

Changing of the guard

Lynn L. Bergeson of Bergeson & Campbell examines the outlook for US industrial chemical regulatory policy

THE 2018 US mid-term elections have redefined the political winds in Washington, DC. What these currents mean for domestic chemical policy, and its impact on global chemical policy initiatives, is unclear.

Most believe that aggressive oversight by the Democrat majority in the new House of Representatives will stymie the Trump administration's initiatives, resulting in modest bipartisan cooperation or, more likely, a virtual standstill on any major environmental legislation or chemical regulation initiative.

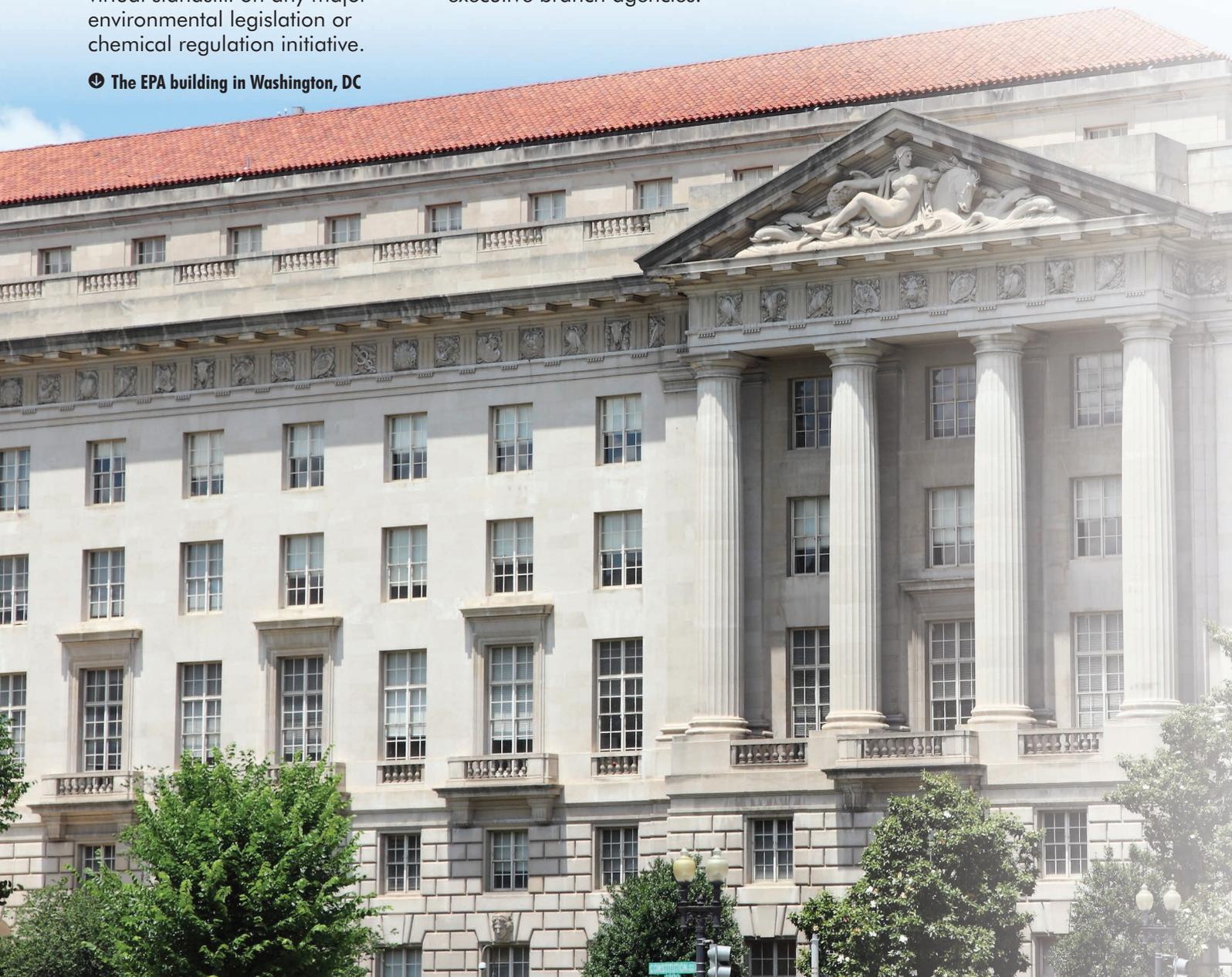
📍 The EPA building in Washington, DC

Given the one-two punch of extreme administrative congestion caused by the recent 35-day federal government shutdown and the shadow of the 2020 election, the chances are that the next 18 months will be the functional equivalent of a political draw.

Election implications

The US Environmental Protection Agency (EPA) will face increasing scrutiny by House committees as part of congressional oversight of executive branch agencies.

At least four senators who are widely presumed to be presidential candidates sit on the Environment and Public Works Committee, which has jurisdiction over the implementation of the revised Toxic Substances Control Act (TSCA). We can be assured of regular reminders of what will be characterised as the administration's neglect of climate change as a significant issue, or even an existential threat to life as we know it.



