public comment period ends **December 15, 2017**

<https://www.epa.gov/stationary-sources-air-pollution/electric-utility-generating-units-repealing-clean-power-plan>



Landfills

- **August 29, 2016:** EPA announced final updates to its New Source Performance Standards (NSPS) and Emission Guidelines for reducing emissions from Municipal Solid Waste (MSW) landfills
- **May 2017:** EPA announced the agency is reconsidering several issues in the 2016 final rules
- **May 31, 2017:** The EPA issued a 90-day stay (until August 29, 2017) on the 2016 NSPS and EG
 - The Stay has expired and the 2016 rules are currently in effect
- The EPA still intends to complete the reconsideration process granted by the Administrator and the EPA will continue to work with states and stakeholders as we develop a path forward on these separate but related actions

<https://www.epa.gov/stationary-sources-air-pollution/municipal-solid-waste-landfills-new-source-performance-standards>



Recent Risk and Technology Review Rules

The Risk and Technology Review (RTR) is a combined effort to evaluate both risk and technology as required by the Clean Air Act (CAA) after the application of maximum achievable control technology (MACT) standards.

Recent Final RTRs:

- Signed 10/2/17: Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills (MACT II): National Emission Standards for Hazardous Air Pollutants (NESHAP) for Chemical Recovery Combustion Sources
- Signed 10/2/17: Manufacturing of Nutritional Yeast NESHAP
- Signed 10/16/17: Publicly Owned Treatment Works (POTW) NESHAP

<https://www3.epa.gov/airtoxics/risk/rtrpg.html>



Air Emission from Animal Waste at Farms

- On December 18, 2008, EPA exempted farms from reporting air releases of hazardous substances from animal waste:
 - Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); and
 - Section 304 of the Emergency Planning and Community Right-to-Know Act (EPCRA), if the farms stable or confine fewer than a certain numbers of animals
- On April 11, 2017, the DC Circuit Court vacated this final rule
- Farms must begin reporting these releases by November 15, 2017
- EPA is currently developing guidance to help farmers comply with the reporting requirements

<https://www.epa.gov/epcra>



Advance Program

A collaborative effort by EPA, states, tribes, and local governments to encourage emission reductions in attainment areas, to help them continue to meet the air quality standards for ozone and PM_{2.5}

Program Goals:

- Help attainment areas to ensure continued health protection
- Better position areas to remain in attainment
- Efficiently direct available resources toward actions to address ozone and PM_{2.5} problems quickly

Region 4 Participants

SC – entire state
Catawba Tribe, SC
Middle GA (including Robins Air Force Base)
Louisville, KY
Cumberland County, NC (including Fort Bragg)
Charlotte, NC
NC – Remainder of the State

EPA Region 4 contact: Kelly Sheckler
404-562-9222; sheckler.Kelly@epa.gov
www.epa.gov/advance

**Southeast
Diesel
Collaborative**

**EXPANDING
THE SOUTHERN CONNECTION**

Energy



Environment



Economics



“Creating a legacy of cleaner diesel engines”



Southeast Diesel Collaborative (SEDC)

- Voluntary public/private partnership formed in 2006 (part of the National Clean Diesel Campaign), focused on clean diesel opportunities that incorporate Energy, the Environment and Economics
- Diverse Partners from government, industry, state/local groups with the goal of improving air quality and public health by reducing emissions from existing diesel engines
- Annual funding under the Diesel Emissions Reduction Act (DERA)
- 12th Annual Partners Meeting coming – November 28-30 in Atlanta



www.southeastdiesel.org



Volkswagen Clean Air Act Partial Settlement

- Through a series of three partial settlements, the EPA has resolved civil enforcement cases against Volkswagen
 - The Resolves allegations that Volkswagen violated the Clean Air Act by the sale of ~590,000 MY09 to MY16 diesel motor vehicles equipped with “defeat devices”
- The 2.0L partial settlement requires Volkswagen to fund a \$2.7B mitigation trust fund (for States and tribes) to pay for defined eligible projects that reduce NOx; the 3.0L partial settlement requires an additional \$225M
 - --Wilmington Trust selected as the mitigation trust fund trustee
- The 2.0L partial settlement also requires Volkswagen to invest \$2B in Zero Electric Vehicle (ZEV) charging infrastructure and in the promotion of ZEVs
- US District Court filed an order approving the Environmental Mitigation Trust Agreement:
 - The Trust effective date (TED) is **October 2, 2017**
 - Governors contact the Trustee within 60 days of TED to elect to participate and appoint a state agency to implement mitigation actions
 - Funds for mitigation must meet eligible criteria in final order

