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2018 Environmental and Energy Law Forecast

FEDERAL FORECAST

The Trump Administration and EPA

Carol F. McCabe, Esq. and Claudia V. Colón, Esq.

When President Trump took office last January, he announced aggressive goals affecting federal environmental law and policy, including deregulation, energy independence, economic growth and streamlined permitting. How did the administration fare in 2017, and what can we expect for 2018? While the administration highlights its deregulatory successes, many aspects of its environmental agenda have drawn strong opposition from environmental advocacy groups and certain states. The administration has taken steps toward significant rollbacks, including the proposed repeal of the Obama administration's Clean Power Plan, and the proposed revision of the "Waters of the United States" ("WOTUS") rule. In inviting public comment on these and other regulatory actions, EPA has made its legal and policy case. For example, the administration estimates that repeal of the Clean Power Plan is consistent with EPA's legal authority under the Clean Air Act, and will eliminate up to $33 billion in compliance costs as of 2030. In reviewing and revising the WOTUS Rule, EPA seeks to minimize regulatory uncertainty while providing due deference to the states' role in carrying out the goals of the Clean Water Act.

The current administration's push to roll back environmental regulations has not been entirely smooth. For example, back in July, the Clean Air Council successfully challenged Administrator Pruitt's attempt to temporarily suspend oil and gas methane emission standards promulgated in 2016, which include methane leak detection and repair requirements, pending reconsideration of the rule. The U.S. Court of Appeals for the D.C. Circuit in *Clean Air Council, et al. v. Scott Pruitt*, No. 17-1145 (D.C. Cir. July 3, 2017), found that Pruitt lacked authority to stay the rules in the absence of a required (rather than discretionary) reconsideration under the Clean Air Act. EPA has proposed a longer-term delay of the standards pending completion of its reconsideration process. The proposed delay has been subject to public notice and comment and is being watched very closely by industry and environmental groups alike.

EPA faces significant budget and personnel reductions, in furtherance of the administration's goal of defining the appropriate federal role of environmental protection while supporting the agency's focus on core statutory work. 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 job eliminations. While the administration has promoted cooperative federalism between the federal government and states and tribes, these budget cuts signify a potential strain on state environmental programs that have been funded at least in part by EPA. On the enforcement front, however, EPA has pledged to work closely with states to promote compliance and to address environmental violations, with delegated states taking the enforcement lead in most cases.

At the beginning of his tenure, Administrator Pruitt signaled his interest in efficient site cleanups, and EPA indeed focused a fair amount of attention on the Superfund program in 2017. In May, Administrator 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 recently released list includes sites in the mid-Atlantic region, such as the American Cyanamid Co. Site in Bound Brook, NJ; the Diamond Alkali Site in Newark, NJ; and the Ventron/Velsicol Site in Wood Ridge, NJ.

In terms of new EPA personnel, only the Regional Administrator position for EPA Region 9 remains open. The rest of the positions have been filled, including Alexandra Dapolito Dunn appointed as Region 1 Administrator, Peter Lopez as Region 2 Administrator, Cosmo Servidio as Region 3 Administrator, Trey Glenn in Region 4, Cathy Stepp named for Region 5, Anne Idsal for Region 6, Jim Gulliford in Region 7, Doug Benevento in Region 8, and Chris Hadlick in Region 10. Important posts have been filled at headquarters, including Bill Wehrum as the Assistant Administrator for the Office of Air and Radiation, Susan Bodine as Assistant Administrator for the Office of Enforcement and Compliance Assurance, David Ross as Assistant Administrator for the Office of Water, and Matt Leopold as EPA General Counsel.

