

2025 LAW AND POLICY

The MTVLO Regulations: Is the Deep State Winning?

A Policy Note

Following up on recent Supreme Court decisions that relaxed procedural strictures and reined in federal agencies' power to interpret the limits of their own authority, the President, through a series of Executive Orders is trying to reassert control over the administrative agencies. These orders are to be implemented through an enhanced OMB/OIRA review process supported by DOGE teams embedded in the agencies -- a new level of OMB review designed to keep regulations and interpretations consistent with the law and with Administration policy. Earlier notes — *DOGaiE REDUX* and *Back to the Future* [*Back-to-the-Future*](#) — suggested that this approach, supported by effective IT/AI, systems, could finally give the President real control over the agencies in the Executive Branch.

EPA's repeal of the greenhouse gas related Endangerment-finding showed that the system can work. The efficient rulemaking proceeding shifted a primary driving force for EPA actions away from the global issue of climate change and toward concentration on issues that more directly affect the health and safety of Americans.

But a framework that can work is not the same as a framework that will prevail. From the beginning, our central worry has been that this well-conceived initiative, designed at the top executive level, will be unable to overcome inertia and resistance from within the agencies which actually run the regulatory machine. EPA's pending Marine Tank Vessel Loading Operations (MTVLO) rulemaking is the case that brings that worry into focus — and current indications are not encouraging.

What the MTVLO matter shows

Our comments on the MTVLO proposal (Docket EPA-HQ-OAR-2025-0207) documented a rulemaking that, on the merits, should never have survived the new review process. Initially, these regulations were conceived and justified as a step toward control of global greenhouse gas emissions. When the endangerment finding repeal removed that justification, the proposal should have been withdrawn. Instead, EPA recast it as a means of controlling emissions of Hazardous Air Pollutants—a justification which is clearly inadequate to support the additional costs and risks which the regulations would create.

As proposed, the amended MTVLO regulations would for the first time impose a 95% by-weight HAPs reduction mandate on offshore loading terminals beyond U.S. territorial waters. The initial capital costs of this revision would exceed \$100M+ per new terminal and \$250M+ per existing terminals and would add tens of millions in operating costs per year. The resulting dollar cost per ton of HAP reduction would be in the hundreds of thousands. Compliance technology that is being used to claim feasibility of the 95% reduction requirement is not only completely untried, it creates new safety risks and, on balance, is likely to cost more lives than it saves.

Finally, the new requirements rest on an illegal claim of EPA extraterritorial jurisdiction that is not granted by the Deepwater Port Act, the Clean Air Act or any other U.S. law and which international law does not permit. This claim is built largely on informal EPA “guidance” that has never been subjected to public notice and comment. That guidance is contrary to the best reading of the DWPA and the Freedom of the Seas policies of every Administration since 1974.

In other words, this is precisely the kind of action the new system was built to catch: a costly rule, resting on contested jurisdiction, grounded in legacy guidance that conflicts with the best reading of the statute and, most important, *clearly contrary to Administration policy*.

The new E.O. framework should have flagged every one of those features.

It did not. And the reason should concern anyone who shares our optimism about executive-led reform. Our review of the OIRA/EPA pre-notice consultation suggests that **OIRA was misinformed about the rule’s actual impact** — that the impact of the regulations was mischaracterized by regional EPA staff in a way that appears to have steered the proposal away from the “significant impact” review that would have surfaced these problems, and that the serious questions OIRA did pose were met with short-shrift, non-answers.

That is the “deep-state” problem in its essence. The new system depends entirely on accurate information getting to the OIRA reviewers. When embedded staffs control the inputs — the cost estimates, the feasibility analysis, the threshold determinations that decide whether a rule even gets meaningful OIRA scrutiny — they can route a defective rule around the checks designed to stop it. The oversight architecture can be sound and still be defeated, not by open defiance, but by management of the information on which it runs.

Why this is the case

It is worth being precise about why the MTVLO proposal is more troubling than an ordinary disagreement over a rule.

The endangerment finding repeal worked because the system was allowed to operate on accurate premises. MTVLO suggests what happens when it is not. The failure here is not that OIRA reviewed the rule and reached the wrong conclusion. It is that the structure of the review — its triggers, its thresholds, its reliance on agency-supplied analysis — appear to have been navigated so that genuine review never fully engaged. A control system that can be steered around by those it is meant to control is only as strong as its weakest input.

This is the gap our earlier optimism may have underweighted. *Back to the Future* placed great hope in AI-assisted oversight and legislative-history analysis as tools that would let the Executive and the courts recover what Congress and the Constitution actually authorized — and we continue to believe that is the correct long-term answer. But legislative-history analysis only answers the question “what did Congress authorize?” OIRA review should be able to address

additional questions — “consistency with Administration policy, did the agency tell OIRA the truth about what this rule costs, what it will achieve, what law justifies it, and whether the technology to meet it exists?” The MTVLO record suggests that these latter questions may determine whether law and executive policy prevail — or whether the administrative state continues to operate at its own pace and direction.

Is the deep state winning?

On the present record, in this matter, the honest answer is: it may be.

The case for the new enhanced OIRA review structure is still strong. The constitutional logic is sound, the legal foundation after *Loper Bright* and related cases is stronger than it has been in forty years, and the endangerment finding repeal proves the system can deliver. But the MTVLO proposal is a warning that a sound design is not a self-executing one. The administrative state is strong, deeply experienced, and — as the OIRA consultation record suggests — capable of subverting oversight from inside the process rather than confronting it head-on. If a rule this vulnerable on cost, feasibility, jurisdiction and actual impact can be steered past the new review system, then OMB and the White House may be unable to exert the control the executive orders were designed to achieve — not because the design is wrong, but because the people who run the machinery have not yet been made to operate it honestly.

What it would take to win

As put in our MTVLO comments, the E.O. program needs teeth. Specifically:

- **OIRA review cannot depend on agency-supplied threshold determinations alone.** When a rule reaches the scale and contestability of MTVLO, the decision whether it gets “significant impact” review should not rest on numbers the proposing agency controls and can downplay. There should be IT and AI systems in place to assure that the high policy level knows what is happening at the execution level. The policy level needs to know this in time to take appropriate corrective action.
 - **The DOGE teams have to audit inputs, not just outputs.** Their value is precisely in catching the misinformed cost estimate and the buried feasibility gap before the rule moves at its earliest stages— checking the agency’s representations against reality, not merely reviewing the rule as presented. Again IT/AI driven systems can raise the red flags.
 - **Legacy guidance has to be affirmatively determined case-by case, not passively inherited.** The Deepwater Port history clearly illustrates how informal, never-vetted staff positions become de facto law and then become the foundation for binding rules, inconsistent with the underlying statutes. The guidance-review mandate in the E.O.s only works if it actually runs.
- 3
- **Consequences must attach to subverting the process.** A review system that can be routed around at no cost is an invitation to route around it. The endangerment finding

shows what the system does when it engages. The MTVLO proposed rule shows what happens when it is prevented from engaging. The difference has to matter.

The Administration's initiative is serious and it can be effective. But the MTVLO proposal is a real test, and so far it is one in which the administrative state appears to be passing and the reformers appear to be failing. Whether that result stands — whether OMB and the White House can in fact assert the control the Constitution contemplates and the Executive Orders intend — is, on the evidence of this rulemaking, still very much an open question.

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