MANKO | GOLD | KATCHER | FOX LLP

AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

2019 Environmental and Energy Law Forecast

FEDERAL FORECAST

The Trump Administration and EPA in 2019

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

During his first year in office, President Trump signed executive orders declaring his intent to dismantle environmental rules, with the goal of easing regulatory burdens on industry, boosting economic growth, and gaining energy independence. As we predicted in our Forecast for 2018, EPA took several significant actions in furtherance of these goals last year, including, for example: formally proposing a new rule to replace the Obama-era Clean Power Plan; announcing revisions to several regulations in line with the Administration's support for reviving the coal industry (e.g. relaxing New Source Performance Standards (NSPS) rules for coal plants and requirements for coal ash disposal); and, proposing a new rule limiting the scope and application of the "Waters of the United States" (WOTUS) rule. This year, we can expect EPA's regulatory rollbacks to continue, but not without fervent challenges from environmental advocacy groups and heavy oversight from the newly-Democrat House of Representatives. Below are some significant Clean Air Act, Clean Water Act, Budgetary, Enforcement and Personnel issues that EPA will be facing this year. Superfund, hazardous waste, New Source Review, Renewable Fuel Standards and Endangered Species Act developments are addressed by separate articles in the MGKF 2019 Environmental and Energy Law Forecast.

Clean Air Act

In the summer of 2018, EPA issued its long-anticipated proposal to replace the Clean Power Plan, named the Affordable Clean Energy (ACE) rule. The proposed ACE rule is based on several key differences from its predecessor; most importantly, the rule defines the "best system of emissions reduction" for greenhouse gas emissions from existing power plants as on-site, heat-rate efficiency improvements. The ACE rule contains a list of candidate technologies that states would consider in establishing standards of performance for existing plants. The proposed ACE rule also contains provisions that would allow for a new preliminary applicability test for determining whether a physical or operational change made to a power plant may be a "major modification" triggering New Source Review; and new implementing regulations for emissions guidelines under Clean Air Act section 111(d). The proposed rule is thus markedly different from the Clean Power Plan, including with respect to its quantification of the costs and benefits of the rule. EPA estimates that replacing the Clean Power Plan with the ACE rule could result in $3.4 billion in net benefits, including $400 million annually.

While EPA estimates that the proposed ACE rule would reduce CO_2 emissions in 2025 by between 13 and 30 million short tons, the Trump administration has downplayed the threat of climate change. Indeed, the President expressed his disagreement with the conclusions of the National Climate Assessment report findings released in November of 2018, which warned that the U.S. could face hundreds of billions of

dollars in the coming decades from climate impacts. While EPA plans to finalize the ACE rule this spring, the Agency has received extensive public comment on the proposal, including by states and environmental groups that will likely challenge the rule.

In late 2018, EPA issued a proposed rule that would ease the NSPS for greenhouse gas emissions from new, modified, and reconstructed coal-fired power plants by undoing its prior determination that carbon capture and storage (CCS) constitutes the "best system of emission reduction" for new plants. Instead, due to the high cost and limited geographic availability of CCS, EPA proposed that CO_2 limits for new sources should be based on the most efficient demonstrated steam cycle in combination with the best operating practices.

Another EPA proposal issued in December of 2018 would revise the cost-benefit analysis justifying the mercury restrictions in the Obama-era Mercury and Air Toxics Standards (MATS) rule, finding that the costs to industry of complying with the rule (estimated at $7.4 million to $9.6 million annually) heavily outweighed the quantifiable benefits of the rule (estimated at $4 million to $6 million annually). Notably, EPA's revised cost-benefit analysis excluded consideration of co-benefits of the rule associated with reduction of pollutants other than mercury, such as particulate matter. Representatives of the utility sector, however, have asked for the rule to be left as is, since some coal plants have already spent billions in compliance costs.