Looking forward to 2018, we can expect EPA to pursue its proposed repeal of the Clean Power Plan, its revision of the WOTUS, and deregulatory actions on a host of other federal environmental rules that have been subject to delay or proposed repeal. EPA appears to be moving forward with considering a replacement to the Clean Power Plan, with the release on December 18 of an Advance Notice of Proposed Rulemaking requesting public input on a potential replacement rule. The administration's Unified Agenda of Regulatory and Deregulatory Actions signals the administration's continued focus on the reduction of regulatory burdens and costs and sets a "better than 2:1" goal for 2018, with plans to finalize three deregulatory actions for every new one 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. Of particular note for manufacturing facilities, EPA has recently announced its intention to evaluate reforms to the Clean Air Act New Source Review pre-construction permitting program. We can also expect EPA's focus on the Superfund program to continue with Administrator Pruitt's direct participation and oversight of priority sites.

A detailed analysis of The Trump Administration and EPA by McCabe and Colón originally appeared in *The Legal Intelligencer* article on January 11, 2018.

The Superfund Task Force Recommendations

John F. Gullace, Esq. and Kathleen B. Campbell, Esq.

Rarely do large bureaucracies move quickly, but EPA Administrator Pruitt's efforts to reshape the federal Superfund program have moved at an unusually brisk pace by any standards. On May 9, 2017, Administrator Pruitt issued a memorandum that gave him and his designee sole authority to select Superfund remedies that are likely to exceed $50 million. Later that month, on May 22, Administrator Pruitt issued another Memorandum, this one titled: "Prioritizing the Superfund Program," in which he formed a Superfund Task Force to "provide recommendations on an expedited timeframe on how the agency can

restructure the cleanup process, realign incentives of all involved parties to promote expeditious remediation, reduce the burden on cooperating parties, incentivize parties to remediate sites, encourage private investment in cleanups and sites, and promote the revitalization of properties across the country."

The Superfund Task Force, which was comprised of EPA personnel from across the country, completed its work on June 21, 2017, and its recommendations were made public on July 25, 2017. The Superfund Task Force developed 42 recommendations, none of which require legislation. The themes we gleaned from the recommendations are that EPA wants to show quick progress at high-profile sites and generally speed up the Superfund process; EPA intends to reduce the number of Superfund sites on the National Priorities List (NPL) by completing cleanups and being more selective about the sites added to the NPL; and EPA will focus on ways to bring contaminated sites back into productive use. We can expect EPA to use both the carrot and the stick in pursuit of these goals in 2018.

One specific recommendation was that the Administrator become directly involved in ten high priority sites, a so-called Top 10 List. On December 8, 2017, EPA announced that the Top 10 List had been created – and initially consists of 21 sites that will receive Administrator Pruitt's direct attention. The Administration has staked much of its environmental agenda on its ability to make the Superfund program more efficient, so we expect the Administration to continue its drive to accelerate the cleanup of high profile Superfund sites, such as those on the Top 21 List. Responsible parties at these sites, and other sites, should expect to see the Superfund process move more quickly than historically has been the norm. Equally, responsible parties may encounter an EPA that is more flexible when it comes to remedies, employing strategies such as adaptive management, but also perhaps quicker to issue orders where progress does not meet EPA's expectations.

On January 17, 2018, EPA released a "Superfund Redevelopment Focus List" identifying 30 Superfund Sites "with the greatest expected redevelopment and commercial potential." EPA developed the list in response to the Superfund Task Force Recommendations and is seeking to accelerate the productive reuse of these sites. According to EPA, it "will focus redevelopment training, tools and resources towards the sites on this list." The list of 30 focus sites includes three in Pennsylvania and one in New Jersey: the BoRit Asbestos site in Ambler, PA; the Crater Resources site in Upper Merion Township, PA; the Metal Bank site in Philadelphia, PA; and the Roebling Steel Co. site in Florence, NJ. EPA Administrator Pruitt was quoted in EPA's announcement as saying: "EPA is more than a collaborative partner to remediate the nation's most contaminated sites, we're also working to successfully integrate Superfund sites back into communities across the country, … Today's redevelopment list incorporates Superfund sites ready to become catalysts for economic growth and revitalization."

