Late 2018 saw the U.S. Environmental Protection Agency (EPA) announce several regulatory and policy changes with potentially far-reaching impacts on the way the agency regulates the emissions of both criteria pollutants and hazardous air pollutants under the U.S. Clean Air Act. Each of these changes, their projected impact on both the regulated community and the environment, and the likelihood of legal challenges are discussed here in more detail.

**EPA Revises Cost Finding for MATS Rule to De-Emphasize ‘Co-Benefits’**

On December 27, 2018, EPA announced a proposal to revise the cost–benefit analysis for the Mercury and Air Toxic Standards (MATS) Rule. MATS is an Obama-era regulation aimed at reducing emissions of mercury and air toxics, including arsenic, chromium, and nickel, from coal-fired power plants. A 2015 U.S. Supreme Court decision (Michigan v. USEPA) had left MATS in place, but tasked EPA with reconsidering the rule with respect to the costs of compliance for impacted electric generating utilities.

It was unclear how the agency would go about its reconsideration of MATS in light of the court’s decision. Options included amending the rule, replacing the rule in its entirety, or rescinding the rule. Each of these options carried differing
risks of legal challenges from some combination of environmental groups, electric-generating utilities, and the coal industry. Confounding EPA's calculus was the fact that the majority of coal-fired electric plants had already completed the capital investments necessary to comply with MATS. As a result, any undoing or relaxation of the rule offered no opportunity for these plants to recover these “sunk” costs—turning possible supporters of rule overhaul into bystanders at best.

EPA's approach to revising its cost–benefit analysis involved retaining the Obama Administration's US$10-billion per year compliance cost estimate, while dramatically altering the projected health benefits of the rule (which were calculated to outweigh compliance costs by a ratio of 9 to 1). The Obama-era EPA had originally calculated in 2011 that the MATS rule would result in non-hazardous air pollutants (HAPs) co-benefits ranging from US$33 billion and US$90 billion. Conversely, target HAP benefits related directly to mercury emission reductions were estimated to range from only US$500,000 to US$6 million annually. The agency’s revised accounting of health benefits retained those benefits tied directly to reductions in HAPs, but omitted all previously calculated “co-benefits” tied to indirect reductions in non-HAP air pollutants.

Given that the rule’s costs now exceed its benefits, MATS is no longer “appropriate and necessary”—likely rendering the 2012 rule retroactively “unreasonable”. This paves the way for opponents of MATS to seek repeal of the rule in court.

**New EPA Policy Revises Historic Approach to Defining ‘Ambient Air’**

In November 2018, EPA released draft guidance that promises to alter the agency’s longstanding interpretation of its own 48-year-old regulatory definition of “ambient air”. Ambient air is defined at 40 CFR 50.1(e) to mean “that portion of the atmosphere, external to buildings, to which the general public has access.” Historically (going back to at least 1980), EPA has interpreted ambient air to include all areas outside of buildings with the exception of land owned or controlled by a stationary source where public access is precluded by a fence or other physical barrier. The agency’s rationale was that air which the public could readily access (and breathe) was air warranting protection under the Clean Air Act.

The agency’s November 2018 draft guidance proposes to eliminate the requirement that a fence or physical barrier be present in order to better reflect the options available to a stationary source today to effectively deter and control public access. As such, the revised ambient air policy will look to “measures, which may include physical barriers that are effective in deterring or precluding access to the land by the general public.” EPA suggests that appropriate measures could consist of video surveillance and monitoring, security patrols, drones, and other “future technologies”.

The practical impacts of the new interpretation of what constitutes “ambient air” will be seen most readily in the context of air quality modeling conducted to determine “fenceline” impacts associated with permitting new and modified sources of air contaminants. As regulated entities may now have a path to moving hypothetical “offsite receptors” further away from sources, it will undoubtedly be easier for sources to pass modeling without reducing emissions, raising stacks, or investing in potentially costly physical barriers. All of this, of course, could result in legal challenges from environmental groups and impacted citizens.

**EPA to Propose Regulation Formally Ending MATS ‘Once In, Always In’**

EPA’s regulatory agenda for 2019 indicates that the agency intends to issue a Second Notice of Proposed Rulemaking (NPRM) in February 2019 in connection with its efforts to reverse its highly contentious “Once In, Always In” policy pertaining to major source Maximum Achievable Control Technology (MACT) applicability. In January 2018, EPA issued a memorandum announcing its intent to reverse the policy. The agency had maintained since 1995 that a facility subject to a major source MACT standard on that standard’s initial compliance date was forever bound to comply with the MACT regardless of subsequent HAP potential to emit reductions that may have rendered the facility “non-major” for MACT purposes.

The Second NPRM indicates an intent on behalf of EPA to formalize its January 2018 memorandum through administrative rulemaking. According to its regulatory docket, a Second NPRM in early 2019 would revive an initial NPRM originally issued by the George W. Bush EPA in January 2007. At that time, the agency had proposed a regulatory reversal of its 1995 “Once In, Always In” guidance memorandum. The effort lost momentum, however.