Earlier in 2018, EPA also issued the first of a planned two-part final rule intended to provide more flexibility to states and regulated facilities in the management of coal ash. In 2015 when the coal ash rule was finalized, multiple lawsuits were filed by both industry and environmentalists. Last August, shortly after EPA issued its proposed rule, the U.S. Court of Appeals for the D.C. Circuit sided with environmental groups by rejecting industry claims that the rule went too far and finding that the Obama-era rules did not go far enough, concluding that the rule did not require sufficient protections for unlined and partially-lined pits, and that some storage facilities had been improperly exempted. While it remains to be seen whether the D.C. Circuit's ruling will undermine the Agency's new proposal, environmental groups promptly challenged the new rules in the D.C. Circuit.

Clean Water Act

EPA plans to finalize a new rule that would clarify the scope of federal jurisdiction over waters of the United States, in accordance with President Trump's 2017 executive order entitled, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." In December of 2018, EPA and the Department of Army issued a proposed rule to revise the WOTUS definition, which would outline six clear categories of waters that would be considered "waters of the United States," as follows: (1) traditional navigable waters (such as large rivers, lakes, tidal waters and the territorial seas); (2) tributaries that flow to traditional navigable waters and are permanent or intermittent, but not ephemeral water features that flow only in direct response to snow or rain events; (3) jurisdictional ditches, including those that are traditional navigable waters, such as the Erie canal, or otherwise satisfy the conditions of the tributary definition and were either constructed in a tributary or were built in an adjacent wetlands; (4) certain lakes and ponds, including those that are traditional navigable waters, such as the Great Salt Lake or Lake Champlain, and those that contribute perennial or intermittent flow to a traditional navigable water, or are flooded by a "water of the United States" in a typical year, such as oxbow lakes; (5) impoundments of "waters of the United States;" and, (6) adjacent wetlands, including those that physically touch other jurisdictional waters, those with a surface water connection that results from inundation from a "water of the United States," or perennial or intermittent flow between the wetland and a "water of United States."

The WOTUS rule would exclude from the definition of "water of the United States," ephemeral features that contain water only during or in response to rainfall, groundwater, ditches that do not meet the criteria necessary to be considered jurisdictional, prior converted cropland used in support of agricultural purposes, certain stormwater control features contracted in upland areas, certain wastewater recycling structures constructed in upland areas, and certain wastewater treatment systems. All in all, the agencies were seeking to offer clarity with the new rule, which they hope to achieve by removing the case-by-case reliance on Justice Kennedy's "significant nexus" test and providing clear-cut definitions of which waters are and are not covered. While the comment period for the rule will remain open for 60 days after publication, the rule has already been met with strong reactions and will likely garner significant comment from states, environmental groups, agricultural interests, and the industrial and development sectors.

Budget

As to EPA's budget, although the Trump Administration announced steep budget cuts for the Agency last year, those cuts have not been implemented. There have been some funding cuts, however, as the Office of Management and Budget shows spending by the EPA at $8.725 billion in 2016; $8.165 billion in 2017; and an estimated $7.916 billion in 2018. EPA's FY 2019 budget of $6.146 billion represents a further reduction from the previous year, while intended to ensure that the Agency will deliver on its goals of providing Americans with clean air, land, and water; ensuring chemical safety; promoting cooperative federalism; and administering the law in order to refocus the Agency on its statutory obligations as intended by Congress.

Enforcement

Although EPA's FY 2018 enforcement results have not yet been published, some independent analysts have concluded EPA reduced its efforts in 2018. For example, the Environmental Data and Governance Initiative, an advocacy group formed by university researchers, has concluded that EPA's enforcement activity steeply declined between 2017 and 2018, with 54 settled criminal cases in 2018, as compared to 87 in 2017, 81 in 2016, and more than 100 in every year between 2010 and 2015. On the civil enforcement front, the group also noted declines in the use of enforcement tools such as administrative penalty orders, administrative compliance orders, consent decrees, and Superfund administrative orders for cost recovery.

