Suits to Compel EPA Action Likely to Increase

*Kenneth J. Warren, *The Legal Intelligencer*

During his 2016 campaign, President Donald J. Trump frequently criticized the number and breadth of federal regulations as unduly restricting free market activities. Environmental regulations were particularly targeted, with the Waters of the United States (WOTUS) rule and the Clean Power Plan regulations leading the list. True to his campaign promises, President Trump has issued several executive orders designed to slow or stop the promulgation of new regulations and begin the process to revoke or modify existing regulations, including the WOTUS and Clean Power Plan rules. Congress has walked in lockstep by, among other things, using its authority under the Congressional Review Act to repeal the Stream Protection Rule limiting surface mining near waterbodies. Further executive and congressional actions can be expected.

Notwithstanding the administration's goals, regulatory reform cannot be accomplished by executive action overnight. Revisions to federal regulations may be made only following notice and comment, which may involve a several-year process for technical, science-based - environmental rules. Where the scientific consensus provides strong support for existing - regulations, the administration may struggle and potentially fail in its effort to find a scientific basis for a regulatory change.

Regulatory reform is not the only tool available to the administration to further its efforts to reduce EPA regulatory oversight. The process of establishing a budget for each federal agency starts with the executive branch. Based on the administration's initial budget proposal, President Trump intends to limit the EPA's reach by depriving it of resources. If the president's proposed budgetary reductions are enacted by Congress, the EPA will lose 25 percent of its approximately 15,000 employees and over 30 percent of its $8.1 million budget. This would significantly hamper the EPA's ability to administer environmental programs throughout the agency, including meeting existing statutory deadlines for EPA action.

If for budgetary or policy reasons EPA actions are delayed, lawsuits to compel the EPA to perform its duties will likely become more prevalent. Most federal environmental statutes contain a citizen suit provision authorizing any citizen to commence a civil action against the EPA administrator for failing to perform any nondiscretionary act or duty. If and when the EPA retreats from the active role that Congress has prescribed for it, citizens may fill the gap.

In addition, the Administrative Procedure Act (APA) allows a judicial challenge to compel an agency action unlawfully withheld or unreasonably delayed, 5 U.S.C. Section 706(1), or to hold - unlawful and set aside an agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. Section 706(2)(A). The EPA's failure to take - actions required by statute or its decisions at the conclusion of rulemaking processes to adopt, revise or repeal regulations are likely to be subject to challenge under the APA.

There is ample precedent for challenging EPA inaction. For example, in *Raymond Proffitt Foundation v. EPA* , 930 F. Supp. 1088 (E.D. Pa. 1996), an environmental group sought a court order requiring the EPA to prepare and publish revised water quality standards for Pennsylvania waterbodies. It was undisputed that the EPA rejected Pennsylvania's proposed water quality standards submitted under the Clean Water Act and specified the revisions that Pennsylvania must make to comply with the Act. Pennsylvania, however, did not adopt these revisions within 90 days following notice from the EPA as required by the act. Where the state fails to act, the administrator "shall promptly" prepare and publish proposed regulations setting forth a revised or new water quality standard, 33 U.S.C. Section 1313(c)(4). Nevertheless, the EPA did not initiate rulemaking. The court issued an order requiring the EPA to publish the revised standard as a proposed regulation, explaining that the "shall promptly" language in the act imposed a mandatory duty on the EPA that the court could enforce.

Two recent cases show the continued willingness of federal courts to keep the EPA to a schedule. In *Blue Ridge Environmental Defense League v. Pruitt*, Case No. 16-cv-00364 (D.C. D.C.) (March 22), and *California Communities Against Toxics,* (D.C. D.C.) (March 13), - environmental advocacy groups challenged the EPA's failure to review and revise national emissions standards for sources of hazardous air pollutants (NESHAPs) under the Clean Air Act. NESHAPs must be reviewed and revised as necessary every eight years to account for changes in technology. 42 U.S.C. Section 7412(d)(6). The EPA must also consider any residual risk to public health and promulgate any additional standards necessary to protect the public, 42 U.S.C. Section 7412(f). The EPA often conducts a single rulemaking called a risk and technology - review to fulfill both statutory requirements. In these cases, the EPA acknowledged that for over eight years it had not performed this review for multiple sources.

Because it was uncontested that the EPA had failed to perform its mandatory duties, the remaining question was the selection of the appropriate remedy. The Clean Air Act grants district courts jurisdiction to order the administrator to perform an act or duty mandated by the statute and to compel agency action unreasonably delayed, 42 U.S.C. Section 7604(a). In *NRDC v. Train, 510 F.2d 692*, 705 (D.C. Cir. 1974), a Clean Water Act case, the U.S. Court of Appeals for the District of Columbia held under similar circumstances that a district court may exercise its equity powers "to set enforceable deadlines both of an ultimate and an intermediate nature," *Blue Ridge*, quoting *Train*, 501 F.2d at 705. The courts followed that precedent here.

Not surprisingly, the EPA and the plaintiffs disagreed on the time the EPA should be afforded. Citing *Train* and other precedent, the courts noted that equity would not support a schedule that was impossible for the EPA to meet. Nevertheless, this standard placed a "heavy burden" on the EPA. The EPA argued that granting it additional time would enable it to perform a higher quality review. While potentially true, this basis did not satisfy the "impossibility" standard. Other provisions of the Clean Air Act showed that Congress contemplated that the EPA could promulgate dozens of air toxics rules in a condensed period of time. Any disagreement with this proposition should be directed to Congress, not the courts. Accordingly, the courts established aggressive schedules for the EPA to conduct its review.

These Clean Air Act cases were straightforward because the mandatory obligations were clear and the relevant deadlines by when the EPA must act were specified in the statute. Other

statutory provisions, however, may impose arguably discretionary requirements or not establish specific deadlines. For these provisions, courts may face the difficulty tasks of deciding whether mandatory duties exist and, if so, whether the EPA's action was "unreasonably withheld." See, e.g., *Zen-Noh Grain v. Jackson* , 943 F. Supp. 2d 657, 663 (D. La. 2013), (finding that the EPA's decision to take or not take action to modify or revoke a Clean Air Act permit is discretionary).

Even when a court has authority to address the EPA's failure to meet a statutory deadline, the potential lack of agency resources may complicate a court's selection of remedy. If the EPA is denied resources, performance of all of its mandatory duties in a timely manner may be impossible. Under these circumstances, courts may choose among priorities, potentially by balancing Congressional goals under multiple statutes, or allow the administration's choice of priorities to prevail. If the new administration keeps to its present course, the role courts play in mandating action by the EPA may have a critical effect on the continued vitality and effectiveness of many EPA programs established by Congress but disfavored by the administration.

*Kenneth J. Warren is a founding partner of Warren Environmental Counsel and has been practicing environmental law for more than 30 years. He is a former chair of the American Bar Association section of environment, energy and resources, where he led the section's 10,000 members. He can be reached at kwarren@warrenenvcounsel.com.