State draft mitigation plans available online now (DE, NH, OR, PA, VA)



Volkswagen Clean Air Act Partial Settlement

- **Mitigation Trust Fund State Allocations for 2.0L Agreement [from \$2.7B total]:**
 - Alabama \$24.08 million
 - **Florida \$152.37 million**
 - Georgia \$58.10 million
 - Kentucky \$19.04 million
 - Mississippi \$9.24 million
 - North Carolina \$87.17 million
 - South Carolina \$31.63 million
 - Tennessee \$42.40 million

Websites and links for information

- www.vwcourtsettlement.com
 - Vehicle owners or leasees register online here
- <https://www.epa.gov/enforcement/volkswagen-clean-air-act-civil-settlement>
- www.cand.uscourts.gov/filelibrary/2869/Order-Granting-Entry-of-Consent-Decree.pdf



Questions?

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Deconstructing the US EPA: Opportunities and Obstacles

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**Florida Section,
Air & Waste Management
Association
October 25, 2017**

The “Administrative State”

- Steve Bannon, former White House Chief Strategist, has called for “Deconstruction of the Administrative State:”
 - Government overregulation, taxation, permissive immigration and free trade policies have created the US administrative state
 - The over-regulation is engineered by the left to advance its agenda and is supported by the corporatist, globalist media and coastal elites.
 - US EPA is the biggest agency in the Administrative State.
- Most recent deconstruction target: the Clean Power Plan.

Executive (Presidential) Opportunities for Deconstruction

- Executive Orders
- Presidential Memoranda
- Agency rulemaking and repeal
- Policy and Personnel decisions
- Spending decisions

What Are Executive Orders

- Have existed since George Washington, based upon constitutional grant of executive power, and thus have the full force of law.
- Cannot make law, just explain or implement existing legal authority.
- Most famous: Emancipation Proclamation.
- Must now be numbered and published in the Federal Register to give them “general applicability and legal effect.” 44 U.S.C. § 1505
- Are published on White House website at <https://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders>.

Executive Orders--Examples

- Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs (1/30/17)—repeal two rules for every one enacted, etc.
- Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule (2/28/17)—redo current rule and suspend litigation defending it.
- Presidential Executive Order on Promoting Energy Independence and Economic Growth (3/28/17)—“appropriately suspend, revise, or rescind those [existing environmental regulations] that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.”
- Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure (8/15/17)—deregulating and streamlining environmental review of infrastructure projects.

Laws to be waived under 8/15/17 EO for construction of Three Miles of Border Wall on 09/12/2017

- The National Environmental Policy Act
- The Endangered Species Act
- The Clean Water Act
- The National Historic Preservation Act
- The Migratory Bird Treaty Act
- The Migratory Bird Conservation Act
- The Clean Air Act
- The Archeological Resources Protection Act
- The Paleontological Resources Preservation Act
- The Federal Cave Resources Protection Act of 1988
- The Safe Drinking Water Act
- The Noise Control Act
- The Solid Waste Disposal Act
- The Resource Conservation and Recovery Act
- The Comprehensive Environmental Response, Compensation, and Liability Act
- The Archaeological and Historic Preservation Act
- The Antiquities Act
- The Historic Sites, Buildings, and Antiquities Act
- The Farmland Protection Policy Act
- The Federal Land Policy and Management Act
- Section 10 of the Reclamation Project Act of 1939
- The National Fish and Wildlife Act of 1956
- The Fish and Wildlife Coordination Act
- The Administrative Procedure Act
- The Rivers and Harbors Act of 1899
- The Eagle Protection Act

What are Presidential Memoranda?

- Generally involve directions to executive branch or delegations of authority
- Not numbered or required to be published in Federal Register
- Publishing Memoranda give them “general applicability and legal effect.”
- No requirement to cite authority or cost (unless over \$100 million)
- Memoranda posted on White House website:
<https://www.whitehouse.gov/briefing-room/presidential-actions/presidential-memoranda>

