

Turning Back the Clock

The Obama Administration and the Legacy of Bush-era Midnight Regulations

IN THE WANING DAYS of the Bush administration, federal agencies finalized scores of new regulations. Many of these so-called midnight regulations were deregulatory in nature, targeting public protections for the environment, workers, and the general citizenry.

Criticism came from all corners of the progressive community: Environmentalists, women's and family rights advocates, labor unions, consumer activists, humans needs advocates, and good government groups all chafed at the Bush administration's campaign and considered ways to limit the impact of these midnight regulations.

Despite its responsibility to oversee the executive branch, Congress failed to take meaningful action on all but one of the most controversial midnight regulations.¹ Although some advocates chose to sue agencies over legally deficient rules, the cumbersome and time-consuming nature of the judicial process made any action in the short term unlikely. That left President Obama and his incoming administration the challenge of tackling these rules.

However, the Bush administration had done its best to handcuff Obama by ensuring the rules became effective by the time Obama took office. Upon publishing a final regulation, agencies must allow for a window of time before the rule can take effect (often 30 or 60 days). By finalizing rules in October, November, and December of 2008, agencies had shrewdly timed many of their rule-makings to ensure that window closed before the Bush administration left office.

EARLY ON, the Obama administration laid out its strategy for reviewing regulations left over from the Bush administration. On Jan. 20, White House Chief of Staff Rahm Emanuel issued a memo covering two categories of regulations: those still in the pipeline (which were to be halted until Obama appointees were in place) and those final but not yet in effect. The memo instructed agencies to "consider extending for 60 days the effective date" of those rules that were finalized but were not in effect as of Jan. 20.²



Agencies took advantage of the Emanuel memo for several rules. The U.S. Environmental Protection Agency (EPA) delayed from February 2009 until May 2010 the effective date of a controversial change to the way it polices air pollution, buying itself more time to reconsider the regulation.³

However, the Emanuel memo covered too few midnight regulations since so many had already taken effect. Undoing the damage of the Bush midnight regulations could only be achieved after a laborious rule-by-rule review. Each situation required a different strategy for addressing the problem. It became clear very quickly that cross-cutting laws like the Congressional Review Act (CRA),⁴ which allows Congress to overturn regulations legislatively, would not be relevant. This raises a question about the utility of the CRA that Congress may wish to consider.

THE OBAMA ADMINISTRATION turned to strategies other than delaying effective dates in order to quash or limit the impact of those regulations already in effect. While the administration has largely proven effective in altering the regulatory path of those regulations it has targeted, some actions are still continuing – and some regulations remain unaddressed entirely.

The administration has addressed the Bush-era regulations on a case-by-case basis. After environmentalists criticized a November 2008 rule that opened to energy development two million acres in the western U.S., incoming Interior Secretary Ken Salazar sought ways to preserve the land. But Salazar did not attack the regulation, which allowed energy companies to lease federal land for oil shale development (an unproven and environmentally devastating method of extracting oil from solid rock). Instead, he placed a hold on the leases, empowering himself to control the pace of development.⁵

But those situational remedies, which do not strike regulations from the books, can present pitfalls, as the administration learned. For example, after conservationists sued the Interior Department over a rule easing restrictions on mountaintop mining, the Obama administration decided in April to stand aside and asked the court to throw out the regulation.⁶ Environmentalists cheered the decision, but, less than four months later, a federal judge rejected the administration's request.⁷ The regulation remains in effect.

Whether the Obama administration will attempt more settlements remains to be seen, but several midnight regulations are the subjects of ongoing lawsuits. Environmental groups are suing the EPA in order to require more information about air pollution at farms.⁸ Highway safety advocates are suing the Department of Transportation (DOT) over a rule that raises the limit on the number of consecutive hours truck drivers can spend behind the wheel.⁹ Federal courts have already overruled nearly identical DOT rules on two separate occasions, but while the judicial process drags on, the current rule remains in effect.

