Federal Environmental Deregulation and Pennsylvania Operations

Written by: David G. Mandelbaum

On Oct. 16, the Environmental Protection Agency published its proposal to repeal the carbon pollution emission guidelines for existing electric power plants, the centerpiece of the Clean Power Plan, 82 Fed. Reg. 48,035. That action serves as a reminder that the current national administration takes seriously its promise to deregulate business under the environmental laws. Indeed, the president claimed publication of the proposal as a significant accomplishment in a tweet on Oct. 15. In Pennsylvania, however, for the most part the Pennsylvania Department of Environmental Protection—not the federal EPA—issues permits and administers the environmental regulations because Pennsylvania's regulatory program has been delegated or authorized under federal law to satisfy both state and federal requirements. Therefore, a relaxation of federal requirements would not necessarily imply a relaxation of the conditions that a regulated entity in Pennsylvania must meet.

This is not a column about whether the current federal approach is a good idea or a bad one. Clients may like or dislike any given regulatory change. The change may entail competitive advantage or disadvantage; the change may create capacity for a client's emissions by regulating others, or it may grant that capacity to those others. However, almost all clients dislike uncertainty over regulatory requirements.

The Sept. 15, 2015, column in this series,"When an Agency Changes Its Mind" addressed the issue of when an administrative agency can properly reverse itself. Any action to "formulate, amend, or repeal" a rule is rulemaking subject to the Administrative Procedure Act, 5 U.S.C. Section 551(5), as in *Organized Village of Kake v. U.S. Department of Agriculture*, 746 F.3d 970 (9th Cir. 2014)(en banc), analyzed the difference between a change in policy, which is generally permissible—and a change in a factual determination—which generally requires new evidence in order to avoid being arbitrary or capricious.

A change in policy because of a change in federal administration does not necessarily imply a change in policy at the state level. So, just because the federal EPA has changed its mind does not necessarily imply that the Pennsylvania Environmental Quality Board or the Pennsylvania Department of Environmental Protection has gone, or will go, along.

Most federal environmental statutes make the federal requirements a regulatory floor. States may call for additional or more stringent regulatory conditions.

However, states sometimes make the federal requirements the ceiling. In 1996, Gov. Tom Ridge issued Executive Order 1996-1 that was codified in 4 Pa. Code Section 1.371 establishing principles for the development of new regulations. These principles apply to all Pennsylvania regulations, not just environmental rules.

Section 1.371(5) provides: "If Federal regulations exist, regulations of the commonwealth may not exceed federal standards unless justified by a compelling and articulable Pennsylvania

interest or required by State law." Section 1.372(a) calls for amendment or repeal of regulations inconsistent with the principles laid out in Section 1.371.

Even so, section 1.371(5) does not establish an enforceable requirement that Pennsylvania regulations must be no more stringent than parallel federal rules. For one thing, a Pennsylvania interest or state law will override the principle. For another, Section 1.380(b) of title 4 provides that "this subchapter is intended only to improve the internal management of executive agencies and is not intended to create a right or benefit, substantive or procedural, enforceable at law by a party against the commonwealth, its agencies, its officers or any person."

In addition to the general guidance of Section 1.371, one ought to note the hazardous air pollutant section of the Pennsylvania Air Pollution Control Act, 35 Pa. Stat. Ann. Section 4006.6. HAPs are regulated through the promulgation of standards under Section 112 of the Clean Air Act, 42 U.S.C. Section 7412. The Pennsylvania state statute incorporates those federal standards by reference. It goes on to state: "The Environmental Quality Board may not establish a more stringent performance or emission standard for hazardous air pollutant emissions from existing sources, except as provided in subsection (d)," 35 Pa. Stat. Ann. Section 4006.6(a). Accordingly, when the federal Clean Air Mercury Rule was invalidated, Pennsylvania could not maintain its own implementing mercury regulations, as in *PPL Generation v. Commonwealth*, 986 A.2d 48 (Pa. 2009).

Subsection (d) does authorize more stringent or different Pennsylvania regulations if required to protect public health, welfare, or the environment. The Environmental Quality Board has no authority to adopt any regulation at all unless the rule would promote those purposes. Accordingly, exactly when the 4006.6(d) exception overrides the 4006.6(a) "no different than federal" general rule is not clear.

Section 4006.6(a) applies only to HAPs and not to other regulations adopted under the Air Pollution Control Act. Parallel provisions do not exist in other Pennsylvania environmental laws. Thus, in any other context, the existence of section 4006.6(a) is problematic for the argument that because federal standards have changed, so should Pennsylvania standards. So, for example, the Pennsylvania Solid Waste Management Act specifically authorizes deviations from the federal hazardous waste rules to regulate separately different classes of hazardous waste. The Hazardous Sites Cleanup Act states a legislative intention to develop an independent state cleanup program for sites that do not require attention under the federal Comprehensive Environmental Response, Compensation and Liability Act, 35 Pa. Stat. Ann. Section 6020.102(12)(ii). The Land Recycling and Environmental Remediation Standards Act (Act 2) offers a way of selecting a remedy for contaminated sites wholly different from that used under any federal law, and then sets that remedy as the floor in a federal remedy selection, 35 Pa. Stat. Ann. Section 6026.106(a) ("the remediation standards under this act shall be considered as applicable, relevant and appropriate requirements for the Commonwealth under" CERCLA). That provision was intended to supplant a "no molecules" standard under the Clean Streams Law.

Federal deregulation does not necessarily imply relaxation in permit conditions, even under federal law. So, for example, if one has complied with a stringent technology-based effluent limitation under the Clean Water Act, Section 402(o) generally inhibits relaxation of the permit limit even if the regulations change.

Further, changes in the scope of federal regulation often would not change the scope of state permitting authority. For example, challenges to the Waters of the United States rule have received recent attention, s*ee, e.g., National Association of Manufacturers v. Department of Defense*, No. 16-299 (U.S. argued Oct. 11)(on proper court in which to challenge WOTUS rule). But even were federal Clean Water Act regulatory jurisdiction cut back, the Clean Streams Law would continue to subject all waters, including groundwater, to regulation as "waters of the Commonwealth." The Air Pollution Control Act regulates all emissions of pollutants regardless of amount (unless exempted) *and* the installation of air pollution control equipment, a much broader scope than the federal Clean Air Act.

Thus, federal deregulation in a place like Pennsylvania does not always automatically result in loosening of the requirements faced by facilities in the commonwealth. Regulation is less volatile than that. Change in either direction requires attention at the state and facility level.•

David G. Mandelbaum is national co-chair of the environmental practice group of Greenberg Traurig. His principal office is in Philadelphia. He teaches Environmental Litigation: Superfund and Oil and Gas Law in rotation at Temple Law School. He was educated at Harvard College and Harvard Law School.