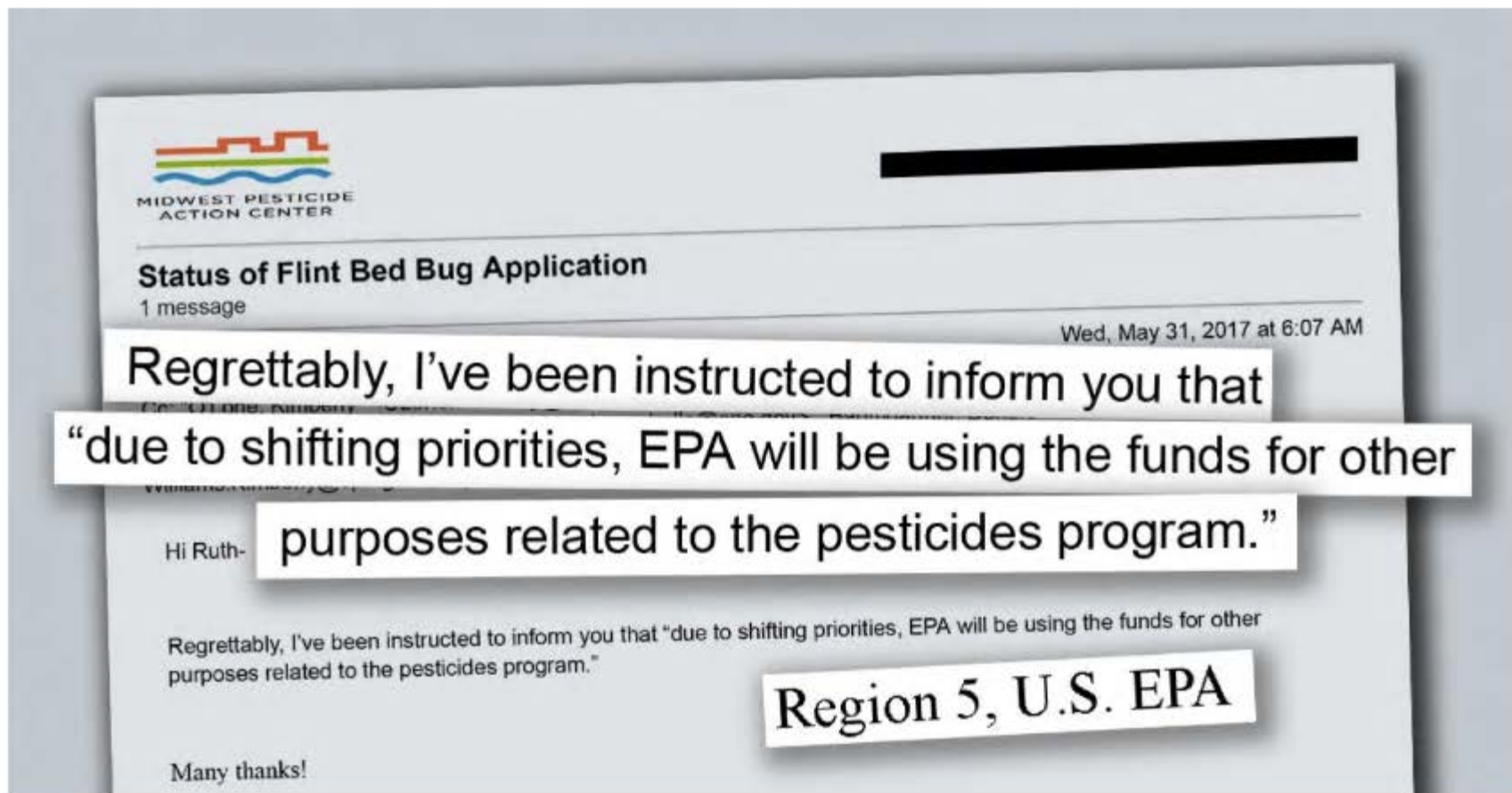
Presidential Memoranda-- Examples

- Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing (1/25/17)—permit streamlining and rule reform
- Construction of the Keystone XL Pipeline (1/24/17)—expedite a favorable review
- Construction of the Dakota Access Pipeline (1/24/17) —Secretary of Army must take all actions necessary to review and approve in an expedited manner.

Policy and Personnel Decisions

- EPA Administrator Scott Pruitt (sued EPA 14 times) pledged at CPAC to “roll back the regulatory state.”
- Pruitt issues “Back-to-Basics” agenda at Pennsylvania coal mine.
<https://www.epa.gov/newsreleases/epa-launches-back-basics-agenda-pennsylvania-coal-mine>.
- Reorganization and layoffs.
- Consolidate and centralize decision-making to political appointees
- Change website information—for example, deletion of website explaining climate change.
- Don’t reappoint members of the EPA Scientific Advisory Board
- Civil penalties down 60% during first six months of Trump Administration.
- Nominating longtime coal lobbyist (Andrew Wheeler) as Deputy Administrator.
- A political consultant (John Konkus) now reviews all EPA proposed grant solicitations and awards—e.g.,
 - Temporarily freezing all grants to Alaska after Sen. Murkowski voted against Obamacare repeal,
 - Defunding Chesapeake Bay Journal.
 - And . . .