The pace at which Pruitt's EPA continues to address the Task Force recommendations is obviously unknown at this point, but as of now all signs point to speed. We expect Superfund to remain an EPA priority in 2018 and will watch with interest to see what specific new tools might be employed by EPA to begin returning contaminated sites to productive use.

EPA Begins Repeal and Replacement of Clean Water Rule in Effort to Limit Federal Wetland Permitting Jurisdiction

James M. McClammer, Esq.

The Clean Water Rule, as it is known, was promulgated in 2015 to redefine "waters of the United States," a term used to prescribe the limits of federal wetlands permitting jurisdiction on private property by the U.S. Corps of Engineers pursuant to the Clean Water Act (CWA). The controversial rule is the response of the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to several U.S. Supreme Court decisions that questioned the Corps' expansive view of its permitting jurisdiction pursuant to Section 404 of the CWA.

Once promulgated, the Clean Water Rule was challenged by a number of states, private parties, and environmental organizations in various federal courts, alleging, in part, that the rule exceeded the authority of the CWA. The Sixth Circuit stayed the Clean Water Rule nationwide, and the U.S. Supreme Court heard argument this past October on whether the jurisdiction over challenges to the rule should sit with the federal appellate or district courts. At this time, because of the Sixth Circuit's stay, the pre-2015 rule defining "waters of the United States" remains in effect.

The stay of the 2015 Clean Water Rule has allowed the Trump administration to focus on repealing the rule and replacing it with one that would curb the Corps' jurisdiction over waterbodies such as wetlands. This past July, EPA and the Corps initiated a two-step rulemaking process to (1) reinstitute the prior-2015 rule which is currently in place due to the Sixth Circuit's stay of the Clean Water Rule; and (2) propose a new definition of "waters of the United States" consistent with the principles of limited jurisdiction outlined by the late Justice Scalia in *Rapanos v. United States*, one of the U.S. Supreme Court cases leading to the promulgation of the 2015 Clean Water Rule. While the agencies work on replacing the Clean Water Rule, they also published a proposed rulemaking to extend the applicability date for the 2015 Clean Water Rule until two years from the date on which that rulemaking becomes final.

Thus, the legal challenges to the Clean Water Rule currently working their way through the court system may prove moot if the Trump administration succeeds in entirely replacing the Clean Water Rule, thereby limiting the Corp's Section 404 permitting authority pursuant to the CWA.

Application of New TSCA Rules Will Continue to Evolve in 2018

Todd D. Kantorczyk, Esq.

In the waning days of the Obama Administration, the United States Environmental Protection Agency (EPA) published three draft Toxic Substances Control Act (TSCA) rules that were required by the Frank R. Lautenberg Chemical Safety for the 21st Century Act (the "Act") to be finalized by June 22, 2017. EPA did, in fact, publish final versions of these three rules—the Risk Evaluation Rule, the Prioritization Rule, and the Inventory Reset Rule—in late July and early August of 2017, but the final versions differed in certain key respects from the draft rules. In general, the final versions of the Risk Evaluation Rule and the Prioritization Rule gave EPA additional flexibility regarding the "conditions of use" that EPA must consider in determining whether a new or existing chemical poses an unreasonable risk to human health or the environment. With respect to the Inventory Reset Rule, the final rule modified how companies can assert that the identity of a chemical qualifies as confidential business information.

Environmental groups that had previously lauded the draft rules now asserted that the final rules failed to satisfy the requirements of the Act and ultimately filed seven challenges to the final rules in three different federal circuits (D.C., 4th and 9th). Those appeals are still in the briefing stage, and at the end of November 2017, the Ninth Circuit denied EPA's motion to move the challenge pending before that court to the Fourth Circuit.

