



The View from D.C.

The Status of EPA's Deregulatory Agenda

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Great Ambition, Largely Untested

- EPA has proposed or is considering proposing to roll back or revise more than 60 federal environmental rules.
- Few have been finalized, and it is not clear how those will fare in court.
- 2018 is a critical year for finalizing major rulemakings if the Administration intends to defend them in court.
- EPA's efforts to stay effectiveness of Obama-era rules without additional notice-and-comment rulemaking has largely been stymied by the courts.
- EPA and the White House have issued a number of guidance documents, which may be nearly as effective as rulemakings in adjusting federal environmental policy.

Administrator Pruitt seeks to roll back dozens of rules, streamline permitting and other reviews, and devolve authority to the States. But much is still just proposed.

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What's Been Done?

Final Rules and Guidance Issued by EPA

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A Handful of Significant Final Rules

- **Financial Responsibility Requirements Under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry**

Section 108(b) of CERCLA establishes certain authorities concerning financial responsibility requirements. EPA proposed requirements for the hardrock mining industry on January 11, 2017. By court order, it was required to issue a final decision by December 1, 2017. In its final decision, EPA determined no federal financial assurance requirements for the industry were necessary. 83 Fed. Reg. 7556 (Feb. 21, 2018).

- **Renewable Fuel Standards for 2018**

EPA is required to set volumetric standards for renewable fuels used in transportation fuel for each calendar year. 82 Fed. Reg. 58486 (Dec. 12, 2017).

- **New Source Performance Standards for Methane Emissions from Oil & Gas Facilities**

On March 12, 2018, EPA published a final rule removing from the fugitive emission requirements of the NSPS the requirement for completion of delayed repair during unscheduled or emergency vent blowdowns.

- **Framework Rules for Revised Toxic Substances Control Act**

EPA has issued three rules to implement the revised Act: the Prioritization Process Rule; the Risk Evaluation Process Rule; and the Inventory Rule. It has also proposed a Fees Rule.

- **NO_x NAAQS Retained**

On April 6, 2018, EPA issued a final rule retaining the current (2010) 1-hour standard of 100 ppb and an annual standard of 53 ppb.

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Delays of Effective Dates of Final Rules

- **Waters of the United States (WOTUS) Rule Applicability Date Delay**

On January 31, 2018, EPA and the Army Corps of Engineers finalized a rule postponing applicability of the WOTUS Rule for two years, until February 6, 2020, to allow the Agencies time to reconsider the WOTUS Rule.

- **Steam EGU Effluent Limitations Guideline Compliance Date Postponement**

On September 13, 2017, EPA finalized a rule postponing for two years certain compliance dates for the effluent limitations guidelines and standards for steam electric power plants, to allow EPA time to conduct a rulemaking to potentially revise certain best available technology economically achievable (“BAT”) limitations and pretreatment standards.

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Guidance, Memoranda, and Other Actions

- **Guidance Memo Deferring to Owner/Operator’s Emissions Calculations for New Source Review**

On December 7, 2017, EPA issued guidance that informs the regulated community that EPA will not second guess a source owner or operator’s “projected actual emissions” calculations for determining whether a modification will result in a significant increase in emissions under NSR.

- **Guidance Memo on Netting of Emissions Increases and Decreases Under NSR**

On March 13, 2018, EPA issued guidance that informs the regulated community that both emissions increases *and* decreases from a proposed project at an existing major stationary source may be taken into account under Step 1 of the major modification applicability process under NSR.

- **Guidance Memo Withdrawing “Once-in, Always-in” Policy Under Section 112**

On January 25, 2018, EPA issued guidance withdrawing a 1995 memorandum opining that once a source was determined to be a major source of hazardous air pollutant emissions, it would always be treated as such. Under the new guidance, a source that takes an enforceable limit on its potential to emit below the major source thresholds may be regulated as an “area source.”

- **Cancellation of Information Collection Request Regarding Methane Emissions from Oil and Gas Sources**

ICR issued on November 10, 2016. Withdrawn on April 2, 2017, at request of 11 states, as unduly burdensome.

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- **Memorandum on Common Control**

April 30, 2018 letter to Pennsylvania DEP regarding when emissions from separate facilities should be considered to be under common control for purposes of new source review. New [memorandum](#) focuses on the authority of one entity to dictate decisions of the other entity (and therefore considered part of a single source).

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What's Been Stopped? Judicial Review of EPA's Actions

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Courts Are Insisting on Full Rulemaking

Executive's attempts to stay Obama-era rules through administrative "short cuts" blocked

- **Administrative Procedure Act Section 705**

APA Section 705 provides that, "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." The Bureau of Land Management ("BLM") invoked Section 705 to delay already-effective Obama-era regulations pending reconsideration by the Agency. On October 4, 2017, a federal district court in California invalidated BLM's administrative stay of the rule, holding that an agency cannot postpone the effectiveness of a rule that is already effective. *California v. U.S. Bureau of Land Management*, No. 3:17-cv-03804-EDL (N.D. CA).

- **Clean Air Act Section 307(d)(7)(B)**

CAA Section 307(d)(7)(B) authorizes EPA to stay a rule's effectiveness for up to 90 days when a person demonstrates to EPA that an objection to that rule could not have been raised within the public comment period or arose after the period for public comment, thus requiring reconsideration of the rule. EPA invoked section 307(d)(7)(B) to stay portions of the NSPS for fugitive emissions of methane and other pollutants by the natural gas industry while EPA reconsidered the NSPS. On July 3, 2017, a divided panel of the D.C. Circuit held that EPA lacked authority to invoke this provision where the grounds for objection were not new and could have been raised during the comment period. The court noted that EPA could seek to postpone the rule's compliance requirements through notice-and-comment rulemaking. *Clean Air Council v. Pruitt*, No. 17-1145 (D.C. Cir.).

