Legislative, Regulatory and Judicial Challenges to the 2015 Ozone National Ambient Air Quality Standards

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President Donald Trump has expressed a strong opposition to many federal environmental regulatory programs and the work of the Environmental Protection Agency (EPA) during Barack Obama's presidency. His nominee for EPA administrator — Oklahoma Attorney General Scott Pruitt, an ardent critic of EPA and one of several state attorneys general who has made a practice of filing lawsuits challenging its regulations — leaves no doubt that there will be an effort under the Trump administration to scale back EPA's approach to environmental regulation.

Similarly, Republican party control of both the Senate and House provides an opportunity to pass legislation limiting the nature and reach of federal environmental law, although the ability to pass such legislation is likely to depend on whether Republican senators are willing to dispense with the filibuster on legislation. So far, a number of senators, including Senate Majority Leader Mitch McConnell, R-Ky., have expressed reservations about taking such a step. If the filibuster survives, it is likely that we will not see substantial amendments to existing federal environmental statutes such as the Clean Air Act. In that scenario, the decade-long battle over environmental regulations, with industry on one side and the environmental community on the other, and with EPA favoring one side or the other depending on which party holds office, will continue to play itself out during the new administration.

One prominent example of an important, hotly contested regulation that is likely to be hashed out by the courts is EPA's 2015 revision of the National Ambient Air Quality Standards (NAAQS) for ozone. There is speculation that the Trump administration may attempt to pull back from the defense of the rule or scale back the standards. Even if EPA decides it no longer wants to defend the standards, it is not clear that such a tactic would be effective because briefing has already been completed and there are other parties in the consolidated litigation besides EPA arguing that the standards should be no less stringent than those set forth by EPA. If the standards are upheld by the courts or if the courts agree with environmental petitioners that the standards should be more stringent, EPA may find it difficult, in the absence of new legislation, to develop a factual record to support less stringent standards.

Ozone Standards

EPA published its revised NAAQS for ozone on October 26, 2015. The revision lowers both the primary and secondary ozone air quality standards from 75 parts per billion (ppb) to 70 ppb. As invariably happens, the revised standards were challenged, on the one hand, by industry and certain state petitioners arguing that the standards should not have been reduced, and by environmental groups on the other arguing that EPA should have lowered the standards further. A number of states also are participating as *amici curiae* in support of EPA. The challenges were consolidated under *Murray Energy Corp. v. United States Environmental Protection Agency*. Briefing occurred in 2016, and the U.S. Court of Appeals for the District of Columbia Circuit has scheduled oral argument for April 19, 2017.

The establishment of NAAQS and implementation of policies to achieve compliance with such standards is one of the central programs of the federal Clean Air Act. EPA identifies pollutants subject to NAAQS and establishes ambient air quality standards for such pollutants pursuant to Sections 108(a) and 109 of the act. EPA is required to review the standards every five years and revise them if necessary to protect the public health and welfare. States are subsequently required to develop plans to achieve and maintain compliance with the revised standards.

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As EPA lowers the standard for a pollutant such as ozone, more areas will be out of compliance with the standards, prompting more stringent regulation of stationary and mobile sources. More stringent ambient air quality standards impose additional obstacles to the construction of new or modification of existing major emitting sources, in both attainment and nonattainment areas. In attainment areas, new or modified major sources have to demonstrate that the emissions from their projects will not cause or contribute to a violation of the standards. In nonattainment areas, new or modified major sources of oxides of nitrogen or volatile organic compounds (the precursor chemicals to the formation of ozone in the atmosphere) have to offset their emissions at a more than 1:1 ratio, with the ratio increasing the more severe the level of nonattainment.

Potential Impact of the 2015 Ozone Standards

EPA estimated that based on 2012-14 air quality data, approximately 241 counties in 31 states would be in nonattainment at 70 ppb; areas in the Southwest and the industrial Midwest would be most negatively impacted. Industry petitioners have cited studies arguing that the number of affected counties will be much higher. EPA is expected to issue initial attainment/nonattainment designations under the new standards in 2017.

Similarly, there is a wide discrepancy in the estimated costs of complying with the new standards. EPA estimated that the annual cost to comply with the rule by 2025 (excluding California, which has a longer deadline to come into attainment due to more severe ozone issues) would be $1.4 billion per year, while the National Association of Manufacturers produced an estimate in 2015, based on the assumption that EPA would revise the NAAQS to 65 ppb, that the cost, "as measured in reduced Gross Domestic Product, would be up to $140 billion annually from 2017-2040." Much of this discrepancy is due to the methodologies, assumptions and baselines used by the respective analysts. If the environmental petitioners prevail, EPA has estimated that the annual compliance costs would be 10 times its original estimate if the standard is set at 65 ppb rather than at 70 ppb.