Where strategic maneuvering has been untenable or undesirable, the Obama administration has turned to a more straightforward method for reversing regulations: reentering the rulemaking process. In May, the Centers for Medicare and Medicaid Services (CMS) published a notice proposing to withdraw an October 2008 regulation that limited benefits for low-income citizens enrolled in Medicaid. After subjecting the proposal to public review and comment, as the Administrative Procedure Act requires

agencies to do, CMS withdrew the rule June 30.¹⁰ Effective July 1, it is as though the regulation never existed.

Complete eradication is not the only option when reentering the rulemaking process. The Department of Labor has proposed amending a December 2008 regulation which weakened wage protections and housing standards for farmworkers.¹¹ Other agencies have said publicly that they will reconsider, and potentially revise, some of the Bush administration's midnight regulations.

THUS FAR, the Obama administration has allowed many midnight regulations to stand. Women's rights advocates criticized the Department of Health and Human Services (HHS) for a rule they say will limit access to reproductive health services including contraception. Although HHS proposed in March to withdraw the rule,¹² it has since backed away from taking any definitive action. On other regulations, the administration has been completely silent.

Still, the Obama administration deserves credit for making midnight regulations a priority and for exercising different strategies to mitigate their damage to society. OMB Watch expects the Obama administration to continue to endeavor to limit or withdraw regulations finalized near the end of the Bush administration and continues to monitor the administration's progress. The attached chart includes the current status, as of Oct. 23, of 27 midnight regulations identified as controversial. For more information, visit OMB Watch's midnight regulations homepage at <http://www.ombwatch.org/node/9686>.

1. The FY 2009 omnibus appropriations bill passed by Congress on March 11 (Pub. L. 111-8) includes a provision that permitted the departments of Commerce and Interior to "withdraw or reissue" a rule changing the way the Endangered Species Act is implemented. The provision allowed the agencies to bypass the normal rulemaking process. On May 4, the agencies formally withdrew the original rule.
2. Rahm Emanuel, "Memorandum for the Heads of Executive Departments and Agencies; Subject: Regulatory Review," Jan. 20, 2009. Available at: www.ombwatch.org/files/regs/midnightregfreezememo.pdf.
3. "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation," U.S. Environmental Protection Agency, 74 FR 22693, May 14, 2009. Available at: <http://edocket.access.gpo.gov/2009/pdf/E9-11271.pdf>.
4. Pub. L. 104-121.
5. "Potential for Oil Shale Development; Withdrawal of the Call for Nominations—Oil Shale Research, Development, and Demonstration (R, D, and D) Program and Request for Public Comment," U.S. Department of the Interior Bureau of Land Management, 74 FR 8983, Feb. 27, 2009. Available at: <http://edocket.access.gpo.gov/2009/pdf/E9-4259.pdf>.
6. Ken Salazar, "Remarks on Mountaintop Mining Rule," April 27, 2009. Available at: http://interior.gov/news/09_News_Releases/Mountain_Top_Remarks.pdf.
7. Henry H. Kennedy Jr., "Memorandum Opinion and Order," United States District Court for the District of Columbia, Civil Action 09-00115 (HHK), Aug. 12, 2009. Available at: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2009cv0115-18.
8. *Waterkeeper Alliance v. EPA*, D.C. Cir., No. 09-1017, January 15, 2009.
9. *Public Citizen, et al. v. Federal Motor Carrier Safety Administration and the United States*, U.S. Court of Appeals for the District of Columbia, No. 09-1094 (filed August 2009).
10. "Medicaid Program: Rescission of School-Based Administration/Transportation Final Rule, Outpatient Hospital Services Final Rule, and Partial Rescission of Case Management Interim Final Rule," U.S. Department of Health and Human Services Centers for Medicare & Medicaid Services, 74 FR 31183, June 30, 2009. Available at: <http://edocket.access.gpo.gov/2009/pdf/E9-15345.pdf>.
11. "Temporary Agricultural Employment of H-2A Aliens in the United States," U.S. Department of Labor Employment and Training Administration and Wage and Hour Division, 74 FR 45906, Sep. 4, 2009. Available at: <http://edocket.access.gpo.gov/2009/pdf/E9-21017.pdf>.
12. "Rescission of the Regulation Entitled 'Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law'; Proposal," U.S. Department of Health and Human Services, 74 FR 10207, March 10, 2009. Available at: <http://edocket.access.gpo.gov/2009/pdf/E9-5067.pdf>.



