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A Year in Review: The EPA and the Trump Administration

**CAROL F. MCCABE
AND CLAUDIA V. COLÓN**

Special to the Legal

President Donald Trump took office last January with a keen focus on minimizing regulatory burdens imposed by the Environmental Protection Agency. In the first months of his presidency, Trump took aim at many Obama-era regulations, issuing a spate of executive orders promoting deregulation, reduced regulatory costs, energy independence, expedited environmental reviews for infrastructure projects and economic growth. Two of these orders specifically called for the review and suspension, revision or rescission of the Clean Power Plan (CPP) greenhouse gas standards for existing power plants and the Waters of the United States (WOTUS) rule defining the jurisdictional reach of the Clean Water Act. Trump criticized these and other rules as symbolic of EPA's overreach of authority, while Trump's critics feared that under his direction, EPA would abdicate its responsibility to protect the environment. Indeed, the Trump administration was poised at its outset to significantly impact federal environmental law and policy, with Administrator Pruitt announcing a "back-to-basics" agenda that would refocus EPA on its intended mission, return power to the states, and create an environment where jobs can grow. Was that agenda realized in 2017, and what will we see from EPA in 2018?

As of the close of 2017, Trump's EPA had put the wheels in motion on the repeal



CAROL F. MCCABE and **CLAUDIA V. COLÓN** are attorneys with the environmental, energy, safety and land use law and litigation firm of Manko, Gold, Katcher & Fox, located just outside of Philadelphia. They can be reached at 484-430-5700 or cmccabe@mankogold.com and ccolon@mankogold.com, respectively.

and replacement of the CPP and WOTUS rules, both of which had already been suspended in response to judicial challenges. In October, EPA published a proposed repeal of the CPP, and in December published an Advance Notice of Proposed Rulemaking soliciting comment on a replacement for the CPP. These actions put forth a more restrictive interpretation of the scope of EPA's authority under Section 111(d) of the Clean Air Act than that advanced by the Obama administration. Likewise, EPA and the Army Corps of Engineers proposed the first step in a two-step repeal and replacement of the WOTUS rule, which would first recodify the jurisdictional definitions under the Clean Water Act that existed before the WOTUS rule was promulgated. Each of these actions are subject to the same notice and comment procedures by which the CPP and WOTUS rules were initially promulgated, and like the rules themselves, have

been controversial. EPA's planned finalization of these rulemaking proposals in 2018 will most certainly lead to judicial challenges by environmental advocacy groups and state attorney generals.

The Trump administration also set out to suspend and revise other high-profile Obama-era rules that were either already effective or slated to take effect in 2017. In doing so, EPA met with immediate challenges to its authority to suspend or delay regulatory requirements. For example, a series of delays of Risk Management Program rule revisions have been challenged by states and environmental and labor groups, and those challenges remain pending before the D.C. Circuit. Likewise, EPA's 90-day stay of methane emission standards for oil and gas operations under the Clean Air Act was immediately challenged by environmental groups. In *Clean Air Council v. Pruitt*, No. 17-1145 (D.C. Cir. July 3, 2017), the D.C. Circuit held that although the Clean Air Act authorizes EPA to issue a temporary stay pending reconsideration of a rule, such a stay is only authorized when the mandatory criteria for reconsideration are met—that it was impracticable for commenters to raise an objection to the rule during the public comment period, and that the objection is of central relevance to the rule. In examining the bases for EPA's reconsideration of the oil and gas rules, the court found that the criteria for mandatory reconsideration were not met, and thus its issuance of the stay was unlawful. Noting that EPA may nonetheless voluntarily reconsider the rule, the court did not reach the question of whether

EPA may stay the rule through notice and comment rulemaking procedures. Indeed, EPA has proposed a longer-term delay of the oil and gas standards pending completion of reconsideration. Once that action is final, likely challenges to the action will explore EPA's authority to suspend otherwise effective regulations after public notice and comment.

