



Round-up of Clean Air Developments from 2017

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2017 was an unusual year for environmental regulation, particularly under the Clean Air Act. A new President and new EPA Administrator have brought about significant changes to the environmental policies of their predecessors. Here are some of the most important developments that occurred:

Carbon Regulation

When the Obama Administration left office in January 2017, the Clean Power Plan (CPP) had been issued as a final rule and petitions for appeal by a host of industry groups had been filed in the United States Court of Appeals for the D.C. Circuit. Oral argument on the appeal was held in September 2016 before all judges, except recused judges. This is rare. Shortly after he took office, President Trump signed an Executive Order in March 2017 directing EPA to review the CPP. In early April, EPA announced that it was reviewing the CPP and, if appropriate, would issue a proposed rule suspending, revising or rescinding it. At the same time, EPA proposed a rule withdrawing the proposed CPP federal implementation plan, proposed model trading rules, and proposed amendments to the CPP framework regulations, all of which were still under review by the Office of Management and Budget. In light of EPA's actions, the D.C. Circuit Court stayed the pending litigation on November 9 for 60 days, which extended through the end of 2017. EPA released an Advanced Notice of Proposed Rulemaking on December 18 seeking public input on a proposal to replace the CPP. At the close of 2017, the Trump Administration's efforts to slow down, repeal and replace the CPP have been successful. We expect EPA to issue a proposed CPP replacement rule that is narrow and that gives substantial flexibility to the states in setting standards of performance. As the rulemaking process moves forward, it is unclear whether the D.C. Circuit Court will continue to delay issuing an opinion on the legality of the 2015 CPP. Most affected power producers are suspending their plans to comply with the CPP due to the uncertainty associated with the litigation and new rulemaking. Instead, the industry focus is on providing input to EPA with the goal of a fair and effective rule that is consistent with Clean Air Act section 111(d).

Clean Air Act Enforcement

EPA finalized twelve settlements of Clean Air Act civil enforcement cases during 2017, all of which presumably were filed or otherwise initiated under the Obama Administration. Companies subject to

these consent decrees included those in the glass, oil and gas, carbon black, and chemical industry sectors. Three mobile source consent decrees were finalized, continuing the trend of enforcement on emissions from engines. Notably, consent decrees were not finalized in the cement, electric utility, and acid gas industry sectors, which have been high on the enforcement initiative list in recent years. The Trump EPA has specifically noted its intent to continue the initiative to cut hazardous air pollutants from leaking equipment and poorly operated flares in chemical plants and petroleum refineries. In fact, EPA expanded the initiative to include large product storage tanks and hazardous waste generator and treatment, storage and disposal facilities.

EPA Political Appointees

The Trump Administration has been slow to fill vacancies at EPA. EPA Administrator Scott Pruitt tapped William L. Wehrum as Assistant Administrator for the Office of Air and Radiation. Wehrum previously worked at EPA as a political appointee in the George W. Bush Administration and as an attorney representing industry interests. He was narrowly approved as Assistant Administrator by the Senate in November. Wehrum is working alongside newly-approved appointees Susan Bodine, Assistant Administrator for Enforcement and Compliance Assurance, and Andrew Wheeler, Deputy Administrator. Bodine previously served in the George W. Bush Administration, and Wheeler was Chief Counsel to Republican Senator Inhofe. All of these appointments are widely considered to be pro-industry.

New Source Review (?NSR?) Rollbacks

NSR regulations are under review by the Trump Administration, and EPA has formed a task force to overhaul them, according to several sources. Significantly, EPA has already chipped away at the longstanding application of NSR regulations by issuing a guidance memorandum. The guidance resets EPA's policy by stating that EPA will no longer second-guess industry actual-to-projected-actual emissions in the absence of "clear error." Rather, EPA's enforcement focus will be on the actual emissions during the five or ten-year recordkeeping or reporting period after the project is completed. This policy is a major shift from EPA's positions in past enforcement cases.

Other Actions

A few other notable actions include attainment and unclassifiable designations for the 2015 Ozone National Ambient Air Quality Standards. In December, EPA determined that most areas of the country met the 2015 standards and therefore designated them as either in attainment or unclassifiable. No non-attainment designations were released in 2017. The Cross-State Air Pollution Rule (?CSAPR?) Update finalized by the Obama Administration in 2016 took effect in May 2017. The CSAPR Update reduced archived NOx seasonal allowances and moved allowance true-up deadlines.

Overall, industry was a big winner in 2017, particularly utilities that saved costs by delaying preparation for compliance with the CPP. Industry costs may pick up in 2018 when EPA's efforts to formulate a CPP repeal and replacement rule accelerate. Industry-friendly EPA political appointees are expected to give industry more input into rulemaking processes. Clean Air Act enforcement cases have remained consistent among a number of key industries.

82 Fed. Reg. 48035 (Oct. 16, 2017) (Proposed rule repealing CPP).

82 Fed. Reg. 61507 (Dec. 28, 2017) (Advanced Notice of Proposed Rulemaking; Comments are due February 28, 2018).

National Enforcement Initiative: Cutting Hazardous Air Pollutants

<https://www.epa.gov/enforcement/national-enforcement-initiative-cutting-hazardous-air-pollutants>

New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Test in Determining Major Modification Applicability, (EPA Dec. 7, 2017).

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