The following is a list of midnight regulations identified as controversial. The list is not meant to be comprehensive. The current status reflects the latest information available to OMB Watch as of Oct. 23, 2009.

Regulation (agency)	Description	Publication date	Original effective date	Efforts to reverse or change the regulation	Current status
Labor organization annual financial reports (Office of Labor Management Standards)	The rule adds itemization and other requirements to the LM-2 form. The rule also establishes procedures for revoking the right of smaller unions to file LM-3 and requiring them to file LM-2.	1/21/2009	2/20/2009	On Feb. 3, the agency published a notice in the Federal Register proposing to extend the effective date of the rule and received comment on the extension until Feb. 13. On Feb. 20, the agency published a notice that extends until April 21 the effective date of the rule. On March 19, the agency published a notice proposing a further extension of the effective date to Oct. 19; it confirmed that extension April 21. Also on April 21, the agency published a notice proposing to withdraw the rule entirely. The agency accepted public comment on the withdrawal proposal until June 22 (after one extension of the period). On Oct. 13, the agency published a final rule formally withdrawing the original, Jan. 21 rule.	Withdrawn
Country-of-origin labeling (Agricultural Marketing Service)	The rule established country-of-origin labeling requirements for beef, lamb, chicken, goat, pork, fish and shellfish, certain nuts, and other perishable agricultural commodities. However, an overly broad definition of "processed foods" could exempt "over 60 percent of pork, the majority of frozen vegetables, an estimated 95 percent of peanuts, pecans, and macadamia nuts, and multi-ingredient fresh produce items such as fruit salads and salad mixes" from the labeling requirements, according to Wenhauter, Executive Director of Food and Water Watch.	1/15/2009	3/16/2009	Secretary Vilsack informed industry Feb. 20 that he intends to allow the rule to go into effect as planned but asked it to take additional steps to effectively make the rule more stringent. Vilsack asked industry to label meat products with the country in which a product was born, raised, and slaughtered and asked it not to abuse the definition of processed food.	Effective

Regulation (agency)	Description	Publication date	Original effective date	Efforts to reverse or change the regulation	Current status
Aggregation of emissions under New Source Review (Environmental Protection Agency (EPA))	The rule would change the way industrial facilities count their air pollution emissions. The rule would no longer require facilities to aggregate emissions data, if the emissions are a result of different processes that are not “substantially related.”	1/15/2009	2/17/2009	On Feb. 13 EPA published a notice in the Federal Register that extended until May 18 the effective date of the rule. Also on Feb. 13, EPA published a notice announcing it would reconsider the rule and may hold a public hearing. On March 18, EPA published a notice proposing a further extension of the effective date to Nov. 18. EPA accepted public comment on the March 18 notice until April 17. On May 14, the agency published a final rule further extending the effective date to May 18, 2010.	Not yet effective
Partner Vetting System (U.S. Agency for International Development (USAID))	The rule creates the Partner Vetting System (PVS) which would screen charities, and their “principle” employees, who receive or apply for USAID funding for possible ties to terrorists. The government would then screen these employee names against classified databases (USAID will not specify which databases) that has information on terrorists. The rule also states, “The decision as to whether to implement PVS will be made by the incoming Obama Administration.”	1/2/2009	2/2/2009	On Feb. 2 USAID published a notice in the Federal Register that extended until April 3 the effective date of the rule. On April 2 the agency published a notice that further extended the effective date until May 4. On May 6 the agency published a notice that further extended the effective date until Aug. 4. The rule has yet to be implemented. Implementation is unlikely prior to the appointment of a new USAID administrator. President Obama has yet to nominate an individual to the position. The FY 2010 Senate appropriations bill for the Department of State (S. 1434), currently under consideration, includes a provision that would temporarily bar implementation.	Effective, but implementation delayed
Pledge requirements for HIV/AIDS grantees (Department of Health and Human Services)	The rule requires HIV/AIDS grantees to choose between adopting government policy (explicitly and unequivocally opposing prostitution and sex trafficking) for their entire organizations or setting up completely separate affiliated organizations. However, the degree of separation proposed is so severe that it is impractical to implement.	12/24/2008	1/20/2009	The Obama administration has indicated it will issue a new proposed rule in January 2010 which would revise the December 2008 rule.	Effective

