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The EPA's Most Significant Actions Of 2019

By **Carol McCabe and Zachary Koslap** (January 9, 2020, 5:58 PM EST)

Carol McCabe

Zachary Koslap

With 2019 having come to a close, it is evident that the U.S. Environmental Protection Agency has largely continued its deregulatory focus during the third year of the Trump administration, with the repeal and replacement of rulemakings originally undertaken during the Obama administration. The EPA has also reinterpreted certain key policies, and implemented new policies.

In particular, and as discussed more fully in this article, some of the highlights of EPA action during 2019 include the finalization of the Affordable Clean Energy rule, the issuance of new guidance related to New Source Review under the Clean Air Act, and the repeal and proposed replacement of the 2015 Waters of the United States rule. The executive order titled "Reducing Regulation and Controlling Regulatory Costs," which survived judicial challenge at the end of 2019, perhaps best epitomizes the overall trend of the EPA's deregulatory actions.

At the same time, not all programs have been scaled back. Both Congress and the EPA ramped up efforts in 2019 to address the emergence of per- and polyfluoroalkyl substances, or PFAS. The EPA also announced the next 20 chemicals to undergo risk evaluation under the Toxic Substances Control Act, and named two new sites and five proposed sites to the National Priorities List under the Superfund program. Below, we review significant EPA actions of 2019 in more detail.

Affordable Clean Energy Rule

Fulfilling a 2016 campaign promise by then-candidate Donald Trump, on July 8, 2019, the EPA issued the final Affordable Clean Energy, or ACE, rule, which replaces the Clean Power Plan, or CPP, implemented by the Obama administration.

Promulgated under Section 111(d) of the Clean Air Act, the CPP set emissions performance rates that reflected the best system of emissions reduction, or BSER, and required states to submit plans specifically designed to limit CO2 emissions from certain existing fossil fuel-fired power plants based on the emissions set under the CPP. Most critically, the CPP would have not only included measures that could be imposed on individual sources, but also would have allowed states to guide the mix of energy sources across the power grid as part of the BSER.

The scope of the ACE rule is significantly narrower than the CPP. Under the ACE rule, the EPA refocused on individual coal-fired electric utility steam generating units, and determined that heat rate improvement is the BSER for CO2. The ACE rule lists six candidate technologies that states may consider in requiring owners or operators of coal-fired electric generating units to improve the heat rate: neural network/intelligent sootblowers; boiler feed pumps; air heater and duct leakage control; variable frequency drives; blade path upgrade; and economizer redesign or replacement.

The states will establish unit-specific standards of performance that reflect the emission limitation achievable through application of the BSER. In so doing, the states may consider the remaining useful life of the source and other source-specific factors. States' plans are due within three years of the final rule, and the plans may allow sources up to 24 months to comply.

The ACE rule went into effect on Sept. 6, 2019, and was challenged by public health groups, environmental groups and a coalition of 22 states and six municipalities, while certain industry groups and power providers have sought to intervene on EPA's behalf in support of the rule. Whether the ACE rule withstands judicial scrutiny is something to watch for in 2020.

New Source Review

The EPA issued a number of new policies at the end of 2019 that will change or clarify certain aspects of New Source Review, or NSR, permitting under the Clean Air Act. In one action, the EPA took important steps to refocus its interpretation of "adjacency" in the context of NSR.

In a policy memorandum dated Nov. 26, 2019, the EPA explained that "physical proximity" is the determining factor in its adjacency determinations under NSR and Title V source determinations, rather than "functional interrelatedness." When determining whether one or more pollutant-emitting activities should be considered a single source under applicable NSR and Title V source determinations, the EPA and state-permitting authorities assess, in part, whether the location of the emissions sources are on contiguous or adjacent properties.

As explained in the EPA's policy memorandum, with no regulatory definition of "adjacent," permitting authorities have made individual source determinations on a case-by-case basis. In past administrations, the EPA often looked at the functional interrelatedness of emissions sources to determine the adjacency of the sources and whether the sources should collectively be considered a single source.

The EPA's policy memorandum emphasizes the physical proximity of the emissions sources and considers functional relatedness to be "not a relevant consideration" to the inquiry of adjacency. While the agency acknowledged that state, tribal and local authorities with approved permitting programs retain authority to make single-source determinations, going forward, emissions sources that are functionally interrelated but not physically proximate would not be considered single sources under the EPA's new policy.

Additionally, the EPA updated its policy on areas of land excluded from ambient air in connection with the National Ambient Air Quality Standards. In a policy memorandum dated Dec. 2, 2019, the agency further refined its policy of excluding from ambient air land areas where the public was precluded from entry.

Until now, those areas of land owned and controlled by a stationary source had to include "a fence or other physical barrier" in order for EPA to recognize the area as precluding the public from entry, thus

excluding the area of land from ambient air. In the EPA's new policy memorandum, the agency relaxed the physical barrier requirement to now include "measures, which may include physical barriers, that are effective in precluding access to the land by the general public."

The EPA justified the change in policy by noting that over time, courts have upheld specific EPA exclusions of areas from ambient air when those areas may have had signs or security patrols. With constant changes in the way site owners are able to surveil and keep areas secure, the agency believes the change in policy will keep up to date with the new ways owners are able to exclude the general public from land areas. The policy change will allow greater flexibility in ensuring that areas of land may be excluded from evaluations of sources' impacts to ambient air when compared to the National Ambient Air Quality Standards.

