



WASHINGTON WATCH

The Trump Administration and Likely Impacts on Environmental Law and Policy

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2016 was full of surprises, two of which are driving much of the environmental agenda for the U.S. Environmental Protection Agency (EPA) in 2017. First, Congress significantly amended the Toxic Substances Control Act (TSCA) in June of 2016. The changes are intended to reform the program to address the widely recognized deficiencies in the law, especially regarding existing chemicals, chemical testing, Confidential Business Information (CBI) claims, and preemption of state actions. EPA has been busy implementing the new law, as the all-important “framework rules” must be issued in final in June 2017. The second surprise event was even more unexpected -- the election of Donald Trump as President. His election is already having a significant impact on environmental law and policy. This column briefly offers some thoughts and predictions on the impact of the new Administration on environmental issues of interest to our readers.

General Overview

The implementation of new TSCA is clearer now since the three framework rules have been proposed, importantly all before the Presidential Inauguration on January 20, 2017. These include the Inventory reset rule (January 13, 2017), the risk evaluation process rule (January 19, 2017), and the prioritization process rule (January 17, 2017). These rules largely frame the process for EPA’s review of existing chemicals under TSCA. What is less predictable is how the Trump Administration will continue TSCA implementation and address other general environmental programs. What is clearer is that the EPA operating environment has changed significantly. Mr. Trump’s 2018 fiscal year budget would change EPA institutionally, and all EPA programs, not just the Air Office, will likely see new or different

emphases on how, when, or why to impose any appropriate regulatory controls.

Along with a new Republican President, both the House and Senate remained with Republican majorities. EPA is under great pressure to align with the party platform and long-standing calls from Congressional critics to be more flexible and business-oriented in implementing its programs. Rulemaking has generally ground to a halt, and only rules that are statutorily required or approved by the Administration are making their way into the *Federal Register*. Current and past policies and interpretations are under scrutiny and many are likely to change. Democrats in Congress and environmental advocates who supported Obama Administration policies are resisting these significant changes, but to no real effect. Specific predictions about policies and decisions are purely speculative at this point, but it likely means EPA will be operating in a volatile and often hostile environment (induced by both friends and foes alike).

What is also predictable is that non-governmental organization (NGO) environmental advocates will need to change, and are changing, their approach in an attempt to move their agenda and policy goals away from a now unfriendly Administration. What has happened in the past during a change in Administration like this is that there is a renewed emphasis on litigation and petition filings as a means to avoid the executive and legislative branches. Advocacy through the judicial branch of government may be slow, uneven, and unpredictable, but it will also be seen as more likely to be a successful forum.

EPA Operating Environment

Few things can get the attention of federal civil servants more than a promise to eliminate their agency. Candidate Trump at various times promised to eliminate EPA and change the fundamental direction of the Agency on climate change and to reduce the regulatory burdens of environmental regulations on businesses. While President Trump is unlikely to eliminate EPA, his fiscal year 2018 proposed budget promises deep personnel cuts, a reduced budget, and workforce "reform" of changed work conditions and retirement benefits, all of which will have an immediate impact on the EPA operating environment. President Trump imposed a

hiring freeze and some reports confirm that EPA staff retirements are up from years past, causing the “brain drain” problem, which was already underway, to worsen. If budget and personnel cuts as proposed are implemented, there will be an immediate adverse effect on EPA staff morale, and these cuts could lead to a large increase in more staff retirements to avoid proposed changes or simply because staff members do not want to work under the direction of the new leadership.