Regulation (agency)	Description	Publication date	Original effective date	Efforts to reverse or change the regulation	Current status
Exemption of information reporting for federal contractors (Wage and Hour Division)	The rule exempts contractors covered by the Davis-Bacon Act and the Copeland Anti-Kickback Act from including in weekly payroll record reports to the federal government the social security numbers and home addresses of workers. This will make it more difficult for the government to verify the accuracy of reports.	12/19/2008	1/18/2009	Unknown	Effective
Privatization of public toll roads (Federal Highway Administration)	The rule could lead to an increase in the privatization of public toll roads by forcing states to accept bids from private companies when reorganizing or transferring authority for operating toll roads.	12/19/2008	1/18/2009	Unknown	Effective
Access to reproductive health services (Department of Health and Human Services (HHS))	The rule could limit women's access to reproductive health services. The rule requires health care providers to certify they will allow their employees to withhold services on the basis of religious or moral grounds or risk losing federal funding.	12/19/2008	1/20/2009	At least three suits have been filed against HHS: One by a group of seven state attorneys general; one by Planned Parenthood; and one by the National Family Planning and Reproductive Health Association. All three suits were filed in the U.S. District Court for the District of Connecticut. Rep. Diana DeGette has introduced legislation to overturn the rule (H.R. 570). On March 10, the agency published a notice proposing to withdraw the rule entirely. The agency accepted public comment on the withdrawal proposal until April 9. The spring edition of the semiannual Unified Agenda of Regulatory and Deregulatory Action, published in May, identified the rule as a long-term action and indicated that next steps were "undetermined."	Effective; possible remedy pending
Certification for the Employment of H-2B Aliens (Employment and Training Administration)	The rule eliminates the requirement that the government certify employers' compliance with H-2B program requirements, instead allowing for self attestation.	12/19/2008	1/18/2009	Unknown	Effective
Burning of hazardous waste (Environmental Protection Agency)	The rule reclassifies thousands of tons of hazardous waste as fuel, allowing it to be burned instead of sensitively disposed of. The emissions generated by burning the waste would be more toxic than emissions from burning fossil fuels.	12/19/2008	1/20/2009	On May 5, EPA announced it is reconsidering the rule and expects to propose a withdrawal notice in November 2009.	Effective; possible remedy pending

Regulation (agency)	Description	Publication date	Original effective date	Efforts to reverse or change the regulation	Current status
Revisions to the H-2A guest-worker program (Employment and Training Administration)	The rule weakens wage protections and housing standards for agricultural workers. The rule could also allow employers to hire more foreign workers without giving due consideration to U.S. workers.	12/18/2008	1/17/2009	A coalition of farmworker unions sued to block the rule. The U.S. District Court for the District of Columbia denied a motion to immediately suspend the effective date of the rule. The underlying case continues. On May 29, the agency published a final rule, suspending the original Dec. 18, 2008 regulation for nine months. However, on June 29, a federal court overturned the May 29 rule, reinstating the Dec. 18 rule. On Sept. 4, the agency published a proposed rule that would largely reverse the controversial aspects of the original Dec. 18, 2008 rule. The agency accepted public comment on the proposal until Oct. 20 (after one extension).	Effective; possible remedy pending
Air pollution reporting from farms (Environmental Protection Agency)	The rule exempts factory farms from reporting air pollution emissions coming from animal waste.	12/18/2008	1/20/2009	A coalition of environmental groups has filed suit.	Effective
Endangered species consultation (Fish and Wildlife Service/ National Oceanic and Atmospheric Administration)	The rule alters implementation of the Endangered Species Act by allowing federal land-use managers to approve projects like infrastructure creation, minerals extraction, or logging without consulting federal habitat managers and biological health experts responsible for species protection. Previously, consultation had been required. The rule also forbids global warming from being considered as a factor in species decisions.	12/16/2008	1/15/2009	A coalition of environmental groups filed suit Dec. 11 in the U.S. District Court for the Northern District of California. Several state attorneys general filed separately. President Obama March 3 issued a memo instructing agencies to “exercise their discretion” to continue consultation. The FY 2009 omnibus appropriations bill passed by Congress on March 11 (Pub. L. 111-8) includes a provision that permitted the Commerce and Interior secretaries to “withdraw or reissue” the rule without going through the normal rulemaking process. On May 4, the agencies published a final rule formally withdrawing the original Dec. 16, 2008 rule.	Withdrawn

