Are We There Yet? The Challenges of Litigating Clean Air Act Rules

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The Clean Air Act (CAA) depends heavily on regulations adopted by the Environmental Protection Agency (EPA) to implement its broad and often ambiguous terms. However, proposed regulations extending EPA's authority to new pollutants or source types, or increasing the stringency of existing requirements, are almost always controversial and often immediately challenged in federal court—sometimes by targets of the regulation, sometimes by parties who believe the regulations did not go far enough, and often by both.

In recent years, hot-button regulations proposed by one administration have remained tied up in the courts when the next presidential transition occurs, allowing the new administration to reverse a challenged policy before the courts have even had a chance to decide the legality of the previous administration's policy. This pendulum swing from one administration to the next can leave states and regulated entities trying to decide whether to gear up to comply with a new rule or wait and see if it dies on the vine once a new administration changes course, starting the cycle anew.

While litigation over CAA regulations is not a new phenomenon, the politics surrounding key policy issues, such as climate change, have become increasingly polarized over the years. As a result, the possibility of litigation is a threat that must be considered at all stages of the rulemaking process if a rule is to have any hope of survival. Complicating matters further are unique rulemaking and judicial review procedures in the CAA that differ from Administrative Procedure Act (APA) requirements. These differences not only can influence how litigation over CAA rules will play out; they can be outcome-determinative.

Most of these CAA-specific procedural requirements have been on the books for decades. Some provisions though have only recently been interpreted and applied by the courts. This article explores the interplay between the rulemaking process and judicial review of CAA regulations, and the way litigation has come to claim its own starring role in an increasingly complicated and contentious regulatory process.

Rulemaking and Judicial Review, CAA Style

Provisions governing EPA development and federal court review of air regulations are contained in section 307 of the CAA. Together, they dictate how a rule must be written, including what information becomes part of the rulemaking record, when and where a rule can be challenged in court, what issues can be raised in a challenge, what happens to a rule during that challenge, and what actions can and cannot be challenged.

When section 307 was adopted in 1970, the CAA was unclear regarding the availability of judicial review of administratively promulgated regulations. Section 307(b) resolved that problem by dictating when and where a lawsuit challenging a CAA final regulation may be brought. Under section 307(b), litigants have 60 days to petition for review of a rule following its publication in the *Federal Register*, unless the petition is based on grounds arising after the rule's publication, in which case it must be brought within 60 days after such grounds arise. Section 307(b) also establishes the venue for a challenge to each specific type of air regulation EPA is required to issue. 42 U.S.C. § 7607(b).

Recognizing that some administrative actions are national in scope and require "even and consistent national application," Congress provided that suits challenging nationally applicable regulations (such as New Source Performance Standards or National Emission Standards for Hazardous Air Pollutants), can only be brought in the D.C. Circuit Court of Appeals. S. Rep. No. 91-4358, at 441 (1970). In contrast, suits challenging EPA's approval or promulgation of a state implementation plan (under the regional haze program or a section 111(d) program

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like the Clean Power Plan (CPP) or the Affordable Clean Energy rule, for example) must be brought in federal appeals court for the appropriate local circuit. Section 307(b) provides one exception—actions that appear local must still go to the D.C. Circuit if they are "based on a determination of nationwide scope or effect" and EPA expressly characterizes them as such. 42 U.S.C. § 7607(b)(1).

Section 307 of the CAA goes beyond identifying when and where a rule challenge may be brought—it also details what issues may be raised in that challenge.

The determination of whether a rule is "of nationwide scope and effect" can have significant implications for the success of a rule challenge. While this may seem a simple matter, whether a rule involving a single state nevertheless involves application of a nationwide policy is often unclear. A case in point is the challenge brought to a 2015 EPA rulemaking determining that dozens of state implementation plans (SIPs) were deficient because they allowed sources to exceed emission limits during periods of startup, shutdown, and malfunction (SSM). The so-called SSM SIP Call required states to revise their SIPs to eliminate enforcement discretion or affirmative defenses during periods of SSM. The SSM SIP Call was challenged in the D.C. Circuit due to the nationwide scope and effect of the rule, even though it targeted individual state regulations. *Env't Comm. of the Fla. Elec. Power Coordinating Grp. v. EPA*, No.15-1239 (D.C Cir. filed July 27, 2015). Before oral argument could be heard, the Trump administration took office and asked for the case to be held in abeyance.