On January 30, 2017, President Trump issued Executive Order 13771, the “Presidential Executive Order Reducing Regulation and Controlling Regulatory Costs,” casually referred to as the “one in, two out” Order, which states that when executive departments and agencies “publicly propos[e] for notice and comment or otherwise promulgat[e] a new regulation, [they] shall identify at least two existing regulations to be repealed” (Trump, 2017a). The Order also states that no incremental costs can be accrued for any new regulations unless required by law or advised in writing by the Director of the Office of Management and Budget (OMB) (Trump, 2017b). For any costs that are accrued, it is directed for them to be “offset by the elimination of existing costs associated with at least two prior regulations” (Trump, 2017b). In the Order, the OMB Director is tasked with providing guidance on implementation (Trump, 2017c) as well as identifying the total amount of costs allowed for each agency “in issuing new regulations and repealing regulations for the next fiscal year” (Trump, 2017d). The regulations exempt from this order are: regulations issued with respect to a military, national security, or foreign affairs function; regulations related to agency organization, management, or personnel; and other categories exempted by the OMB Director (Trump, 2017e).

Congress’s surprisingly aggressive use of the Congressional Review Act (CRA) also set off alarm bells at EPA and elsewhere. The Republican-controlled House moved quickly to nullify rules issued in the last few months of the Obama Administration. The Senate passed resolutions to nullify a Department of Interior measure to buffer streams, a rule targeted by the coal industry. Other regulations in Congress’s sights include rules curbing drilling in the Arctic, EPA’s risk management requirements to prevent chemical releases, and rules limiting air pollutants that cross state lines.

New Leadership

E. Scott Pruitt was confirmed in February to be the EPA's new Administrator. Formerly, Pruitt was the Attorney General of Oklahoma. Pruitt is on record as opposing the Obama Administration initiatives on climate change and water pollution, and he sued EPA 14 times in the recent past over climate change rules and policies. The Trump Administration is dismantling the Obama Administration's Climate Action Plan and has announced its intention to withdraw from the Paris Agreement. Pruitt will be an energetic supporter of these Administration goals.

For the EPA toxics program office -- the Office of Chemical Safety and Pollution Prevention (OCSPP) -- it is not clear what direction any general "stop the EPA" rhetoric might mean for the regulation of pesticides and chemicals. The regulated community is informing the new leadership on the need for a functional, effective TSCA program. This advocacy has apparently been effective, as the proposed budget does not slash the OCSPP budget and, in fact, proposes a slight bump. In addition, Pruitt has noted on several occasions his interest in implementing TSCA and has characterized it as a priority. Whether EPA resources are there to address comprehensively the many new burdens imposed on the toxics program under new TSCA remains to be seen.

Congressional Relations

The new Republican President complements the Republican Congress, a Congress that has been uniquely hostile to many EPA initiatives developed under the Obama Administration. This will be more evident in air and water programs than in the toxics program. As noted, EPA is retreating from climate change initiatives across the board. The Trump Administration will address elements of the pesticide program, especially where the pesticide industry has objected to policies regarding changes to the 10x safety factor and the use of epidemiological data in risk assessments. The Administration also has suspended indefinitely certain changes to the Worker Protection Standard and can be expected to revisit policies to protect pollinators. In recent years, the pesticide registrant community has raised concerns about the "science integrity" of EPA decisions and has lodged complaints about policies that industry believes have been issued or developed without

sufficient transparency or requisite notice and comment rulemaking authority. These subjects generally are certain to be the focus of Congressional oversight and policy lobbying of any new EPA leadership team. Taken together, EPA may face a more engaged and involved Congress, as the committee leadership of the authorizing and Congressional oversight committees will now assume they will get more deference to their initiatives.

Key Program Impacts

Air

As noted above, the Trump EPA is dismantling the Obama climate change legacy. How successful and over what period of time Trump's commitments in this regard could be realized is far from clear. Article 28 of the Paris Agreement governs withdrawals, and it outlines a four-year timetable. Gutting the greenhouse gas program involves judicial elements in light of the 2007 U.S. Supreme Court decision in *Massachusetts v. EPA*, holding that EPA has authority to regulate greenhouse gases under the Clean Air Act, and other determinations that provide a basis for the argument that EPA must regulate such emissions. Plainly, with regard to new air rulemakings, we can expect a general slowdown in EPA action, and we are witnessing now exactly such a slowdown as well as a general uptick in NGO litigations.