The courts hearing the foregoing challenges have not stayed any of the new rules, however, and EPA has continued to move forward with plans to implement them. For example, EPA continues to expect that manufacturers and importers of chemical substances will identify by February 7, 2018, whether substances listed on the current TSCA Inventory are active in U.S. commerce, with processors required to supplement that list by October 5, 2018. And at the end of 2017, EPA released two documents and held two public meetings concerning the Agency's future approaches towards the review of new chemicals and the identification of existing chemicals for priority risk reviews. EPA is taking public comment on the new chemicals framework document and the prioritization document until January 20 and January 25, 2018, respectively. It is also working on a TSCA mercury reporting rule which is addressed here. In short, 2018 promises to be another significant year with respect to implementation of the fundamental amendments to the TSCA regulatory framework as required by the sweeping reforms contained in the Act.

TSCA Mercury Reporting Final Rule Expected by Summer 2018

Zachary J. Koslap, Esq. and Michael C. Nines, P.E., LEED AP

As part of EPA's continuing efforts to implement the Frank R. Lautenberg Chemical Safety for the 21st Century Act, which amended the Toxic Substance Control Act (TSCA) enacted on June 22, 2016, the EPA has issued a proposed mercury reporting rule to implement TSCA section 8(b)(10)(D). The TSCA Amendments require EPA to issue a final mercury reporting rule no later than two years after the enactment of the TSCA amendments (by June 22, 2018) to establish reporting deadline(s) and information requirements for the purpose of assisting EPA's statutorily-mandated periodic update and publication of the inventory of mercury supply, use, and trade in the United States. As required under TSCA, the reporting requirements would apply to any person who manufactures mercury or mercury-added products or otherwise intentionally uses mercury in a manufacturing process.

EPA published the proposed rule on October 26, 2017 requiring those who manufacture, import, or otherwise distribute in commerce mercury or mercury-added products to report to EPA both quantitative and qualitative data related to those activities. The proposed rule has no reporting threshold, and as such, anyone conducting the regulated activity with any amount of mercury falls within the framework of the proposed rule. Persons engaging in certain activities with mercury will be required to provide the information necessary for the inventory.

Generally, the proposed rule applies to those who manufacture, store, import, export, sell, or otherwise distribute in commerce mercury and mercury-added products. Those engaged in the above-mentioned activities must report on quantities of mercury used in industrial processes, whether that mercury was manufactured, imported, exported, or distributed. Some reduced burden for reporting is envisioned in the proposed rule for manufacturers or importers already subject to reporting programs such as TSCA's Chemical Data Reporting (CDR) Rule. For example, those who manufacture (including import) or otherwise engage in the regulated activities with mercury at levels greater than or equal to 2,500-pounds for elemental mercury and 25,000-pounds for mercury compounds in a specific reporting period; the

country of origin or destination, the North American Industrial Classification System (NAICS) codes for mercury distributed in commerce, and amount of mercury stored must be included in reports. The proposed rule establishes a reporting deadline of July 1, 2019, coinciding with the Toxic Release Inventory (TRI) program deadline, and every three years thereafter. As it stands, the proposed rule would require reporting data of the proceeding calendar year only (i.e., 2018).

The proposed rule exempts certain activities from the rule's reporting obligations. Persons "engaged in the generation, handling, or management of mercury-containing waste" are not required to report to the mercury inventory. The notice specifically calls out hazardous waste treatment facilities that convert recovered mercury from mercury-containing waste to mercury sulfide for export as exempt from reporting to the proposed rule. At the same time, the exemption does not apply to persons who distill and recover elemental mercury for its eventual sale.

EPA estimates that approximately 750 entities will be impacted by the reporting requirements.