EPA then withdrew the SSM SIP Call for three individual states—Texas, North Carolina, and Iowa—based on a different interpretation of the CAA than the one underlying the SIP Call itself. These state-specific withdrawals were challenged in the D.C. Circuit, based on a claim that the rules were nationwide in scope and effect because they reinterpreted EPA's national SSM policy. Based on the similarity in the relevant legal issues, the litigants also asked for the challenges to be consolidated with the 2015 SSM SIP Call case. EPA and industry intervenors opposed consolidation, arguing that the challenges must be heard in local circuits, based on state-specific factual and legal issues.

In a brief order, the D.C. Circuit denied consolidation but ordered all four cases to be argued on the same day to the same panel of judges assigned to the broader SSM SIP Call case, with the question of venue to be briefed and argued along with the merits—the court evidently saw it as a close enough question to hear argument on the point. While Congress likely intended section 307 to establish a bright line for determining venue, the SSM SIP Call case shows how, in practice, the question of venue can remain unclear.

The Give and Take Between Rulemaking and Judicial Review Under the CAA

Section 307 of the CAA goes beyond identifying when and where a rule challenge may be brought—it also details what issues may be raised in that challenge. These provisions governing the scope of judicial review are embedded in the same part of section 307 that governs certain aspects of the rulemaking process, underscoring how elements of that process can have direct implications for judicial review.

Under section 307(d), proposed rules must provide for a comment period and include a statement of basis and purpose. The final rulemaking must identify and explain major changes from the proposal and respond to significant comments raised during the comment period. The statement and purpose, reasons for changes to the proposal, public comments, and EPA's response to significant comments, taken together, establish the exclusive rulemaking record for judicial review. These requirements reflect more general APA requirements but add emphasis to the need to follow those procedures in developing and promulgating air regulations.

For potential challengers of a CAA rule, the public comment period is critical—it is the only way to preserve key issues for judicial review. Section 307(d) provides that only objections raised with "reasonable specificity" during the comment period can form the basis for judicial review of that rule. In short: no comment, no review. 42 U.S.C. § 7607(d).

There are only two exceptions—a challenger may preserve an issue if (1) the objection was impracticable to raise within the comment period or (2) the grounds for objection arose after the comment period and are "of central relevance to the outcome of the rule." 42 U.S.C. § 7607(d)(4)(B)(i). However, even issues that meet these criteria cannot go straight to court—they must first be submitted to EPA in a petition for reconsideration. These section 307(d) requirements establish two different paths for review of an issue. If a prospective challenger can raise an issue during the comment period, it must do so to preserve the possibility of judicial review on that point. If the issue was not available for comment, due to a surprise change from proposed to final rule or previously unavailable information, the only path to review is via a petition to EPA for reconsideration.

The bottom line is that challengers to air rules must choose whether to go to court or to EPA, not both. If a challenger goes to court with an issue, it must be based on a comment submitted, which confirms reconsideration is not warranted (or at least not mandatory). If a challenger seeks reconsideration, it must be based on the claim that no comment was submitted due to impracticability or after-arising grounds, which confirms judicial review is unavailable. Any attempt to take the same issue in both directions could force the challenger to make inconsistent arguments, harming the likelihood of success on either path.

A recent decision by the D.C. Circuit demonstrates how these constraints work in practice. In 2019, the court tossed claims by several states against EPA's Cross-State Air Pollution Rule related to emission budget calculation methods introduced by EPA for the first time in the final rule. *Wisconsin v. EPA*, 938 F.3d 303 (D.C. Cir. 2019). The court recognized that the states had no opportunity to raise the issue during public comments on the proposed rule but explained that section 307 requires a party challenging agency action to petition EPA for administrative reconsideration before raising the issue with the court. The court acknowledged that while this might be a "roundabout way" of doing things, "we cannot fairly review how the agency responded to an argument that was never presented it." *Id*. at 332.

Pressing Pause with a Stay

Many of the requirements in section 307 suggest a keen focus by Congress on finality, with a strong preference for allowing rules to become effective even as any challenges to them proceed. Section 307(b) expressly provides that filing a petition for administrative reconsideration does not affect the finality of a rule for purposes of pursuing judicial review or postpone the effectiveness of a rule. Section 307(d) does allow the effectiveness of a rule to be stayed during reconsideration or judicial review, but only for a period of three months.

