

Coronavirus Outbreak Complicates Regulatory Agenda's Final Stretch

One year ago this column provided a scorecard for the Trump administration's regulatory and deregulatory agenda, highlighting initiatives it said it would pursue over the next 12 months. The administration is now racing to the finish line. As the "lookback period" for the Congressional Review Act quickly approaches, and the unprecedented crisis caused by COVID-19 leads to delays in the courts and the regulatory apparatus, environmental practitioners will be following developments closely.

If a Democratic president and Congress are elected in November, the consequences of CRA review could become significant. At the beginning of a new administration, Congress can use the CRA to nullify a final rule that was promulgated toward the end of the previous administration — specifically, within

A new president and Congress can eliminate rules made late in prior term

60 legislative days of congressional adjournment. If a joint resolution of disapproval is enacted and signed by the president, this not only invalidates the rule in question, it also bars the agency from issuing another rule in "substantially the same form" unless authorized by a subsequent law. It also nullifies the regulation retroactively, "as though [it] had never taken effect." President Trump and the 115th Congress, for example, overturned 16 regulations promulgated by the Obama administration after mid-June 2016.

The 2020 cut-off date for the lookback period will depend on how long Congress stays in session this term, but could come as early as late May or June this time around. The disruption caused by the COVID-19 pandemic could lead to fewer session days and an early cutoff date. On the other hand, Senate Majority Leader Mitch McConnell's announcement that the Senate would not leave town until the

Hill passed emergency economic relief signals that additional session days may well be necessary, and could result in the CRA period moving later in the year.

A number of important rules have been proposed but not yet finalized. EPA, for example, has yet to finalize its proposed revisions to effluent limitations guidelines for power plants. EPA has also proposed repealing the long-standing once in, always in Clean Air Act policy for hazardous air pollutants, in which a facility determined to be a major source cannot be re-categorized as a non-major source. Under the Clean Water Act, EPA has recently proposed limiting the scope of state re-

view of major projects under Section 401. And the Council on Environmental Quality recently proposed a rule overhauling its NEPA regulations.

Other proposals awaiting finalization include revisions to methane emissions standards for the oil and gas sector, a proposed lead and copper rule under the Safe Drinking Water Act, and a rollback of EPA's mercury air toxics standard's "appropriate and necessary" finding. EPA also has a long list of statutory deadlines to be achieved during 2020 under the 2016 amendments to the Toxic Substances Control Act. And the agency is required to meet certain deadlines related to polyfluoroalkyl substances established by the defense appropriations legislation enacted late in 2019.

To be sure, not all regulations have been stalled. Notably, EPA and the National Highway Traffic Safety Administration recently succeeded in finalizing their long-awaited revised greenhouse gas and fuel economy standards for light-duty vehicles.

Whether a proposed regulation will be finalized in time to avoid CRA review will depend, in part, on where it is



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in the OMB review process. Pursuant to E.O. 12866, OMB review can take up to 90 days (which can be extended) to allow for adequate interagency consideration. Emergency measures to address the COVID-19 crisis, including federal staff telework and elimination of in-person hearings and meetings, could cause further delays in an already stressed regulatory review process.

Legal challenges to recently issued final rules also face delays. For example, in 2019, EPA rescinded the Obama-era Clean Power Plan and replaced it with the Affordable Clean Energy Rule, narrowly limiting the regulation of carbon emissions from existing power plants. Briefing on this rule is under way in the D.C. Circuit and, under normal circumstances, a hearing might occur before the end of the year.

EPA also withdrew the waiver of preemption allowing California and other states to adopt their own light-duty greenhouse gas emissions standards, and that action is subject to ongoing litigation. Additionally, EPA rescinded the Obama-era Waters of the United States rule, replacing it with the narrower Navigable Waters Protection Rule. Challenges to this rule must be brought in district court, and litigation will soon be proliferating.

As courts struggle with pandemic-related shutdowns and transition to virtual oral arguments, the chances for many of these rule challenges being decided before a new presidential term begins in January 2021 is quickly diminishing.