Personnel

Last July former Administrator Scott Pruitt resigned over a slew of spending and ethics scandals, and was replaced by Andrew Wheeler, a former coal industry lobbyist, as Acting Administrator. President Trump officially nominated Wheeler for the full-time post on January 9, pending confirmation from the Senate. In addition to the rulemaking activities discussed above, Wheeler continues former Administrator Pruitt's emphasis on addressing Superfund cleanups. Indeed, on November 20, 2018, EPA released a third revision to the Administrator's Emphasis List of Superfund Sites Targeted for Immediate, Intense Action. Administrator Wheeler has also announced that he intends to continue Pruitt's plan to pursue the controversial "science transparency" rule, which would require EPA to use peer-reviewed and reproducible scientific data and information where available, and ensure the regulatory science underlying its actions is publicly available. The Agency is now reviewing the almost 600,000 comments received on the proposed rule.

Conclusion

Finally, in the midst of EPA's regulatory rollback and other activities that will surely face scrutiny from states and environmental advocacy groups as we saw in 2018, we can also expect increased oversight from the

Democrat majority in the House of Representatives in 2019. Party leaders in the House have identified climate change as a top priority for their terms, which may result in more aggressive oversight over any changes to rules affecting greenhouse gas emissions. Indeed, House Speaker Nancy Pelosi has revived the Select Committee on Energy Independence and Global Warming, which was eliminated in 2010 after Republicans took over the House. Representative Frank Pallone, D-NJ, will lead the House Energy and Commerce Committee, which could play a central role in scrutinizing the Trump administration's regulatory rollbacks.

Superfund Task Force Update

John F. Gullace, Esq.

2018 saw many changes at EPA, including the departures of EPA Administrator Pruitt and his chief lieutenant responsible for Superfund reform and the Superfund Task Force, Albert "Kell" Kelly. Nonetheless, the Superfund Task Force continued its work under the leadership of Deputy Assistant Administrator Steven Cook. After a series of EPA sponsored "listening sessions" in 2017 and 2018, on July 23, 2018, EPA issued the "2018 Update" to the Superfund Task Force Recommendations, approximately one year after the initial publication of the Task Force Recommendations.

Since his appointment, Deputy Assistant Administrator Cook has been meeting with stakeholders around the country to discuss the Superfund Task Force Recommendations, solicit input and plan next steps. At one of these meetings, Cook indicated that the Task Force would be wrapping up its work this summer as EPA turns its focus to implementation of the Task Force Recommendations. Acting Administrator Wheeler's forward to the 2018 Update to the Superfund Task Force Recommendations notes that "a key responsibility of [EPA] is cleaning up and revitalizing contaminated land and returning it to use so that communities can utilize and enjoy it. . . . The recommendations in the Superfund Task Force Report address barriers that delay cleanup and redevelopment of contaminated sites."

In 2019, EPA will continue to focus attention on the Superfund process and we can expect EPA to use the Superfund Task Force Recommendations as a blueprint for expediting cleanups and to encourage redevelopment of formerly contaminated sites.

NSR Reform Update

Michael Dillon, Esq.

2018 saw EPA take a series of actions meant to clarify, revise, and streamline the New Source Review (NSR) program, continuing the Agency's momentum from the previous year. NSR is a permitting program under the Clean Air Act that imposes preconstruction requirements on certain major sources of air pollutants. As part of the Trump Administration's regulatory reform agenda, EPA's Regulatory Review Task Force pointed to NSR as a program that too often imposes significant costs and regulatory uncertainty for subject facilities and identified seven program areas ripe for reform.

In March 2018, EPA issued a guidance memo entitled, "Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program," setting forth the Agency's interpretation of the way emissions changes from a project should be accounted when determining if NSR applies. The March 2018 memo provides that emissions decreases, as well as increases, should be considered when determining if a project would be subject to NSR, clarifying an issue that has been approached inconsistently in the past.