Regulation (agency)	Description	Publication date	Original effective date	Efforts to reverse or change the regulation	Current status
Mountaintop mining (Office of Surface Mining)	The rule allows mining companies to dump the waste, or spoil, from mountaintop mining into rivers and streams.	12/12/2008	1/12/2009	At least two suits have been filed, both by coalitions of environmental groups and both in the U.S. District Court for the District of Columbia. One was filed Dec. 22. The other was filed Jan. 16. The Interior Department announced April 27 that it would ask the court to overturn the rule, reinstating the old rule. On Aug. 12, the court rejected the request.	Effective
Gun safety in national parks (National Park Service)	The rule lifts the 25-year-old ban on carry-loaded weapons in national parks.	12/10/2008	1/9/2009	At least two suits have been filed, one by a coalition of park safety advocates and one by the Brady Campaign to Prevent Gun Violence. Both were filed in the U.S. District Court for the District of Columbia. One was filed Dec. 30, the other was filed Jan. 6, both before the rule had taken effect. The Interior Department has said it will reevaluate the rule. On March 19, a federal judge granted a request for a preliminary injunction, blocking implementation of the rule until the case is argued. The Obama administration has announced that it will perform an environmental impact assessment of the rule, putting it on hold indefinitely. A credit card reform bill passed by Congress and signed into law May 22 (Pub. L. 111-24) includes a provision that prevents Interior from writing or enforcing any federal gun control regulation affecting national parks.	Effective, but implementation delayed
Vertical tandem lifts (Occupational Safety and Health Administration)	The rule allows maritime port operators to lift two or more empty containers secured together at the same time.	12/10/2008	4/9/2009	Unknown	Effective
Emergency land withdrawals (Bureau of Land Management (BLM))	The rule removes existing regulations that provide for emergency land withdrawals. Specifically, the rule change revokes Congress's authority to require the agency to bar land from being developed in emergency situations. The rulemaking is largely in response to a Congressional Resolution which ordered BLM to immediately remove public lands adjacent to the Grand Canyon from uranium mining claims.	12/5/2008	1/5/2009	Unknown	Effective