EPA now requires political aide's sign-off for agency awards, grant applications



Agency rulemaking and repealing

- Rulemaking and repealing are a function of the executive branch of government.
- Thus, President Trump has full authority to issue his “Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs.”
- But rulemaking and repealing will be needed to implement the order fully.

Spending

- President's 2018 budget proposed cutting EPA's budget by 31 percent, (\$2.7 billion and 3,200 fewer jobs), most of any agency.
- Superfund cleanup remains a stated priority, though with a proposed 30% cut in funding. Also, EPA proposes to stop funding Justice Department for Superfund Enforcement (69 lawyers)
- 24 percent reduction in EPA's Office of Enforcement and Compliance Assurance.
- 45 percent cut in funding of categorical grants to states to implement federally delegated and state environmental programs.
- Elimination of regional initiatives such as Great Lakes Restoration Initiative and Chesapeake Bay Cleanup.

Congressional Opportunities for Deconstruction or Obstruction

- Acts of Congress
- Congressional Rule Repeal
- Appropriations
- Approval of Executive and Judicial Appointments.

Acts of Congress

- All regulations must have cited legislative authorization, and all Executive Orders and Memoranda can be effective only “to the extent allowed by law.”
- Deconstructing the Administrative State will require Congressional cooperation and execution to be completely effective.
- Particularly true if courts find that Executive Orders, Memoranda or Rulemaking exceed legislative authority.

Congressional Rule Repeal

- 5 U.S. Code Ch. 8, Congressional Review of Agency Rulemaking, requires agencies to submit newly adopted rules to Congress, which can vote to reject a rule within 60 days, subject to presidential approval (or veto override).
- A “substantially similar” rule cannot be adopted in its place.
- If the agency does not submit the rule to Congress, the 60-day clock has not started.
- Prior to one-party rule this year, a repeal was only accomplished once. Since then, there have been 14 rules that have been overturned.

Examples of Repeal Efforts

- Successful: On 2/16/17, the President signed a resolution approved by Congress to repeal the Department of Interior's Stream Protection Rule, which would have increased regulatory requirements for coal surface mining near waterways.
- Unsuccessful: On 5/10/17, Congress failed to advance a repeal resolution that would have nullified a Bureau of Land Management methane waste prevention rule.

Obstacles to Deconstruction

- Congress
- Federal Employees
- Federal Administrative Procedures Act
- Federal Courts
- Subsequent elections

Congress

- Congressional facilitation of deconstruction requires the basic ability to pass bills.
- The role of Congress is noted in Presidential Executive Orders and Memoranda by the caveat, “to the extent allowed by law.”
- Congress has the exclusive authority to approve a budget.

Congress--Budget

- Congress has not passed a budget, but is operating on a continuing resolution to finance government and raise the debt ceiling until December 15, 2017.
- At June House Appropriations Committee budget hearing, a senior Republican committee member said, “I can assure you that you will be the first EPA Administrator to come before this committee in eight years that will get more money than they asked for.”
- The House has approved a \$7.5 billion budget for EPA, a \$528 million cut but much less the \$2.7 billion cut the President’s proposed.
- The final approved budget could be higher because of the many constituencies (and vested interests) involved.

Federal Employees

- Most federal employees are in career civil service, and cannot be fired except for just cause, with due process and often collective bargaining agreement protections.
- The President can hire about 4,000 political appointees, out of 2.7 million federal civil servants.
- “You’re fired” be replaced by “You’re position has been defunded, eliminated, or made miserable.”

Federal Administrative Procedures Act

- The Federal Administrative Procedures Act (APA) defines “rulemaking” as “formulating, amending, or repealing a rule.”
- Repeal of a rule requires the same procedures and justification as promulgation. *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 493 U.S. 29 (1983).