Then in November 2018, EPA took a final action to restore a 2009 EPA action that described the principles of project aggregation that EPA would apply when determining if a source had unreasonably segregated a single project into multiple projects for purposes of avoiding NSR. The November 2018 final action completes the Agency's formal reconsideration of the 2009 action and reaffirms EPA's interpretation that only "substantially related" changes should be considered a single "project." Although EPA has styled both the 2009 and 2018 actions as "final," EPA has not proposed to revise the definition of "project" in the NSR regulations.

In addition to the above-mentioned NSR reform actions, EPA opened 2018 by issuing a January guidance memo withdrawing a 1995 memo known as "once in always in." While not directly related to NSR, the January memo is consistent with the goals of the Regulatory Review Task Force in that it is meant to provide flexibility to sources subject to Section 112 of the Clean Air Act by allowing former major sources of hazardous air pollutants to avoid major source requirements when they reduce their emissions below statutory thresholds, a practice prohibited by the 1995 memo.

As of the time of this writing, congressional efforts to amend the NSR program have proved futile, and EPA has not proposed to revise its NSR rules to incorporate its recent policy pronouncements. Therefore, while the regulated community may look favorably upon EPA's commitment to NSR reform, sources should be mindful that EPA's actions to date are only guidance that may be abandoned by a future administration. Likewise, state permitting authorities, which are tasked with reviewing and acting upon permit applications under the NSR program, do not have any obligation to adhere to the NSR guidance memos, or the memo reversing EPA's longstanding "once in always in" policy. Accordingly, source owners and operators need to evaluate carefully whether a proposed project would be feasible even if a state permitting agency declines to review the project through the lens of the recent reform memoranda. Moving forward, it is reasonable to expect EPA to take additional NSR reform actions, as the Agency has yet to address most of the items identified by the Regulatory Review Task Force. But given the lack of statutory and regulatory changes to date, the lasting impact of these NSR reforms remains to be seen

Federal Circuit Courts to Address Climate Change Claims in 2019

Kathleen B. Campbell, Esq. and Garrett D. Trego, Esq.

2018 saw an increase in high-profile lawsuits alleging climate change-related claims against both private industry accused of creating products that aggravate the trend and governments accused of doing too little to address the issue. Federal appellate courts are likely to provide meaningful rulings on both types of cases in 2019.

In the first category, suits against private industry, state and local governments generally alleged state common law claims – public nuisance, trespass, unjust enrichment, etc. – against energy companies, seeking damages related to the current or future impact of climate change on the governments' infrastructure. In total, since 2017, eight municipalities in California and state and local governments in Colorado, Washington, New York, Rhode Island, and Maryland filed such suits.

Federal district courts in New York and California granted defendants' motions to dismiss in two such cases in 2018. The governmental plaintiffs appealed the decisions to federal circuit courts, where arguments will be heard in 2019. In *City of New York v. BP P.L.C.*, No. 18-2188, the Second Circuit will consider the City's arguments that it is entitled to pursue public nuisance and trespass claims against private energy

companies that the City alleges contributed to global warming and forced the City to construct infrastructure improvements to combat the negative effects. The district court dismissed the City's claims, holding that the federal common law and the Clean Air Act displace the City's climate change-related state common law claims and that the climate change-related claims uniquely impact global, foreign policy and separation of powers issues that counsel against a federal district court's intervention. *City of New York v. BP P.L.C.*, 325 F.Supp.3d 466 (S.D.N.Y. 2018). The Second Circuit is likely to consider similar defenses on appeal.

In the Ninth Circuit, a number of municipalities continue to fight energy company defendants over whether the municipalities' climate change-related claims belong in state or federal court. In early 2018, two Northern District of California judges issued conflicting rulings granting and denying, respectively, municipalities' motions to remand their climate change-related state common law claims back to state courts. *Compare California v. BP P.L.C.*, No. C 17-06011, C 17-06012, 2018 WL 1064293 (N.D. Cal. 2018) (denying motions to remand); *County of San Mateo v. Chevron Corp.*, 294 F.Supp.3d 934 (N.D. Cal. 2018) (granting motions to remand). In both cases, federal jurisdiction hinged largely on whether the federal common law applied. In *California*, Judge William Alsup held that "Plaintiffs' nuisance claims—which address the national and international geophysical phenomenon of global warming—are necessarily governed by federal common law." 2018 WL 1064293, at *2.