- **Notice-and-Comment Delays Not Necessarily in the Clear**

In three recent cases, courts have questioned whether agencies can delay rules simply for the sake of reconsideration, even after notice and comment. *California v. U.S. Bureau of Land Management*, No. 3:17-cv-07187-WHO (N.D. CA) (Feb. 22, 2018) (order granting preliminary injunction); *Pinosos Y Campesinos Unidos Del Noroeste v. Pruitt*, No. 4:17-cv-03434-JSW (N.D. CA) (March 21, 2018) (four days' notice not enough to comport with APA before delaying effective date of Pesticide Rule); *Air Alliance Houston v. EPA*, No. 17-1755 (D.C. Cir.) (March 23, 2018) (ordering EPA to produce comprehensive list of notice-and-comment rules delaying effective date of a rule due solely to reconsideration).

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What's Coming? Rulemakings in the Pipeline

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Anticipated Clean Air Act Rulemakings

- **Clean Power Plan (CPP) Repeal/Replacement**

The CPP, a signature rulemaking of Obama's EPA, has been stayed since February 2016. EPA has proposed to repeal the CPP on grounds it exceeds EPA's authority. Separately, EPA has sought comment through an Advance Notice of Proposed Rulemaking on a far narrower replacement rule. EPA is expected to propose a replacement rule in mid-2018 and finalize both rulemakings early 2019.

- **Mercury and Air Toxics Standards (MATS)**

MATS has been in place since 2012 and has largely been implemented, yet the battles continue. EPA Air Chief Bill Wehrum has stated publicly that he believes the underlying finding that it is "appropriate and necessary" to regulate power plant mercury emissions is wrong, and he promises to revisit it, likely this summer. It is not clear what effect that could have on MATS itself.

- **2015 Ozone NAAQS**

In 2015, EPA established a new ozone NAAQS of 70 ppb. Litigation over that NAAQS has been stayed while EPA considers whether that level is too low, particularly given that it may be at or below background levels in some areas of the country. Recent indications are that EPA may not reconsider, but will reevaluate the NAAQS as part of its periodic, 2020 NAAQS review.

- **2022-2025 Light-Duty Vehicle Greenhouse Gas and Fuel Economy Standards**

EPA is currently reassessing Model Year 2022-2025 light duty vehicle standards, promulgated in 2012. The National Highway Traffic Safety Administration is also in the process of setting CAFE (mpg) standards for the same model years. California's CAA authority to receive a waiver for its own state standards could be affected or reevaluated.

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Anticipated Clean Water Act Rulemakings

- **Waters of the United States Rule**

EPA and the Corps of Engineers promulgated a broad rule in 2015 asserting federal jurisdiction over permitting in wide array of waters that have a "significant nexus" to waters of the United States. In March 2017, the Agencies notified the public of their intent to rescind that rule. No final rule has been signed.

- **Effluent Limitations Guidelines for Steam EGUs**

EPA expects to conduct a rulemaking to potentially revise certain best available technology economically achievable ("BAT") effluent limitations and pretreatment standards for existing sources ("PSES") for the steam electric power generating point source category. No proposal has been published.

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Anticipated Resource Conservation & Recovery Act Rulemaking

- **Coal Combustion Residuals (CCR) Rule**

EPA is reconsidering certain provisions of the Obama-era CCR Rule. A proposed rule (the first of two anticipated) signed on March 1, 2018, would allow alternative performance standards for coal ash disposal units with operating permits issued under an approved state or federal coal ash permit program. EPA plans to propose additional revisions to the CCR Rule later in 2018.

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Regulatory Process/Transparency

- **Strengthening Transparency in Regulatory Science**

EPA has proposed rule to require that regulatory decisions (defined as “significant regulatory actions” subject to review by the Office of Management and Budget) identify underlying “dose response data” and “pivotal regulatory science.” The proposed rule would additionally require description and explanations of the assumptions used in studies and models as well as explicit consideration of “high quality studies.” Independent peer review would be required of all pivotal regulatory science used in regulatory decisions. [83 Fed. Reg. 18768 \(Apr. 30, 2018\)](#)

- **Update to NEPA Regulations**

Prerule regulatory package currently pending at OMB; likely will be advanced notice of proposed rulemaking. Administration previously advocated “One Agency, One Decision” environmental permitting review, including a two year deadline on issuing Findings of No Significant Impact or Records of Decision. [Legislative Outline for Rebuilding Infrastructure in America.](#)

- **Increasing Consistency, Reliability, and Transparency in the Rulemaking Process**

Initiative is at prerule stage. According to EPA regulatory agenda the goal is to increase consistency across EPA divisions and offices regarding the consideration of costs in rulemaking.

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Final Thoughts

- **Undoing Existing Rules is No Easier Than Promulgating New Ones**
 - Courts seem to be requiring full process, no shortcuts
 - To survive judicial review, deregulatory actions must be well-reasoned, supported by record
 - Rulemaking defense takes as much time as rulemaking. Rules not finalized by the end of 2018 may not be through the courts before the next presidential election
- **Guidance and Interpretive Rules Are Proving Effective Gap Fillers**
 - No notice-and-comment rulemaking required
 - But cannot be binding on agency or on public
 - Courts are likely to strike down guidance that veers into legislative rulemaking
- **Enforcement Discretion**
 - EPA may choose to prosecute fewer violations, or defer to states, but citizen suit provisions make this protection somewhat illusory.

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Questions?



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