Lisa Soronen, Executive Director, State and Local Legal Center, Washington, D.C., January 10, 2017
BLOG POST NUMBER 1

***Getting Rid of Regulations: How Can It Be Done*?**

President-elect Donald Trump has stated repeatedly that one of the goals of his new administration is to get rid of federal regulations. Despite the fact that the new administration has a menu of options to kill final federal regulations the most effective options are likely the most difficult to achieve.

This blog posting uses as examples three of the most important regulations to state and local government—all of which are on the chopping block: the Clean Power Plan (CPP) (President Obama's signature climate change measure), the regulations defining "waters of the United States" (WOTUS) (a significant term in the Clean Water Act defining the federal government's jurisdiction to regulate water), and the Fair Labor Standards Act (FLSA) overtime regulations (extending overtime pay to 4 million workers).

Perhaps the cleanest way to undo final regulations is to rewrite or eliminate the statutory language being interpreted in the regulation. For example, the WOTUS final rule includes eight categories of jurisdictional waters. Congress could simply rewrite the Clean Water Act to define WOTUS differently from the final regulations. But getting such a change through Congress would probably be impossible as Senate Democrats would certainly filibuster any change they saw as offering less environmental protection than the final regulations.

The Trump Administration could also instruct agencies to rewrite regulations. But a number of challenges arise with this option. First, the agency would have to come up with new proposed regulations. Depending on the regulation, this might take a lot of time. Take the Clean Power Plan regulations; they are over three hundred pages long. Once new regulations are proposed they are subject to a public comment period of either 60 or 120 days. The agency then must consider hundreds or thousands of comments before issuing final rules. When this process is complete the new regulations would almost certainly be subject to a court challenge. Changes to agency rules must be non-arbitrary. Supporters of any of the three regulations discussed in this posting would likely be willing to sue.

Another option to deal with disfavored regulations is to not enforce them by giving agencies inadequate funding to engage in rigorous enforcement or instructing agencies to make enforcement of particular regulations a low priority. This strategy would be more effective for some regulations than others. For example, if President Trump instructed the Department of Labor to ignore employees being classified as "white collar" when they should not be per the FLSA, employees could pursue lawsuits against their employers for this violation without Department of Labor involvement.

Agencies also have the option of issuing interpretations of regulations that can take regulations in a different direction than originally intended. This strategy will not work well for dismantling seismic regulations like the Clean Power Plan or very simple, straightforward regulations like the FLSA overtime rules. Also, these interpretations can be subject to court challenge as arbitrary and can be overturned with the stroke of a pen by the next administration.

The CPP, the WOTUS regulations, and the FLSA regulations are all currently being challenged in court on various grounds. The Trump administration can refuse to defend these laws. But the lawsuits are unlikely to simply go away because interveners will likely step in and defend them. For example, states and local governments have already intervened to defend the Clean Power Plan; Texas AFL-CIO has sought to intervene to defend the FLSA overtime regulations.

All this to say, if any or all of these regulations go, it will not likely be the result of the direct efforts of the new President. Instead, it is likely to done by the United States Supreme Court, which is the subject of my next blog posting, if it is to be done at all.

BLOG POST NUMBER 2

President Trump May Need Justice Kennedy's Vote to Accomplish Regulatory Agenda

President-elect Donald Trump has vowed to get rid of numerous federal regulations adopted by the Obama Administration. Impossible many say. If there is one man who may be able to make this happen it is Supreme Court Justice Anthony Kennedy.

Three of the most important regulations to state and local government were the subject of litigation likely headed to the Supreme Court before Trump was elected: the Clean Power Plan (CPP) (President Obama's signature climate change measure), the regulations defining "waters of the United States" (WOTUS) (a significant term in the Clean Water Act defining the federal government's jurisdiction to regulate water), and the Fair Labor Standards Act (FLSA) overtime regulations (extending overtime pay to 4 million workers).

Numerous commentators, including myself, have noted the difficulty President Trump will have personally undoing any of these regulations. So, despite his hostility towards them (and maybe even because of it) these regulations will probably still end up before the Supreme Court.

