Environmental Quality Management

# WASHINGTON WATCH

## The New Administration and International Chemical Issues

**By Lynn L. Bergeson**

As a candidate and now as president, President Trump has been uncharacteristically predictable in systematically dismantling signature environmental policies of prior administrations and ceding the United States' leadership in combating climate change to other global powers. The administration's industrial chemicals management policy has been less transparent and predictable, however. Some may have interpreted candidate Trump's notable silence on the campaign trail as support for Toxic Substances Control Act (TSCA) reform, given the broad bipartisan support it enjoyed before its enactment on June 22, 2016. Others may have assumed that candidate Trump was simply unaware of the enactment of the most sweeping legislative changes to our domestic chemical management law in four decades and the significant commercial, legal, and trade implications occasioned by enactment of the Frank R. Lautenberg Chemical Safety for the 21st Century Act (Lautenberg). President Trump has kept his TSCA cards close to his vest, and the administration's broader engagement in chemicals management on the world stage is similarly unclear. Some trends can be discerned, or at least inferred, as discussed below.

### *1. The Domestic Scene: TSCA Reform*

Before embarking on a tour of the Trump Administration's engagement in global industrial chemical matters, a brief update on domestic chemical management issues is warranted. TSCA is the federal law that provides the U.S. Environmental Protection Agency (EPA) with the authority to regulate imported, manufactured, and processed industrial chemical substances, including chemicals intended for commercial and consumer uses. Its significant legislative do-over in 2016 and the robust implementation measures required of EPA have been the focus of considerable agency efforts since June 2016. Lautenberg extensively amended TSCA, revising and

adding definitions, expanding testing authority, regulating new and existing chemicals (including for the latter's sequential prioritization, risk evaluation, and risk management steps), expanding information reporting, narrowing confidential business information protection, and tinkering with preemption, among other changes.[1] According to EPA Administrator Pruitt, "EPA's top priority for ensuring the safety of chemicals in the marketplace is the implementation of [Lautenberg], which modernizes [TSCA] by creating new standards and processes for evaluating the safety of chemicals in the marketplace within specific deadlines." (Pruitt, 2018, p.1).

As of this writing in May 2018, there is still no assistant administrator confirmed by the U.S. Senate to lead EPA's Office of Chemical Safety and Pollution Prevention (OCSPP), the office that implements TSCA and other chemical management laws. The administration's first selection, Michael Dourson, Ph.D., was criticized by the nongovernmental organization (NGO) community for his alleged "close ties" to industry, and his nomination ultimately lost the support of North Carolina Republican Senators Thom Tillis and Richard Burr based on their concerns with groundwater contamination at Camp Lejeune. The problems experienced there and elsewhere in the state became highly charged examples of what can happen when "industry advocates" ascend to positions of power.

The OCSPP is largely being managed by Nancy B. Beck, Ph.D., OCSPP's deputy assistant administrator, another alleged "industry advocate," given her prior employment at the American Chemistry Council (ACC), a trade association that represents domestic industrial chemical manufacturers. Dr. Beck's leadership has proven to be focused, effective, and practical at this critical juncture in the implementation of Lautenberg. To date, all statutorily required rulemakings have been issued in a timely manner. Many believe the three all-important "framework" TSCA rules issued in final form under the Trump Administration properly tempered some of the excesses included in the Obama Administration's proposed rules. Not everyone would agree, however, and one needs only to read a few of the Environmental Defense Fund's blog postings[2] to catch a whiff of the outrage. Virtually every new rule (and then some)[3] implementing the new law has been judicially challenged, and the road ahead promises to be deeply divisive, costly, and uncertain—not the forecast the business community longed for.

With all of that said, a few observations can be made at this early stage regarding domestic chemicals management. First, TSCA's core approach to chemicals management has not changed. Chemicals are being managed based on a showing of "unreasonable risk" to human health and the environment, and not on known "hazard," the driver of the precautionary principle that fuels the European Union's (EU) TSCA counterpart, the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH) regulation. Second, changes to TSCA's Section 5 "new chemicals" program have greatly diminished the number of new chemicals being commercialized without restrictions, slowing the pace of chemical innovation. This fact could and likely will inevitably perpetuate the commercial lifeline of incumbent chemicals that are, by and large, more toxic and less environmentally friendly than their newer replacements. It could also discourage foreign investment in new chemical innovation despite our spiffy new tax law.[4] The OCSPP's leadership is working hard to address these issues, but staff shortages, budget limitations, and the exodus of experienced EPA staff greatly confound their quick resolution. Third, amended TSCA gives EPA new authority to compel data production and assess existing chemicals that can be expected to hasten the demise of certain legacy chemicals that will be products of voluntary deselection efforts long before regulatory decisions compel that result. Fourth, animal testing alternatives are now preferred under TSCA, and new testing alternatives including advanced computer modeling, predictive high-throughput assays, and many other testing techniques will flourish and potentially replace slower, less efficient, and less humane testing strategies.