Andrew Wheeler has now taken up his role as EPA administrator



Alexandra Dapolito Dunn is the new OCSPP assistant administrator



Other significant issues include the EPA's budget and lacklustre enforcement, lead poisoning and contaminated drinking water. As presidential candidates vie for visibility, controls on toxic chemicals and the legacy of perfluorinated chemicals in drinking water in key primary states like Iowa and New Hampshire are expected to emerge as identifying issues.

EPA leadership

Two years into the Trump administration, the EPA has almost achieved a full complement of senior political appointees. The prolonged lack of an administrator following Scott Pruitt's resignation under a cloud of controversies ended with the Senate confirmation of his deputy, Andrew Wheeler.

Wheeler has not engendered the withering concerns about his policy decisions that Pruitt did in office, while his less partisan approach and his background as a member of the Washington 'establishment' undoubtedly helped curry favour. Earlier in his career, he worked in what is now

EPA's Office of Chemical Safety and Pollution Prevention (OCSPP), which then, as now, is responsible for implementing TSCA.

In December 2018, the Senate confirmed Alexandra Dapolito Dunn, the former regional administrator of EPA's Region 1 – covering Connecticut, Massachusetts, Rhode Island, Vermont, New Hampshire and Maine – as OCSPP assistant administrator. Dunn, a lawyer, previously served as executive director and general counsel of the Environmental Council of the States, an organisation of state environmental regulatory agencies. She is well regarded and enjoys broad stakeholder support.

Key administration initiatives

President Trump's arrival brought a flurry of executive orders designed to foster business investment and reduce the requirements imposed on regulated entities. There has been a continued emphasis on 'regulatory reform' initiatives, budget cuts and reforming the civil service personnel system.

For the EPA, this has meant continuing efforts to review and revise controversial air and water regulations and other media programmes, along with a new initiative to 'improve' the agency's science. The reviews of individual regulations and any proposals must follow the time-consuming rulemaking process.

Congress has not supported proposals for reducing the EPA's budget and the agency has remained capable of absorbing modest reductions without drastic effects on personnel or programme activities. With a projected 41% of the federal workforce eligible to retire in the next five years, restrictions on hiring new staff and changes to the pension scheme, the government may soon face a serious personnel crisis. The shutdown did not exactly endear government service to the federal workforce or command its loyalty.

Industrial chemicals outlook

The OCSPP has been 'drinking from the fire hose' for the past few years. It has been coping with an



overload of information and tasks as it seeks to comply with the many deadlines embedded in the 2016 amendments to TSCA, in addition to fulfilling its regularly scheduled programming.

The EPA's implementation of TSCA has gone through many changes since 2016. On the whole, its recent approach is more measured, sensible and defensible. Emerging polices have hastened new chemical approvals, more chemicals are appropriately being commercialised without restriction and more defensible restrictions are being imposed on those subject to consent order limitations and/or significant new use rules when a finding of 'not likely to pose an unreasonable risk' cannot be made. Similarly, existing chemical risk evaluations are more pragmatic.

Several initiatives are worth watching in the months ahead. First, the EPA must identify at least 20 high-priority chemicals to undergo risk evaluations and designate at least 20 low-priority chemicals. The process will be conducted in accordance with the prioritisation procedural rule, which has been legally challenged.

The agency has released the document entitled 'A Working Approach for Identifying Potential Candidates for Prioritisation' that

it plans to apply in this process. Once candidate chemicals have been identified, the EPA will initiate the prioritisation process no later than 22 December 2019, a deadline that the shutdown has made immeasurably harder to achieve.

Secondly, the EPA continues to develop risk evaluations for the first ten chemicals selected for evaluation under the new TSCA. During 2019, it will be releasing additional draft risk evaluations for peer review and public comment prior to preparing the final risk evaluations by a 16 December deadline. This is extendable to 16 June 2020, which may be more likely in view of the shutdown.

Thirdly, the agency has indicated that it intends to issue a proposed rule with revisions to the Chemical Data Reporting (CDR) rule. It will have to move quickly with its proposals so that stakeholders are fully educated well before the next reporting cycle in 2020, another challenging goal.

Fourth, look for the first TSCA Section 4 test rules in 2019. The EPA has not yet exercised its new authority to issue unilateral test orders (as opposed to rulemaking or consent agreement) under revised TSCA, but may do so this year.

Finally, the TSCA 'framework' rules – chemical prioritisation, risk evaluation and inventory notification – have all been judicially challenged. 2019 should see important developments in these cases.

Conclusion

The New Year began with a thud for the Trump administration. The Democrats grabbed control of the House of Representatives and the federal government endured an unprecedented 35-day shutdown. The brave federal workforce will do its job, despite the indignities heaped upon it, but the administration's political goals have been greatly undermined. Domestic chemical policy will be dominated by TSCA implementation initiatives that will now invite intense partisan scrutiny, conducted by a divided Congress in the shadow of the looming 2020 election. ●

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