Potential Implications of the Legal Arguments

The potential implications of the NAAQS litigation are significant, despite the fact that the judgment of the D.C. Circuit is directly applicable only to EPA's implementation of Section 109 of the Clean Air Act. Arguments being made in this case echo those that have been presented in other recent litigation and, depending on how the courts rule, could shed light on the future direction of EPA's administration of environmental laws.

Considering Costs

One argument concerns whether EPA can or is required to consider costs in its rulemaking. In its 2001 decision *Whitman v. American Trucking Associations*, the U.S. Supreme Court held, in connection with a challenge to EPA's 1997 ozone NAAQS rule, that EPA was not permitted to consider cost in the development of ambient air quality standards. Nonetheless, the industry petitioners, taking their cue from Justice Stephen Breyer's concurrence in *Whitman*, argued that because Clean Air Act Section 109(d) requires EPA to review and revise the standards "as may be appropriate," EPA was required to consider the adverse socioeconomic and energy impacts of the standards as part of an assessment of the public's tolerance for the health risks being addressed by the standards. In support of this argument, the industry petitioners cited the Supreme Court's 2015 decision in *Michigan v. EPA*. In that case, the Court held that EPA's requirement to regulate hazardous air pollutants emitted by electric steam-generating units if "appropriate and necessary" meant that EPA had to consider all relevant factors, including the cost of such regulation, before deciding to regulate this particular category of emission sources.

EPA's response is that consideration of "socioeconomic and energy impacts" is simply "costs" by another name, and *Whitman* precludes it from considering costs when establishing national ambient air quality standards. Given that *Whitman* spoke to this very issue, one would think that EPA would prevail on this point; however, *Whitman* was decided 16 years ago, and it will be interesting to see if federal courts today are more receptive to an argument that EPA must consider regulatory impacts more broadly, as the Supreme Court was in *Michigan* (albeit interpreting a different section of the Clean Air Act). To give another recent example, in October 2016, a federal district court in West Virginia ruled in a different litigation filed by Murray Energy Corp. that EPA has an obligation to evaluate the potential loss of or shift in employment resulting from its administration and enforcement of the Clean Air Act. EPA has filed an appeal of this ruling, although the agency reportedly has not decided whether to pursue the appeal.

Challenging Scientific Judgments

A second argument concerns EPA's scientific and technical judgments in establishing the standards at 70 ppb. The industry and state petitioners assert that the evidence does not support a standard as low as 70 ppb and that EPA does not satisfactorily explain why it lowered the standard from 75 ppb to 70 ppb. According to the industry petitioners, the evidence is, for practical purposes,

no different than it was in 2008. The environmental petitioners, on the other hand, argue that EPA's Clean Air Scientific Advisory Committee provided scientific advice that sensitive populations almost certainly experience adverse health impacts at concentrations below 70 ppb and that EPA's refusal to lower the standards below 70 ppb was not consistent with the statutory "requisite to protect the public health with an adequate margin of safety" standard. When an agency such as EPA interprets scientific evidence within its area of expertise, courts show considerable deference to the agency's judgment. That said, such deference is a presumption, and EPA still must demonstrate that its evaluation of evidence is rational in light of the statutory provisions being implemented. Historically, environmental petitioners have been more successful than industry in challenging EPA regulations on the ground that EPA's rules did not adequately protect health or the environment. This is in large measure because the federal environmental laws were drafted with environmental protection as a paramount objective. Nonetheless, in recent years, industry and states have been more successful in challenging EPA regulations. The litigation challenging the 2015 ozone NAAQS is likely to present another important data point about the level of deference that EPA will get from the courts with respect to scientific issues.

Conclusion

Even if the Trump administration is unable to alter the course of the current litigation over the 2015 ozone NAAQS, the new administration could countermand proposed regulations that have not yet become final and, to the extent that it is able to develop a sufficient factual record, amend existing regulations that it finds objectionable. The administration also has considerable discretion in setting both its regulatory and enforcement priorities. Finally, the judicial appointments of the Trump administration also will have an impact on the interpretation and implementation of U.S. environmental laws and regulations. Nonetheless, much of what will happen with U.S. environmental law in the short and long term depends on what happens in Congress. If the administration and the Republican Congress are unable to amend environmental statutes such as the Clean Air Act or otherwise effect changes in the law that impact the implementation of such statutes, environmental groups and others that are intent on preserving an expansive federal environmental regulatory presence still have tools at their disposal. Such tools include the ability to challenge EPA regulations they believe are not sufficiently protective of the environment or that weaken existing regulations and the ability to challenge the failure of EPA to issue regulations that such groups believe are required by environmental laws.