Promulgating or Repealing a Federal Regulation

- Rulemaking has many steps as set forth in both the APA and many other federal laws, executive orders, and the like.
- Impetus for enactment of the APA began in the 1930s with FDR's expansion of federal government, making FDR the granddaddy of the Administrative State.
- Congress enacted the APA in 1946 both as a check on executive power and as a means to regulate, standardize and oversee all these new federal agencies.
- Congress would cede power to the executive branch by repealing the APA.

Table of Contents from The Federal Rulemaking Process: An Overview (Congressional Research Service 2013)

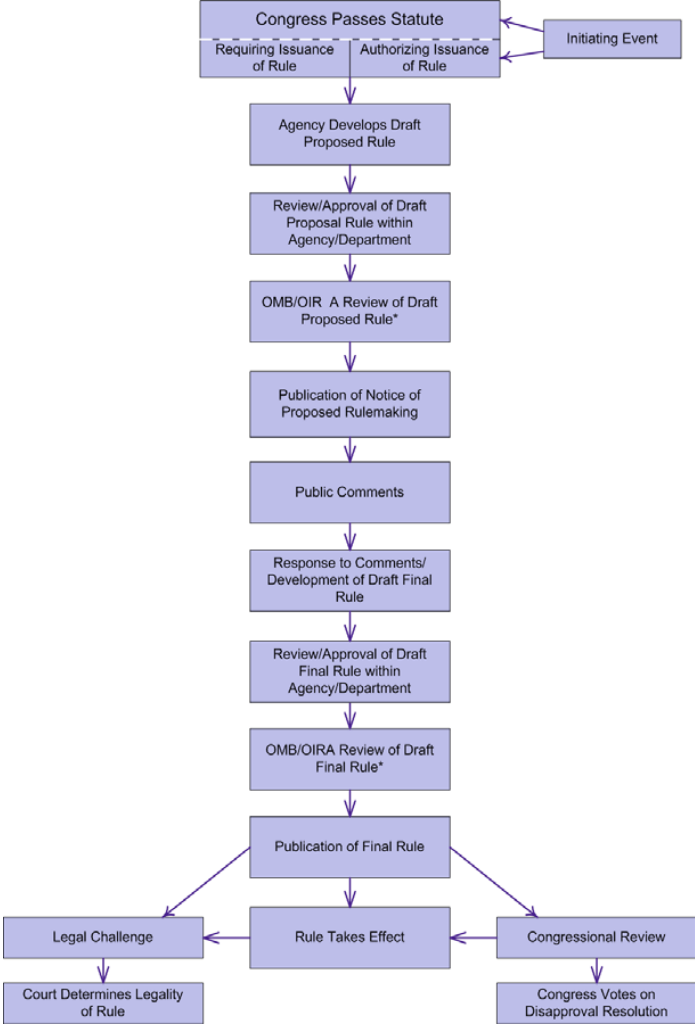
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Federal Rulemaking Process

(Source: Congressional Research Service)



Rulemaking challenges

- The “two-fer” requirement Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs could triple EPA’s rulemaking efforts.
- If the EPA budget is cut too much, and too many more employees quit, who is left to do rulemaking, and how well will they cooperate?
- Challenges expected to Clean Power Plan proposed rule (for example) because justification focuses on regulatory costs and minimizes benefits.
- Example of ineffective short circuiting of rulemaking: In response to Presidential Executive Order on Promoting Energy Independence and Economic Growth, EPA issued a suspension order of its methane rule, previously adopted with a 6/3/17 effective date, which was struck down in court.

Clean Air Council v. Pruitt (D.C.C.A. 17-1145, July 3, 2017)

- An order suspending a rule's effective date is tantamount to amending or revoking a rule.
- That should have been done through regular APA rulemaking procedures.
- 2-1 decision—dissent says EPA has discretion to delay rule effective date. Stay tuned!

Federal Court Obstacles

- Constitutional challenges to laws and executive actions.
- Challenges to executive actions that violate laws.
- Challenges to agency actions (not executive ones, unless undertaking agency action).
- Citizens Suits

Judicial Review under the APA

- 5 U.S.C. §§ 701-706--basic provisions for APA review of agency action.
- “Agency action” definition: “The whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.”
- Judicial review available either in a federal district court or, for rule challenges, directly to a circuit court of appeal, with variations depending on statute.
- Not available to agency action that is “committed to agency discretion by law.”