Despite this statutory limitation, EPA has often sought to stay a rule indefinitely during reconsideration to avoid requiring compliance with a rule that is likely to change. Challenges to final rules often occur when opponents of a signature regulatory action passed near the end of a presidential term seek administrative review of that rule after a new president takes office. While it seems logical that EPA would require significantly more than three months to propose an alternative to a rule that the prior administration likely spent years to craft, section 307(d) definitively limits the stay of an effective date to this tight time frame. Only in recent years, however, have the courts confirmed that limits on stays in section 307 have teeth.

For example, in a 2018 decision, the D.C. Circuit struck down EPA's attempt to extend the compliance date for a chemical release regulation passed in the final week of the Obama administration. *Air Alliance Houston v. EPA*, 906 F.3d 1049 (D.C. Cir. 2018). Several weeks into the new administration, industry petitioners sought administrative reconsideration of the rule. EPA granted the petition, administratively staying the rule for 90 days, as allowed under section 307(b). EPA then passed a separate regulation, referred to by the court as the Delay Rule, which extended the original compliance deadline by 20 months. EPA claimed the delay was issued under the same authority used to establish the rule in the first place, which directs the Agency to impose chemical disaster regulations with effective dates that assure compliance "as expeditiously as practicable."

The court rejected EPA's attempt to rely on a substantive provision of the CAA to skirt the 90-day limit in section 307(b), noting that Congress "saw fit to place a three-month statutory limit" on the reconsideration, regardless of whether that seemed sufficient for the Agency to complete the reconsideration process. *Id.* at 1061. However, the court also explained that its holding was narrow and that the Delay Rule was vacated because it neither amended nor proposed to amend the rule under reconsideration, but only sought a delay while EPA decided what it wanted to do. *Id.* at 1066. This distinction may leave an opening for EPA to delay the effectiveness of a rule if better justified on a substantive basis, rather than solely on the need for more time to rewrite the rule.

Staying Out of Court Altogether

Recognizing the potential risks associated with judicial review of controversial air policies, EPA often acts in ways that are not reviewable in court. Over the last decade or so, as the threat of rule challenges has grown, EPA has increasingly sought to strengthen or ease existing air quality regulations via "guidance." While by definition not binding on the regulated community, guidance often offers interpretations of existing regulations that represent significant changes to prior agency policies. However, guidance is not reviewable under the CAA—section 307(b) only allows for judicial review of final rules or other final agency actions.

Challenges to recent controversial guidance documents in the air context have been denied as the D.C. Circuit has consistently held that guidance documents do not constitute "final action" of the agency. In 2019, the court rejected challenges to EPA guidance defining "significant impact levels" (SILs) under the Clean Air Act's Prevention of Significant Deterioration program, *Sierra Club v. EPA*, 955 F.3d 36 (D.C. Cir. 2019), as well as guidance indicating that major sources of hazardous air pollutants could be reclassified as "area sources" under section 112 of the Act. *Cal. Cmtys. Against Toxics v. EPA*, 934 F.3d 627 (D.C. Cir. 2019).

In each of these cases, the D.C. Circuit determined that the challenged guidance did not constitute "final agency action" subject to judicial review under section 307(b), applying the two-pronged test set out by the Supreme Court in *Bennett v. Spear*, 520 U.S. 154 (1997): (1) whether the action "marks the consummation of the agency's decisionmaking process" and (2) whether the action is "one by which rights and obligations have been determined or from which legal obligations will flow." Central to the decision in each case was a determination that sources would not face any potential liability or enforcement action as a result of the guidance, even though it might forecast the agency's approach to interpreting the rule.

While section 307 does not confer jurisdiction over challenges to significant agency guidance, once an agency relies on that guidance to impose a requirement, it becomes ripe for review. Accordingly, any state or regulated entity that attempts to rely on guidance for the first time may unwittingly become a guinea pig for determining whether that guidance and the action it allows are legal under the CAA, so caution is warranted.

Thanks to new rules finalized by EPA in the final months of the Trump administration, future administrations may not be able to rescind and reissue CAA guidance as freely as in the past. 40 C.F.R. pt. 2, subpt. D. These procedural regulations establish new requirements for the promulgation of agency

guidance, including public notice and comment for "significant" guidance as well as procedures for the public to seek modification or rescission of that guidance. While these procedural rules may be on the chopping block for the new Biden administration, they will at least serve as an initial impediment to any effort to quickly alter current air policies via guidance.