In contrast to both *California* and the S.D.N.Y.'s decision in *City of New York*, Judge Vince Chhabria held in *County of San Mateo* that federal common law *did not displace* the municipalities' state common law claims because, as the U.S. Supreme Court held in *American Electric Power, Inc. v. Connecticut*, the federal common law was itself displaced by the Clean Air Act in federal climate change-related claims. 294 F.Supp. 3d at 937 (citing 564 U.S. 410 (2011)). Through the appeal of the consolidated *County of San Mateo* cases, the Ninth Circuit will soon weigh in on whether the eight California municipalities' state common law claims belong in state or federal court. *County of San Mateo v. Chevron Corp.*, No. 18-15499, 18-15502, 18-15503 (9th Cir.).

In the second category, suits against governments, various environmental groups or groups of young people generally alleged that state or federal governments violated the individual plaintiffs' constitutional rights by failing to adequately address climate change. The leading case is *Juliana v. United States*, No. 15-cv-1517 (D. Or.), in which a group of individual plaintiffs alleged claims against the United States under the Fifth Amendment, the Ninth Amendment, and the public trust doctrine. That case had been scheduled for trial on liability in early 2019, but in late November 2018, federal district Judge Ann Aiken granted on reconsideration the United States' request for certification for interlocutory appeal, after the United States Supreme Court granted the United States' request for stay of proceedings in *In re United States*, 139 S.Ct. 452 (2018). *Juliana v. United States*, No. 15-cv-1517, 2018 WL 6303774 (Nov. 21, 2018). Thus, rather than a trial on the merits at the district court level, the Ninth Circuit will address Judge Aiken's original opinion denying the United States' motion to dismiss in 2016. *See Juliana v. United States*, 217 F.Supp. 3d 1224 (D. Or. 2016) (denying United States' motion to dismiss).

While the flurry of additional climate change-related cases seems likely to continue into 2019, the fate of all these cases may turn in the near term on the rulings issued by the Second and Ninth Circuits in 2019.

The Birds and the Bees - Update on Endangered Species Act Protections

Jonathan E. Rinde, Esq.

The United States Fish and Wildlife Service has proposed a series of three changes to the Endangered Species Act's implementing regulations with the intention of simplifying and clarifying certain procedures under the Act. 83 Fed. Reg. 35174-35201 (July 25, 2018)

One of the changes relates to the procedures for designating critical habitat for threatened and endangered species. The proposal would reinstate the requirement that the Service must first evaluate areas currently occupied by the species before considering whether unoccupied areas are essential to the conservation of the species, and provides a list of conditions where designation of an area for a particular species would not be prudent. The proposal would further remove a provision prohibiting the consideration of economic consequences when designating critical habitat. While the Service states that decisions will continue to be made using biological information, economic concerns could also be raised.

The Service further proposes changes to the way in which a species may be designated as "threatened." The Act defines a threatened species as one that is likely to be in danger of extinction within the "foreseeable future." The Service proposes to interpret the term "foreseeable future" to make it clear that both future threats and the species' responses to those threats must be reasonably determined to be probable. The proposal would also clarify that decisions to delist a species should be made using the same standard for listing species.

Finally, the proposed rule would simplify and clarify the definition of "destruction or adverse modification," which is relevant to Section 7 consultations between federal agencies and the Service. The proposal would remove language the Service considers redundant and confusing and clarify whether and how the Service considers proposed measures to avoid, minimize, or offset adverse effects to listed species or their critical habitat.

In addition to the aforementioned changes, the Service is proposing to rescind its blanket rule under Section 4(d) of the Act which automatically conveys protections for endangered species to threatened species unless otherwise specified. The proposed change would impact only future listings and would not apply to those species already listed as threatened. The Service would develop species-specific conservation rules for each threatened species determined in the future.