It is perhaps unfair to speculate how a Supreme Court Justice might look at these regulations (which are all being challenged on different legal grounds) based solely on whether a Justice is a conservative or a liberal. Nevertheless, these labels indicate general legal philosophies and leanings.

Conservative Justices—for a variety of reasons which may differ depending on the regulation—might generally be more likely to view these (and other regulations) with more hostility than liberal Justices. A conservative Justice is more likely to see any or all of these regulations as an attack on federalism or as an example of federal agency overreach. Regarding the CPP or the WOTUS rule in particular, a conservative Justice may see these measures as part of a pro-environment policy agenda rather than as a manifestation of clear law.

While we don't know who President Trump will nominate to fill Justice Scalia's vacancy all signs point toward President Trump nominating (and the Senate ultimately confirming) a reliable conservative. But this nomination will not change the balance of the Supreme Court before Justice Scalia died as a 5-4 conservative Court with Justice Kennedy in the middle.

So unless membership changes again soon on the Supreme Court the fate of these regulations may lie in the hands of a person as puzzling, powerful, and unpredictable as Donald J. Trump: Justice Kennedy.

ARTICLE

Getting Rid of Regulations: Done with a Little Help from Justice Kennedy?

President-elect Donald Trump has stated repeatedly that one of the goals of his new administration is to get rid of federal regulations. Three on the chopping block of particular interest to state and local government include the Clean Power Plan (CPP) (President Obama's signature climate change measure), the regulations defining "waters of the United States" (WOTUS) (a significant term in the Clean Water Act

defining the federal government's jurisdiction to regulate water), and the Fair Labor Standards Act (FLSA) overtime regulations (extending overtime pay to 4 million workers).

Despite the fact that the new administration has a menu of options to kill final federal regulations the most effective options are likely the most difficult to achieve. If any or all of these regulations go, it will not likely be the result of the direct efforts of the new President. Instead, it is likely to done by the United States Supreme Court, if it is to be done at all.

What Are Trumps Options?
Perhaps the cleanest way to undo final regulations is to rewrite or eliminate the statutory language being interpreted in the regulation. For example, the WOTUS final rule includes eight categories of jurisdictional waters. Congress could simply rewrite the Clean Water Act to define WOTUS differently from the final regulations. But getting such a change through Congress would probably be impossible as Senate Democrats would certainly filibuster any change they saw as offering less environmental protection than the final regulations.

The Trump Administration could also instruct agencies to rewrite regulations. But a number of challenges arise with this option. First, the agency would have to come up with new proposed regulations. Depending on the regulation, this might take a lot of time. Take the Clean Power Plan regulations; they are over three hundred pages long. Once new regulations are proposed they are subject to a public comment period of either 60 or 120 days. The agency then must consider hundreds or thousands of comments before issuing final rules. When this process is complete the new regulations would almost certainly be subject to a court challenge. Changes to agency rules must be non-arbitrary. Supporters of any of the three regulations discussed in this posting would likely be willing to sue.

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Agencies also have the option of issuing interpretations of regulations that can take regulations in a different direction than originally intended. This strategy will not work well for dismantling seismic regulations like the Clean Power Plan or very simple, straightforward regulations like the FLSA overtime rules. Also, these interpretations can be subject to court challenge as arbitrary and can be overturned with the stroke of a pen by the next administration.

The CPP, the WOTUS regulations, and the FLSA regulations are all currently being challenged in court on various grounds. The Trump administration can refuse to defend these laws. But the lawsuits are unlikely to simply go away because interveners will likely step in and defend them. For example, states and local governments have already intervened to defend the Clean Power Plan; Texas AFL-CIO has sought to intervene to defend the FLSA overtime regulations.

Enter Justice Kennedy
Before President Trump was elected all three of the cases described above were likely headed to the Supreme Court. Despite his hostility towards them (and maybe even because of it) these regulation will probably still end up before the Supreme Court.