Waters of the United States

At the beginning of 2019, the regulated community was still taking its first look at the Trump administration's proposed rulemaking revising the definition of "waters of the United States." The proposed new WOTUS rule scales back the scope of the WOTUS definition enacted in 2015 by the Obama administration.

Among other clarifications, the proposed WOTUS rule would no longer define ephemeral streams as jurisdictional waters, and would narrow the definition of jurisdictional "adjacent wetlands" to those wetlands that have a "direct hydrological surface connection" to traditionally jurisdictional waters. The EPA touted the new WOTUS rule as reining in the Obama administration's application of the "significant nexus" test in former U.S. Supreme Court Justice Anthony Kennedy's concurring opinion in Rapanos v. United States.

The EPA and the U.S. Army are working to review over 600,000 comments received, and to finalize the joint rulemaking revising the definition of WOTUS. Meanwhile, the Trump administration's repeal of the 2015 WOTUS rule took effect on Dec. 23, 2019. Until the new rule becomes final, the EPA and the U.S. Army Corps of Engineers will revert to applying the pre-2015 WOTUS rule in their jurisdictional determinations.

The pre-2015 WOTUS rule was already applicable in the 28 states that sought and received from the courts a preliminary injunction of the enforcement of the 2015 WOTUS rule. The repeal of the 2015 WOTUS rule and reimplementation of the pre-2015 WOTUS rule have already been challenged in U.S. District Courts in New Mexico and South Carolina.

Executive Order "Reducing Regulation and Controlling Costs"

The Trump administration's "2-for-1" executive order survived its latest legal challenge at the end of 2019. The U.S. District Court for the District of Columbia dismissed challenges of Executive Order 13771, "Reducing Regulation and Controlling Costs," holding that the groups challenging the executive order did not have standing.[1]

The executive order requires any executive department or agency to propose at least two regulations for repeal for everyone one regulation it promulgates. The costs of any new regulation must be offset by the costs in the two eliminated regulations.

A legal challenge brought by the states of California, Oregon and Minnesota to Executive Order 13771 is

still ongoing. In the meantime, EPA has maintained a webpage dedicated to its deregulatory actions, and as of the end of 2019 claims approximately fifty completed deregulatory actions with about the same number of other deregulatory actions currently under development.

PFAS

The end of 2019 saw both Congress and the EPA ramp up efforts to address PFAS. The House Energy and Commerce Committee advanced legislation that packaged 11 bills mandating stronger regulation of PFAS. The wide-ranging legislation calls for PFAS to be regulated as a hazardous substance under CERCLA, directs the EPA to test the health impacts of PFAS and requires the EPA to promulgate drinking water standards for PFAS.

Independent from the proposed legislation, the EPA took further action in 2019 on addressing PFAS use and contamination. The EPA released draft interim guidance on April 25, 2019, which provided interim recommendations for screening levels and preliminary remediation goals to inform final cleanup levels for perfluorooctanoic acid and perfluorooctane sulfonate in groundwater. The agency finalized the interim guidance on Dec. 20, 2019. The guidance recommends setting PFAS screening levels at 40 parts per trillion, and expects responsible parties to address levels of PFAS above 70 parts per trillion in drinking water.

The EPA also issued an advance notice of proposed rulemaking seeking public comment on adding PFAS to the Toxic Release Inventory under the Emergency Planning and Community Right-to-Know Act. However, the National Defense Authorization Act passed by Congress in late December goes many steps further than the EPA's proposed rulemaking, and adds certain PFAS to the Toxic Release Inventory at a reporting threshold of 100 pounds.

Given the pace and number of new legislative and regulatory actions at the federal and state levels, PFAS are likely to be the subject of continued focus in 2020.

Toxic Substances Control Act

At the end of 2019, as part of the EPA's ongoing efforts to implement the Frank R. Lautenberg Chemical Safety for the 21st Century Act (which amended the Toxic Substances Control Act on June 22, 2016), the agency announced the next 20 chemicals to undergo risk evaluation. These include seven chlorinated solvents, six phthalates, four flame retardants, formaldehyde, a fragrance additive and a polymer precursor.

After the EPA takes public comment on scoping documents for the twenty chemicals, the agency plans to finalize by June 2020 the scoping documents which will include the hazards, exposures, conditions of use and potentially exposed or susceptible subpopulations the EPA expects to consider during each chemical's risk evaluation. The agency will then take public comment on the draft risk evaluations for these chemicals. Finalization of the high priority chemicals list for risk evaluation is the final step in the prioritization process under TSCA.

National Priorities List

The EPA added two new sites to the National Priorities List on Nov. 8, 2019. The Schroud property site in Chicago, and the arsenic mine site in Kent, New York, are the latest sites added to the NPL.

The EPA additionally proposed five new sites to the NPL on Nov. 8, 2019. The proposed sites are located in Delaware, Kansas, Minnesota, Oklahoma and South Carolina. The list of NPL sites totals 1,335, and the list of proposed sites to the NPL now stands at 51.

Carol F. McCabe is a managing partner and Zachary J. Koslap is an associate at Manko Gold Katcher & Fox LLP.

[1] Public Citizen v. Trump, D.D.C., No. 1:17-cv-00253, (Dec. 20, 2019).