The Litigation Life Cycle of Significant Air Regulations

As highlighted in the examples above, the CAA's procedures for rulemaking and judicial review may appear straightforward but can prove nettlesome in their application. However, navigating the process for and potential minefields associated with judicial review under the CAA has taken on more importance than ever, as litigation against controversial rules has become a given. Despite the preference for finality that Congress embedded in section 307, litigation over air rules can drag out for multiple years and over multiple presidential administrations, resulting in substantial uncertainty for regulated entities.

EPA's now decade-long attempt to regulate greenhouse gas emissions (GHGs) from new and existing coal-fired power plants highlights the dramatic swings that can attend a single CAA regulatory action and the role that litigation can play in whether that rulemaking will remain good law. In October 2015, during President Obama's second term, EPA finalized the CPP and the Carbon Pollution Standards (CPS), a sweeping set of regulations under section 111 of the CAA. The rules aimed to reduce GHGs from new coal-fired power plants through limits based on partial carbon capture and sequestration (something only done at one now-mothballed U.S. facility), as well as to reduce GHGs from existing coal-fired units by requiring a shift in electricity generation from coal to natural gas and renewable energy sources. Both rules were immediately challenged in the D.C. Circuit by numerous states and a host of industry petitioners. Almost as many states, the District of Columbia, local governments, other utilities, and nonprofit groups intervened in the litigation in support of the rules.

Although the CPS went into effect, the CPP was stayed in an unprecedented order by the Supreme Court, pending disposition of the challenge to the rule in the D.C. Circuit and any subsequent petition for writ of certiorari to the Supreme Court. During the final months of the Obama administration, over seven hours of oral arguments were heard before an *en banc* panel of 10 D.C. Circuit judges, but no decision was issued prior to the end of Obama's term.

Shortly after taking office, President Donald Trump signed an executive order calling for EPA to review the CPP and the CPS. Based on that order, the D.C. Circuit placed both cases in abeyance while EPA conducted its review of the two rules. The Trump administration ultimately failed to revise the CPS—although it issued a December 2018 proposal, EPA did not finalize it before President Biden took office. Briefing was completed in the CPS challenge, but the case was held in abeyance before oral argument could be held. That litigation may now resume, depending on what EPA does with the proposal and whether the challengers to the rule continue to press their case.

In contrast, the Trump administration repealed the CPP and replaced it with the Affordable Clean Energy (ACE) rule, rendering the challenges to the CPP moot. However, EPA's issuance of its replacement rule initiated another revolution of the litigation merry-go-round with the inevitable filing of a petition for review of the ACE rule in the D.C. Circuit. In essence, all parties switched sides, and briefed many of the same issues that had already been briefed and argued in the CPP case. Unlike the CPP, the ACE rule was not stayed, and states began to implement the rule while the litigation ensued.

Oral argument in the ACE challenge was held before a three-judge panel of the D.C. Circuit in October 2020. Just a month later, President Trump lost his bid for a second term. As a result, the ACE rule litigation appeared likely to meet the same fate as the CPP litigation—the court appeared unlikely to issue a decision before the Biden administration would take office and ask the court to hold the case in abeyance. But on the last full day of the Trump administration, the D.C. Circuit handed down its ruling, vacating the ACE rulemaking.

At the time of this writing, some petitioners in the ACE litigation have filed petitions for a writ of certiorari to the Supreme Court, which, if granted, could resolve years of uncertainty regarding the scope of EPA's authority to regulate GHGs from existing power plants under section 111 of the CAA. Even a decision from the Supreme Court, however, would likely leave many questions unanswered until EPA promulgates yet another regulation to fill the void left by the CPP and ACE, setting the stage for another rule challenge. Despite the apparent goal of certainty and finality in section 307 of the CAA, those aims remain out of reach almost 10 years after President Obama first announced a plan for addressing GHGs from power plants.

EPA's climate change rules for power plants demonstrate how complex and protracted the rulemaking and judicial review process under the CAA can be. However, the long and winding path these rules have taken through EPA and the courts is not reserved for headline-making regulations; any air rule that presents the potential for disagreement (which these days is most of them) must clear the same hurdles. Although the text of section 307 may seem impenetrable in places, and the cases interpreting it equally so, it provides the only roadmap for both EPA and the regulated community as they attempt to chart a course towards certainty and finality—a destination that still seems far off in the constantly shifting landscape of CAA policy.

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