It is perhaps unfair to speculate how a Supreme Court Justice might look at these regulations (which are all being challenged on different legal grounds) based solely on whether a Justice is a conservative or a liberal. Nevertheless, these labels indicate general legal philosophies and leanings.

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Waters of the United States (WOTUS)

This message was sent to our office on January 18, 2017. The Supreme Court agreed to hear 16 cases on Friday, January 13, 2017. Included within the cases was one related to WOTUS.

Lisa Sorenen, Executive Director of State and Local Legal Center

> The Supreme Court has agreed to decide whether federal courts of appeals versus federal district courts (lower courts) have the authority to rule whether the "waters of the United States" (WOTUS) regulations are lawful.
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> Numerous states and local governments have challenged the WOTUS regulations. In *National Association of Manufacturers v. Department of Defense* the Supreme Court will not rule whether the regulations are lawful. Instead, they will simply decide which court gets to take the first crack at deciding whether they are lawful.
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> The regulations define the term "waters of the United States," as used in the Clean Water Act. The definition of this term determines the scope of federal authority to regulate water and when states, local governments, and others must seek federal permits to develop land because it contains WOTUS. States and local governments object to numerous aspects of the definition as too broad.
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> Most federal legal challenges begin in federal district courts, whose decisions are then reviewed by federal courts of appeals. Per the Clean Water Act a number of decisions by the Environmental Protection Agency Administrator must be heard directly in federal courts of appeals, including agency actions "in issuing or denying any permit."

A definitional regulation like the WOTUS regulation does not involve the issuing or denying of a permit. Nevertheless, the Sixth Circuit Court of Appeals concluded that it has jurisdiction to decide whether the WOTUS regulations are lawful.

Judge McKeague, writing for the court, relied on a 2009 Sixth Circuit decision *National Cotton Council v. EPA* holding that this provision encompasses "not only of actions issuing or denying particular permits, but also of regulations governing the issuance of permits." The definition of WOTUS impacts permitting requirements. A concurring judge stated he believed *National Cotton* was wrongly decided but that the court was bound by it.

The Supreme Court has likely stepped in to resolve this dispute because it is a waste of judicial resources for federal courts of appeals to decide whether WOTUS regulations are lawful if they don't in fact have the jurisdiction to make this determination. Even before deciding whether it had jurisdiction to hear this case the Sixth Circuit issued a nationwide preliminary injunction ruling that the WOTUS regulations are unlawful.

Why does it matter whether federal courts of appeals versus federal district courts have the authority to decide whether the WOTUS regulations are lawful? In its *amicus* brief asking the Court to decide this case Ohio, joined by nearly 30 other states, points out that if these (and other) regulations *must* be reviewed by federal courts of appeals, within 120 days following their enactment and are not, they *cannot* be challenged in a later enforcement proceeding. But whether states and local governments and others object to a regulation will often depend on how it is applied. So potential future litigants may have no reason to challenge a regulation until long after the 120-day window has passed, but will be barred from doing so in the future.

Supreme Court to Decide Lower Court Jurisdiction to Rule on Waters of the United States

The Supreme Court has agreed to decide whether federal courts of appeals versus federal district courts have the authority to rule whether the "waters of the United States" (WOTUS) regulations are lawful in *National Association of Manufacturers v. Department of Defense*. Per the Clean Water Act a number of decisions by the Environmental Protection Agency Administrator must be heard directly in federal courts of appeals, including agency actions "in issuing or denying any permit." A definitional regulation like the WOTUS regulation does not involve the issuing or denying of a permit. Nevertheless, the Sixth Circuit Court of Appeals concluded that it has jurisdiction to decide whether the WOTUS regulations are lawful. Judge McKeague, writing for the court, relied on a 2009 Sixth Circuit decision *National Cotton Council v. EPA* holding that this provision encompasses "not only of actions issuing or denying particular permits, but also of regulations governing the issuance of permits." The definition of WOTUS impacts permitting requirements. A concurring judge stated he believed *National Cotton* was wrongly decided but that the court was bound by it.