

4 Questions Environmental Attorneys Have About The CAA

By **Juan Carlos Rodriguez**

Law360, New York (July 28, 2017, 6:46 PM EDT) -- Implementing the Clean Air Act has always been complicated, but President Donald Trump's stated commitment to backing away from Obama-era priorities has added new uncertainty for groups on all sides, leaving practitioners scratching their heads about greenhouse gases, air quality permits and how far the Trump administration will go.

Here are four questions about the Clean Air Act that lawyers said they'd like to see cleared up.

How Will the Trump Administration Address Greenhouse Gases?

The Trump administration has backed away from a plan to control carbon dioxide emissions from power plants as contemplated by the Clean Power Plan, which was the cornerstone of the Obama administration's climate change strategy.

The U.S. Environmental Protection Agency could still create some kind of CO₂ emissions program, since in 2009 it declared the substance — along with the other greenhouse gases methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride — a threat to public health and welfare.

The question of how the EPA may regulate CO₂ and other greenhouse gases is still very much unknown, however. Tom Lorenzen, a partner at Crowell & Moring LLP, said the EPA could decide to take a very limited regulatory approach and push power plant efficiency standards — or it could argue that it doesn't have the authority to regulate CO₂ at all.

"The question is how far back will EPA withdraw?" Lorenzen said.

Liz Williamson, a partner at Eversheds Sutherland, said a key factor in how the Trump administration addresses greenhouse gas issues is how quickly it can staff important positions at the EPA.

"We currently have career EPA personnel that are in place. Will they really carry out the Trump EPA's agenda, which we believe is to replace the Clean Power Plan with some other way of regulating CO₂ that would be more industry-friendly?" she said. "I think it's essential to have the political appointees in place, otherwise you don't have EPA moving in a common direction."

She said the administration is already up against a tight election deadline. If it wants to draft a new CO₂ rule, for instance, it could be looking at 2019 as the earliest date for a final rule to be promulgated.

Will the Administration Revise the New Source Review Program?

Williamson said another thing attorneys are wondering is if the Trump administration will attempt to reform the EPA's New Source Review program, an air quality permitting program for newly built or modified factories, industrial boilers and power plants.

"I see New Source Review as an area that costs industry a lot of money, whether it's in litigation or attempts to comply with regulations," she said. "There could be more clarity in those regulations, and if the Trump administration focused on that, it could really be a benefit to industry."

In particular, Williamson said, stationary sources like power plants are unclear about which projects require Prevention of Significant Deterioration permits, which the EPA says are required for any major new source or any major source making a major modification in a geographical area that meets the National Ambient Air Quality Standards.

"It would be helpful to have a bright-line hourly emissions test so that there would be a definite cause and effect from a project that's being performed and an emissions increase," she said. "And it would be helpful if EPA provided some kind of guidance with respect to industry projects that are not routine and therefore should require a PSD permit."

Will the EPA Address the Cumulative Impacts of Pollution?

David Baron, managing attorney for Earthjustice's office in Washington, D.C., said one area of concern for his organization is if the Trump administration will address the cumulative effects of air pollutants on public health. He said the focus of the EPA's efforts over the years has been on rules for individual pollutants rather than on how different ones can combine to cause health problems.

"It's been very effective in limiting those pollutants or at least reducing them, but according to many scientists and health experts, we're missing the real-world effect of these pollutants because when we go outside we're not exposed just to ozone, or just to particulates, or just to nitrogen oxides, we're exposed to all of them together. And just as drugs that are only mildly toxic are tolerable taken separately, when you put them together they can be deadly," Baron said.

He said the EPA has enough authority under the Clean Air Act to enable it to address those kinds of synergistic effects.

"For example, there's nothing that says you have to adopt National Ambient Air Quality Standards for only one pollutant at a time. There's nothing that says when you're adopting New Source Performance Standards or emissions standards that you can't look at impact of the pollutants collectively rather than just one at a time," Baron said.

In fact, he said, the government has already used that approach with greenhouse gases in a rule addressing emissions from motor vehicles, in which limits were adopted on a group of greenhouse gases, not just one.

"There are ways to do this," he said. "It's just that the agency has been stuck in this one-pollutant-at-a-time mode that is more familiar to them."

How Will States Revise Their Startup, Shutdown and Malfunction Regulations?

Recently, industrial facilities have had to adjust to court rulings that prohibit states from allowing excess air emissions during periods of startup, shutdown and malfunction. The change came after an environmental group successfully challenged the EPA's approval of some state CAA implementation plans that contained provisions exempting SSM emissions.

Svend Brandt-Erichsen, a partner at Nossaman LLP, said businesses are still waiting to see how that change will play out practically.

"That's an area where, for industrial facilities, there is going to be a lot of interest in how state and regional air agencies actually implement changes to SSM provisions in their air rules," he said. "There's science work that has to be done to make sure the rules have the right content, and there is a rulemaking process that has to occur throughout all the agencies that have these kinds of rules in their regulations."

Brandt-Erichsen said industry players are wondering how regulators will act, since they'll have to consider the fact that emissions equipment is designed to operate within certain parameters, and that different types of pollution control devices perform differently at different times and aren't always going to be able to achieve the same level of efficiency.

"The bottom line is, this is potentially more compliance issues for industrial sources," he said.

--Editing by Mark Lebetkin and Sara Ziegler.

This is the first in a series of seven articles looking at pressing questions experts have about major environmental statutes. Tomorrow, attorneys discuss the Clean Water Act.