Standard of Review--5 USC § 706(2)

- Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- Contrary to constitutional right, power, privilege, or immunity;
- In excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- Without observance of procedure required by law;
- Unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
- Unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

“Arbitrary and Capricious”

- Standard is based upon review of the administrative record (with some exceptions)
- So, what is in the record is critical.
- Agency action is arbitrary or capricious where the agency
 - relied on factors which Congress has not intended it to consider,
 - entirely failed to consider an important aspect of the problem,
 - offered an explanation for its decision that runs counter to the evidence before the agency,
 - or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007).

Limitations on Review

- Judicial deference to agency expertise and findings.
- Chevron deference: *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc. et al.*, 467 U.S. 837 (1984).
- “If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.”
- Calls in Executive Office, Congress, and Supreme Court Justice Gorsuch to overrule *Chevron*—but to what effect?

Citizens Suits Requirements

- Federal Court Jurisdiction
- Differs from APA litigation because it substitutes for agency action rather than challenges an action.
- The citizen must give prior notice (generally, 60 days) to the agency before suit can be filed.
- If citizen suit review is not available for a specific type of action, it can may be reviewable under the APA.
- Prevailing parties can recover their attorneys' fees and costs, and plaintiffs may be required to post bond if preliminary injunctive relief is being sought

Citizen Suit Examples

- Clean Water Act, 33 U.S.C. § 1365
- Endangered Species Act, 16 U.S.C. § 1540(g)
- Clean Air Act, 42 U.S.C. § 7604

Citizen Suit Targets

- Permit holders alleged to have violated permits.
- Polluters without permits.
- EPA (or delegated state or local agency) failure to perform a non-discretionary act (like enforce permit requirements, comply with laws or rules).
- EPA failure to initiate rulemaking (or improperly repealing rules).

NY Times 10/6/17 Scoresheet: 25 rules have been overturned

- Flood building standards
- Proposed ban on a potentially harmful pesticide
- Freeze on new coal leases on public lands
- Methane reporting requirement
- Anti-dumping rule for coal companies
- Decision on Keystone XL pipeline
- Decision on Dakota Access pipeline
- Third-party settlement funds
- Offshore drilling ban in the Atlantic and Arctic
- Ban on seismic air gun testing in the Atlantic
- Northern Bering Sea climate resilience plan
- Royalty regulations for oil, gas and coal
- Inclusion of greenhouse gas emissions in environmental reviews
- Permit-issuing process for new infrastructure projects
- Green Climate Fund contributions
- Mining restrictions in Bristol Bay, Alaska
- Grizzly bear listing as endangered species
- Hunting ban on wolves and grizzly bears in Alaska
- Protection of whales and sea turtles
- Reusable water bottles rule for national parks
- National parks climate order
- Environmental mitigation for federal projects
- Calculation for “social cost” of carbon
- Planning rule for public lands
- Copper filter cake listing as hazardous waste

19 rollbacks are in progress

- Clean Power Plan
- Paris climate agreement
- Wetland and tributary protections
- Car and truck fuel-efficiency standards
- Status of 10 national monuments
- Status of 12 marine areas
- Limits on toxic discharge from power plants
- Coal ash discharge regulations
- Emissions standards for new, modified and reconstructed power plants
- Emissions rules for power plant start-up and shutdown
- Sage grouse habitat protections
- Fracking regulations on public lands
- Regulations on oil and gas drilling in some national parks
- Oil rig safety regulations
- Regulations for offshore oil and gas exploration by floating vessels
- Exploratory drilling in the Arctic Wildlife Refuge
- Hunting method regulations in Alaska
- Requirement for tracking emissions on federal highways
- Emissions standards for trailers and glider kits

8 rollbacks are in limbo

- Methane emission limits at new oil and gas wells
- Limits on landfill emissions
- Limits on methane emissions on public lands
- Mercury emission limits for power plants
- Hazardous chemical facility regulations
- Groundwater protections for uranium mines
- Efficiency standards for federal buildings
- Helping consumers buy fuel-efficient tires

The Lawyer Feeding Frenzy Has Begun

- “At least eighteen environmental groups filed four lawsuits in one day against the Trump administration, including suits to keep in place Obama-era environmental policies.” Daily Caller, 5/4/17.
- “Environmental activists have gone from being the government’s closest allies to being nonstop litigants in just four months, filing lawsuits on a weekly basis challenging virtually every move the Trump administration has made in its deregulatory push.” Washington Times, 5/17/17
- “Trump’s ‘drill, baby, drill’ energy policies are being met by ‘sue, baby, sue,’” describing more than four dozen lawsuits filed by environmental groups and Democratic state attorneys general. McClatchy News Service, 7/12/17