Hazardous Waste E-Manifest System to Go Live in 2018

Rodd W. Bender, Esq. and Michael C. Nines, P.E., LEED AP

Several years in the making, the U.S. Environmental Protection Agency (EPA) electronic hazardous waste manifest (e-Manifest) system is scheduled to launch on June 30, 2018. This modernized system will facilitate electronic submission of hazardous waste manifests through a uniform national program covering all federal and state wastes requiring manifests. Once implemented, the system should reduce costs and effort required to prepare and handle paper manifests by hazardous waste generators, transporters, and treatment, storage, and disposal (TSD) facilities; produce more accurate and timely waste shipment information; allow for quicker notification of manifest discrepancies; and establish a single on-line repository of manifest data for EPA, states, regulated entities, and the public. EPA estimates that three to five million paper manifests are produced annually.

Roll-out of the system will culminate a decade-long process that accelerated in 2012 with enactment of the Hazardous Waste Electronic Manifest Establishment Act (e-Manifest Act) authorizing EPA to work with industry and states to implement a national electronic manifest system. EPA published a final rule in 2014 that, among other things, recognizes e-Manifests as the legal equivalents of paper manifests, allows electronic signatures, and authorizes transporters and TSD facilities to accept e-Manifests in lieu of paper forms. Use of e-Manifests will be optional (other than for receiving facilities) but strongly encouraged by EPA.

The e-Manifest Act also authorized EPA to collect reasonable user fees to develop and maintain the system. On January 3, 2018, EPA published a final rule establishing the user fee methodology. The fees are intended to cover costs to develop, operate, maintain, and upgrade a national e-Manifest system, provide public access to the data, and collect and process data from any paper manifests submitted after the e-Manifest system begins to operate. A copy of the user fee final rule can be found here. Anticipated fees will primarily be the responsibility of receiving facilities and are tentatively set to range between $4 and $20 per manifest submittal. EPA will have the authority to seek sanctions for non-payment of user fees. The final rule also addresses some non-fee issues, including for example establishing a process for correcting erroneous data and restricting public access to certain manifest data for chemical security purposes.

EPA has been conducting outreach on the e-Manifest system through a website, webinars, stakeholder meetings, and other methods. The agency has also been helping states prepare for launch, including aligning state manifest practices with the new system, adopting the federal rules, and engaging regulated entities. In the coming months hazardous waste generators, transporters, and TSD facilities should look for more information and training opportunities from EPA and state agencies to be prepared when e-Manifests go live this summer.

Trump Administration Expected to Propose Revisions to Wildlife Regulations

Michael Dillon, Esq.

In 2018, the Trump Administration is expected to publish proposed amendments to regulations administered by the United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). The Executive Branch's Fall 2017 Regulatory Plan previews possible changes to the Endangered Species Act (ESA) and the Migratory Bird Treaty Act (MBTA). The statutes and their regulations bestow protections on threatened and endangered species and certain migratory birds. Such protections often include prohibitions on or modifications to development projects that might harm one or more listed species.

On the topic of possible deregulatory actions under the ESA, the Fall 2017 Regulatory Plan states that FWS and NMFS will publish rule revisions that will be aimed at improving "how the ESA is administered and [reducing] unneeded burdens." The agencies will also look for "opportunities to create efficiencies and streamline the consultation process and the listing and delisting process." Similarly, the Regulatory Plan states that FWS will aim to become "more efficient and timely" in administering the MBTA. To that effect, FWS will consider making regulatory changes to the MBTA rules that will "reduce the burden on industry." FWS is also contemplating other regulatory changes that will "allow applicants to proceed more quickly through the bald and golden eagle permit process."

Although little detail has emerged about the potential rule revisions, the forthcoming proposals likely will reflect the Trump Administration's "fundamental shift" towards regulatory policy, as reflected in the Regulatory Plan. The Administration states that executive actions should be informed by the idea that "excessive and unnecessary federal regulations limit . . . innovation and entrepreneurship," and that limited government intervention is preferable. Furthermore, the 2018 regulatory agenda set forth in the plan is intended to "send a clear message that the public can invest and plan for the future without the looming threat of burdensome and unnecessary new regulations." Considering these policy statements, it seems likely that the amendments to the wildlife rules will be a boon for industry and development.

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