In April and May 2018, U.S. President Donald Trump and U.S. Environmental Protection Agency (EPA) Administrator Scott Pruitt released details concerning a slew of new initiatives aimed at dramatically changing the way that EPA approaches its responsibilities with respect to the foundation of the U.S. Clean Air Act: the National Ambient Air Quality Standards (NAAQS). Unlike previous efforts by the Trump Administration to reshape environmental policy largely through targeted reversal of Obama-Era policies, these initiatives speak in loftier terms about broader changes to the way that EPA approaches the NAAQS and, fundamentally, the nation’s ambient air quality.

Administrator Pruitt’s May 9, 2018, memorandum, entitled “Back-to-Basics Process for Reviewing National Ambient Air Quality Standards,” comes on the heels of Trump’s memorandum, “Presidential Memorandum for the Administrator of the Environmental Protection Agency on Promoting Domestic Manufacturing and Job Creation,” dated April 12, 2018. In that memorandum, Trump directed Administrator Pruitt “to take specific actions to ensure efficient and cost-effective implementation of the NAAQS program.” The memorandum goes on to state that the President’s directions are intended to ensure EPA’s adherence to its “core missions” of protecting the environment and improving air quality, while “reducing unnecessary impediments to new manufacturing and business expansion essential for a growing economy.”

Although many of the aspirational statements in both memoranda (e.g., more closely adhering to statutory deadlines, improving efficiency in the process, and timely processing of “exceptional event demonstrations”) are seemingly without controversy, several of the principles outlined in each suggest potentially divisive departures from past EPA practices (and possibly the statutory language of the Clean Air Act) that require a closer look. These include a renewed emphasis on assessing the economic impact of NAAQS revisions and, focus on both “international emissions” and “background concentration levels” of criteria pollutants and their impact on attaining and maintaining the NAAQS.
On Closer Inspection…

Administrator Pruitt’s repeated mention of the economic impacts of attainment and maintenance of the NAAQS raises the possibility of a longer term strategic play on the part of the Trump Administration and EPA. Section 109(b)(1) of the U.S. Clean Air Act (42 U.S.C. §7409(b)(1)) directs the EPA Administrator to establish (and/or revise) the NAAQS to such levels that are “requisite to protect the public health” with an “adequate margin of safety”. Courts have long held that the agency is foreclosed from considering the economic costs associated with setting NAAQS for criteria pollutants (see, e.g., Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001)). While the Pruitt memorandum appears to recognize this restriction, the repeated emphasis on gathering economic impact data to “provide important policy context” suggests the possibility that this issue may find itself before the U.S. Supreme Court again some time in the near future.

There are several ways that the Trump Administration and EPA could (directly or indirectly) force the issue back to the courts. The first and most overt way would be for Pruitt to explicitly invoke economic costs as a justification for not adopting a more stringent NAAQS when presented with relevant scientific information that would support a NAAQS revision. While this seems unlikely, it is within the realm of possibility—and the addition of Justice Neil Gorsuch to the Supreme Court could yield a different outcome from the Courts holding in Whitman, given that Section 109(b)(1) is actually silent on the question of EPA’s ability to consider economic costs in a NAAQS context.

Administrator Pruitt’s efforts to generate NAAQS-related economic data is more likely designed to educate the public, stakeholders, and Congress about the perceived “real” costs of incrementally cleaner air, including such things as higher fuel prices, higher utility costs, and higher consumer good costs (as manufacturers pass-through the costs of regulatory compliance). While the Supreme Court’s interpretation of Section 109(b)(1) of the Clean Air Act currently prevents EPA from considering economic impacts, calling renewed attention to these costs could lead voters to push their elected representatives to amend the Clean Air Act to revise the way the NAAQS are set. Given that 28 years have passed since the Clean Air Act was last amended (while only 13 years passed between the 1977 amendments and the 1990 amendments), perhaps the time is right for Congress to step in.

With respect to the international transport of criteria pollutants and background concentrations of pollutants, the President’s April 2018 memorandum directs EPA to look beyond domestic stationary and mobile sources of air contaminants in determining whether areas of the country are to be subjected to the more stringent provisions of the Clean Air Act that are applicable to nonattainment areas. In terms of international, transboundary emissions, Section 179B of the Clean Air Act (42 U.S.C. §7509a entitled “International Border Areas”) allows states to offer proof that monitored NAAQS exceedances are caused by emissions emanating from outside of the United States. Although Section 179B has historically been used predominantly by border states (as the title to the section none too subtly suggests) alleging adverse impacts caused by emissions originating in both Mexico and Canada, the Trump Administration has now made it clear that it expects EPA to entertain 179B arguments from any state—and that impacts from emissions emanating anywhere in the world (Asia is specifically mentioned) may be alleged.

How might adverse impacts from far-off global sources be proven to EPA’s satisfaction? Emissions modeling seems to be the only logical answer—though it is entirely unclear how a state or EPA might get access to sufficient foreign source data to populate a meaningful emissions model. Somewhat ironically, the President’s memorandum also speaks at length about the need for EPA to significantly curtail the use of emissions modeling at both the regional/state level and the facility level.

Finally, as to background concentrations of criteria pollutants, both the President’s memorandum and Administrator Pruitt’s memorandum imply that the NAAQS may have advanced to the point where it is no longer possible to distinguish anthropogenic stationary and mobile source emissions from naturally occurring background levels of contaminants in the ambient air. This opens another door for states to argue that further air regulations are unnecessary because the presence of criteria pollutants in the ambient air is beyond their control through stricter state implementation plans. While some states may pursue this argument, other states may not be politically inclined to do so. In order to maintain a competitive balance, the states who “opt-out” of pointing fingers overseas and/or at Mother Nature may be forced to sue EPA—an all too common occurrence since early 2017.

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References