Water

In the water area, Waters of the United States (WOTUS) has been a source of considerable industry angst, and the Trump Administration made withdrawal of this rule a top water priority. WOTUS, also referred to as the Clean Water Rule, seeks to define and limit the Clean Water Act's (CWA) jurisdictional reach. The Trump Administration has vowed to repeal it, and it did so. The rule will inevitably be litigated again and end up back in the Supreme Court. With the balance of the Court likely to shift to a more conservative bent, a future ruling is likely to craft a rule that leaves more waters/wetlands outside the definition of WOTUS.

Toxics

In the toxics area, we do not expect to see much on the legislative side. Reauthorization of the Pesticide Registration Improvement Act (PRIA) is needed this year to ensure pesticide registration activity is funded. The Pesticide Registration Improvement Act of 2003 (PRIA 1) established a fee schedule for pesticide registration- and amendment-related applications and specified decision time periods in which EPA must make a regulatory decision. PRIA has been reauthorized twice, and currently, is scheduled to expire at the end of this federal fiscal year, on September 30, 2017. As was the case for PRIA and its prior reauthorizations, a coalition of registrants, labor, and environmental advocates are working with Congress to pass what will be "PRIA 4" by the end of the fiscal year.

With each reauthorization of PRIA, there has been an increase in the number of fee categories based on the ongoing experience with this pay-for-service program as well as increases in the fees themselves (typically 5%). There also have been provisions addressing the federal annual maintenance fees and money set aside to fund specific projects. Similar changes in PRIA 4 reasonably may be expected. While PRIA reauthorization is unlikely to be high on Congress's or the new Administration's list of priorities, the House and Senate Agriculture and Appropriation Committees recognize that all stakeholders are counting on Congress to pass this legislation to allow the pesticide program to continue to function and secure certainty for the regulated community.

TSCA implementation measures, required under new TSCA, are plainly dominating the time and effort of staff in the Office of Pollution Prevention and Toxics (OPPT). Since issuance of the final framework rules noted above will occur during the new Administration, the final rules are likely to differ, to a greater or lesser extent, from the proposals prepared under the Obama Administration. Two of the three framework rules will be reviewed by OMB. The Inventory reset rule was determined not to be significant.

In addition to these framework rules, EPA must also establish the Science Advisory Committee on Chemicals (SACC), which the Agency did on January 17, 2017. EPA must issue scope documents for the 10 risk evaluation chemicals announced by the Agency on November 29, 2016, which it did.

This step is required to be completed within 6 months of the announcement. The chemicals include 1,4-dioxane, 1-bromopropane, asbestos, carbon tetrachloride, cyclic aliphatic bromide cluster, methylene chloride, N-methylpyrrolidone (NMP), Pigment Violet 29, tetrachloroethylene (perchloroethylene), and trichloroethylene (TCE). EPA is expected to propose in July 2017 the TSCA fees rule authorized under TSCA Section 26(b) and to issue it in final by February 2018. Although this timeline is not required by new TSCA, EPA has expressed its desire to issue a final rule as quickly as possible to generate fees to support the TSCA program.

Conclusion

While it is early, the new Administration is showing many signs of environmental activism, certainly in walking back climate change initiatives and withdrawing the WOTUS rule. Congress also got into the act by using the seldom-used authority of the CRA to nullify rules the Obama Administration tried implementing late in 2016. There is also talk about diminishing the role of EPA's Office of Enforcement and Compliance Assurance and returning more enforcement authority to the states. When, whether, and how this could occur is unclear, as so many things are at this early date in the Trump Administration.

What is clear is that the new Republican Administration will be remarkably different than the Obama Administration in all things environmental. For those of us concerned with climate change, this difference is most unwelcome and, frankly, disturbing. Unless and until the mid-term elections change the balance of power in Congress, we can expect a bumpy and quite possibly unsettling couple of years. In that in the Senate, Democrats will be defending 25 seats as compared with the 8 seats that the Republicans will defend, the prospects for significant change are slim.

References

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