Hazardous Waste e-Manifest System Implementation Update

Michael C. Nines, P.E., LEED AP

EPA officially launched its national system for tracking hazardous waste shipments electronically on June 30, 2018. This system, known as "e-Manifest," was anticipated to modernize the cradle-to-grave hazardous waste tracking process while saving time, resources, and costs for industry and states. The e-Manifest system is expected to impact approximately 160,000 entities who generate, transport, and manage hazardous wastes across the nation. Although strongly discouraged, the use of paper manifests is still allowed for generators and transporters of hazardous waste, with the burden for compliance with the e-Manifest system primarily falling onto receiving facilities. By now, all receiving facilities of manifested hazardous wastes must be registered and utilize the e-Manifest system by entering each manifested shipment into the system or mailing a paper version to EPA for manual data entry. As of late 2018, over

one half million manifests were already entered into the e-Manifest system, with many thousands more paper manifests awaiting entry into the e-Manifest system by EPA staff.

The e-Manifest fees are primarily the responsibility of receiving facilities and range between $5 (for electronic submittals) to $15 (for paper manifests mailed). EPA is not charging user fees to generators, transporters, or brokers as user fees will be only assessed to receiving facilities for each manifest submitted. The receiving facilities responsible for payment of e-Manifest fees will receive an electronic copy of their invoice on the first day of the month after manifests were submitted to EPA. Facilities then must pay their invoice in full within the same calendar month it was received.

The roll-out of the e-Manifest system has not come without it's issues, as industry representatives and the regulated community initially struggled with utilization of the system. This has been especially true for receiving facilities, many of whom had not completed the necessary modifications to their software systems to properly integrate with e-Manifest. This has prompted some receiving facilities to simply mail paper manifests to the EPA for manual entry by EPA staff, thus resulting in the larger e-Manifest fees being passed onto their generator customers.

EPA plans to continue its outreach on the e-Manifest system through a website, webinars, stakeholder meetings, and other methods. The agency has also been helping states, including aligning state manifest practices with the new system, adopting the federal rules, and engaging regulated entities.

2018 Supreme Court Cases Suggest Narrow View of Agency Deference Under *Chevron*

Shelby L. Hancock, Esq.

In 2018 the Supreme Court issued multiple opinions that narrow the *Chevron* doctrine of agency deference and suggest the Court could expressly limit the doctrine in future cases. In the 1984 case *Chevron v. Natural Resources Defense Council, Inc.*, the Supreme Court held that courts should defer to a federal agency's reasonable interpretation of an ambiguous statutory provision. 467 U.S. 837, 104 S. Ct. 2778 (1984). That holding is best understood in two parts. First, the court determines whether the statute under which the agency acted is ambiguous. If the text is clear, the court asks only whether the agency complied with the statute and does not defer to the agency. But if the text is open to multiple interpretations, the court moves on to the second step in the analysis and determines whether the agency's interpretation is reasonable. If it is, the court defers to the agency's interpretation, even if it is not the one that the court would have adopted in the first instance.

Many have criticized *Chevron* deference since its inception, including Supreme Court Justices Thomas and Gorsuch, arguing that it places judicial power in the hands of executive agencies. And a week before his retirement, Justice Kennedy suggested in a concurring opinion that the Court revisit the doctrine and clarify its application. Despite that call, the Court did not take a case in 2018 that directly addresses the continued validity of *Chevron*. It did, however, decide five cases under *Chevron* that imply a narrower view of the doctrine. In each case, the Court concentrated on step one of the analysis and concluded that the statutory text was unambiguous. By deciding the cases at step one, the Court never reached the question of agency deference.

Whether the Court will take a more explicit stance on *Chevron* anytime soon remains uncertain. But regardless of whether the Supreme Court accepts a case on the issue, the trend in 2018 demonstrates that the Court is interested in moving away from the broad deference that has characterized the *Chevron* doctrine in the past. And that move suggests that even if *Chevron* remains on the books, federal agencies could face a more probing eye from the judiciary in the future.