EPA has identified other potential regulatory actions that would promote the principles outlined in President Trump's executive orders. In its "Final Report on Review of Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources Under Executive Order 13783" released in October, EPA summarizes the information received in response to its solicitation of public comment on regulatory burdens facing industry. The report outlines EPA's review of potential actions to streamline complex permitting programs, restore EPA's co-regulatory relationship with the states, increase transparency pertaining to the economic impact of agency actions, and enhance EPA's understanding of the entities it regulates. EPA has set out four key initiatives to advance these goals: comprehensive reform of the complex New Source Review permitting program under the Clean Air Act; reform of the National Ambient Air Quality Standards; robust evaluations of the employment effects of EPA's regulations; and a sector-based outreach program called "Smart Sectors." EPA has started to implement certain of these initiatives, and we will likely see more action in these areas in 2018.

From a budget and personnel standpoint, the Trump administration has evidenced its intent to trim EPA's size and scope. President Trump's proposed EPA budget for FY 2018 is \$5.65 billion, \$2.6 billion less than the FY 2017 budget for the Agency, and carries with it steep program cuts and elimination of about 3,200 jobs. While the administration has promoted cooperative federalism between the federal government and states and tribes, these

budget cuts may signify a potential strain on already struggling state environmental programs that have been funded in part by EPA. Nevertheless, EPA's stated enforcement goals for FY 2018-2019 include strengthening collaboration with states, addressing the most serious non-compliance concerns in communities through implementation of EPA's National Enforcement Initiatives, and implementing cleanups through the Superfund program.

EPA indeed focused on the Superfund program in 2017. In May, Administrator Scott Pruitt issued a memorandum directing agency management to prioritize the Superfund program, and created a Superfund Task Force charged with reviewing the status of the program with the goal of expediting cleanups, reinvigorating efforts by potentially responsible parties, encouraging private investment to facilitate cleanup, promoting redevelopment, and engaging with stakeholders. The task force issued a report of its findings in July, which called for the identification of sites to be placed on a high priority list that will be targeted for immediate and intense attention directly from Administrator Pruitt. The list, release in December, includes several sites in the mid-Atlantic region.

On the enforcement front, EPA's national priorities include those set under the Obama administration, such as reducing air pollution from the largest sources, reducing chemical accidents, and keeping industrial pollutants out of our nation's waters. However, EPA has not released a report of its enforcement statistics as it typically does each December, and has been criticized for its lack of effort in enforcement. For example, a New York Times article reports that during the Trump administration's first nine months, EPA initiated 1,000 fewer cases and sought almost \$9 billion less in penalties and injunctive relief than during the same period under the Obama administration. Responding to the Times' critique of current enforcement efforts, EPA states that the Times has distorted the facts, and confirms Administrator

Pruitt's firm commitment to vigorously enforce against polluters. EPA also notes its greater emphasis on promoting compliance and its partnership with states in addressing environmental violations. Consistent with this message, EPA's Draft FY 2018-2022 Strategic Plan released for public comment in October notes that primary enforcement responsibility will typically reside with the states, where those states implement authorized programs.

Looking forward to 2018, we can expect EPA to pursue its proposed repeal of the CPP, its revision of the WOTUS rule and deregulatory actions on a host of other federal environmental rules that have been subject to delay or proposed repeal. The administration's Unified Agenda of Regulatory and Deregulatory Actions signals the administration's continued focus on the reduction of regulatory burdens and costs, setting a "better than 2:1" goal for 2018, with plans to finalize three deregulatory actions for every new regulatory action taken in FY 2018. With the fate of several federal rules still uncertain, environmental groups and states will continue to take an active role in providing feedback to the agency, and in evaluating impacts to delegated and parallel state programs. In the meantime, according to its draft Strategic Plan, EPA will focus on its core mission of protecting air and water, rebalancing the relationship between EPA and the states through cooperative federalism, and refocusing the agency on its statutory obligations under the law.

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