Regulation (agency)	Description	Publication date	Original effective date	Efforts to reverse or change the regulation	Current status
Rerouting hazmat rail shipments (Pipeline and Hazardous Materials Safety Administration)	The rule requires railcars carrying hazardous materials to reroute around densely populated areas; but it gives control of rerouting to the railroad industry without federal oversight or local input.	11/26/2008	12/26/2008	Unknown	Effective
Rail transportation security (Transportation Security Administration)	The rule requires railcars carrying hazardous materials to reroute around densely populated areas; but it would give control of rerouting to the railroad industry without federal oversight or local input.	11/26/2008	12/26/2008	Unknown	Effective
Runoff from factory farms (Environmental Protection Agency (EPA))	The rule could allow the runoff from concentrated animal feeding operations (CAFO), i.e. factory farms, to pollute waterways without a permit. The rule circumvents the Clean Water Act, instead allowing for self-regulation.	11/20/2008	12/22/2008	On Oct. 15, EPA announced that it would explore and use existing rules to regulate CAFO runoff.	Effective
Truck driver hours of service (Federal Motor Carrier Safety Administration (FMCSA))	The rule allows truck drivers to drive up to 11 consecutive hours and shortens mandatory rest times between work weeks. It is nearly identical to a regulation struck down in the D.C. Court of Appeals in 2007.	11/19/2008	1/19/2009	A coalition of highway safety advocates has petitioned FMSCA to reconsider the rule.	Effective
Oil shale development (Bureau of Land Management (BLM))	Capitalizing on a recent decision by Congress to let the ban on oil shale development to expire, the BLM rule opens 2 million acres of western land to leasing. Environmentalists say oil shale development, which involves extracting liquid oil from solid rock by heating it, increases greenhouse gas emissions and requires intensive water use.	11/18/2008	1/17/2009	A coalition of environmental groups filed suit Jan. 16 in the U.S. District Court for the District of Colorado. Interior Secretary Ken Salazar has announced he would place a hold on the leases pending further review.	Effective, but implementation delayed
Family and medical leave (Wage and Hour Division)	The rule limits employee access to family and medical leave. Among other things, the rule makes it more difficult for workers to use paid vacation or personal time to take leave and allows employers to speak directly to an employee's health care provider. The rule also expands leave opportunities for military families.	11/17/2008	1/16/2009	On April 29, Rep. Carol Shea-Porter (D-NH) introduced a bill (H.R. 2161) that would repeal several of the controversial changes made by the rule. The bill is stuck in committee.	Effective

Regulation (agency)	Description	Publication date	Original effective date	Efforts to reverse or change the regulation	Current status
Medicaid outpatient services (Centers for Medicare and Medicaid Services)	The rule narrows the definition of outpatient hospital services to reduce Medicaid beneficiaries' access to those services, such as dental and vision care.	11/7/2008	12/8/2008	On May 6, the agency published a notice proposing to withdraw the rule entirely. The agency accepted public comment on the proposal until June 1. On June 30, the agency published a final rule formally withdrawing the original, Nov. 7, 2008 rule.	Withdrawn
Definition of solid waste (Environmental Protection Agency)	The rule guts standards for the recycling of hazardous wastes under the Resource Conservation and Recovery Act (RCRA). "In this proposed rulemaking, EPA clings to a concept of 'discard' that would exclude from regulation, by their own estimation, over 3 billion pounds of hazardous waste from over 4600 facilities in 530 industries," according to comments submitted by the Sierra Club, U.S. Public Interest Research Group, National Environmental Trust, and Safe Food and Fertilizer.	10/30/2008	12/29/2008	Earthjustice has petitioned EPA to reconsider the rule. On May 27, EPA published a notice announcing a public meeting to be held June 30 to discuss possible revisions to the rule. EPA also accepted public comment on possible revisions until July 14.	Effective; possible remedy pending
Employment verification by social security records (Department of Homeland Security)	The supplemental to a 2007 final rule instructs employers how to respond to a "no-match" letter from the Social Security Administration (SSA) indicating that an employee's name and social security number do not match SSA records. But as is often the case, a no-match letter could be triggered by a database error, such as a misspelled name, and does not necessarily mean a person is an illegal immigrant.	10/28/2008	10/28/2008	The rule never went into effect because of a 2007 court injunction blocking the government from sending out the letters. On Aug. 19, the agency published a notice proposing to withdraw the rule entirely. The agency accepted public comment on the proposal until Sept. 18. On Oct. 7, the agency published a final rule formally withdrawing the original, Oct. 28, 2008 rule.	Withdrawn
Union annual reports for trusts (Office of Labor-Management Standards)	The rule imposes new trust reporting requirement that is more onerous than requirement adopted in 2006. Treats employer contributions as equivalent of union contributions without explanation. The rule, meant to replace a rule vacated in federal court in July 2007, is widely seen as a political effort to overload labor unions with paperwork.	10/2/2008	12/31/2008	Unknown	Effective