What about the Trump Administration and industrial chemical policy on the international stage? What, if anything, can be discerned at this early stage regarding the administration's engagement in global chemical management initiatives? The short answer is that not much appears to have changed -- an observation that in and of itself may be significant. Whether this is by design or oversight is unclear. A few points warrant mention and are discussed below.

## *2. The International Scene: Chemical Initiatives*

### 2.1 Strategic Approach to International Chemicals Management (SAICM)

 

Industrial chemical initiatives are grounded principally in two programs managed under the auspices of the United Nations (UN). The first is a voluntary chemicals program, the UN Environment Programme's (UNEP) Strategic Approach to International Chemicals Management (SAICM). Unlike global treaties such as the Stockholm Convention or the Montreal Protocol, the SAICM is voluntary and stakeholder-based, meaning that any group is permitted to participate. The SAICM includes 175 governments, including the United States, 85 NGOs, and representatives from industry and civil society.

At its core, the SAICM is a policy framework intended to promote sound chemical management. The SAICM was adopted by the International Conference on Chemicals Management (ICCM) in Dubai, United Arab Emirates, in 2006, and its mandate will expire in 2020, a fast approaching deadline. The SAICM supports achieving the goals set forth in the 2002 Johannesburg World Summit on Sustainable Development, which seeks to ensure that by 2020, chemicals will be produced and used in ways that minimize significant adverse impacts on human health and the environment. The main objectives of the SAICM include: risk reduction, knowledge and information, governance, capacity-building and technical cooperation, and preventing illegal international traffic.

Periodic reviews of the SAICM are undertaken by ICCM at meetings around the world. These consist of multi-day sessions, the most recent of which was convened in Rome, Italy, in November, 2017. The SAICM is scheduled to meet again in March 2018 in Stockholm, Sweden.

Given the fast-approaching 2020 expiration date, whether and if the SAICM should continue is the subject of debate. The SAICM has been considered by many to be a success, perhaps not necessarily measured in terms of achieving its stated goals by 2020, but rather, because of its success in providing a venue where stakeholders are able to meet, exchange information, collaborate, and benefit from its voluntary, stakeholder-based structure. Others point to the fact that the 2020 goals have not been achieved and suggest that a legally enforceable framework is needed. U.S. industry would likely not support any initiative that might produce a legally binding construct that resembles REACH, an option being considered and discussed. The Trump Administration, reflecting the U.S. chemical industry's

strong wishes, can be expected, however, to support extending the SAICM in its current form and continuing the United States' participation in it. Withdrawing from it entirely seems unlikely and unwise, as a United States presence is both prudent and necessary in blunting proposals that can be expected to be advanced by European and Nordic countries to embrace a REACH-like chemicals management approach. EPA's position on the subject is unclear, but a safe assumption is that it aligns with U.S. business' views.

### 2.2 2030 Agenda for Sustainable Development

The second international program is the 2030 Agenda for Sustainable Development, signed in 2015. According to the UN, "[t]he 2030 Agenda is the most transformative development agenda ever adopted by Member States of the United Nations." (UN Secretary-General, 2016, no page number). Under the 2030 Agenda, 17 Sustainable Development Goals (SDG) have been designed to "free the human race from the tyranny of poverty and want and to heal and secure our planet" (UN, 2015, page 3). The 17 goals are:

1) No poverty
2) Zero hunger
3) Good health and well-being
4) Quality education
5) Gender equality
6) Clean water and sanitation
7) Affordable and clean energy
8) Decent work and economic growth
9) Industry, innovation and infrastructure
10) Reduced inequalities
11) Sustainable cities and communities
12) Responsible consumption and production
13) Climate action
14) Life below water
15) Life on land
16) Peace, justice and strong institutions
17) Partnerships for the goals

 

The 2030 Agenda is ambitious. The Business and Sustainable Development Commission (BSDC), launched in Davos, Switzerland, in January 2016, seeks to map the economic benefits that could be available to the global business community if the SDGs are achieved. The BSDC is part of the World Business Council for Sustainable Development (WBCSD), a CEO-led global advocacy association consisting of more than 200 organizations that address business and sustainable development. The BSDC's 37 members include leaders from business, finance, civil society, labor, and international organizations.

While EPA's direct participation is unclear, U.S. chemical stakeholders recognize that much of the work necessary to achieve the SDGs falls on industry. The WBCSD is preparing a report on this topic, which is expected out in draft form by mid-April 2018. The contents of this report will provide a clearer line of sight on how industry intends to achieve the SDGs.

### 3. United States Ratification of the Stockholm Convention

Last year, a stated priority of the U.S. chemical industry was to seek the United States' ratification of the Stockholm Convention on Persistent Organic Pollutants (POP). The treaty was issued in 2001, and signed by President George W. Bush, but it was never ratified by the U.S. Senate. While most of the original dozen chemicals addressed by the convention when it went into effect in 2004 included pesticides, more recently the Persistent Organic Pollutants Review Committee (POPRC) has focused on industrial chemicals. U.S. chemical interests have expressed concern that without the United States' ratification, European and Nordic countries' influence on chemical selection, along with their decided bias in favor of the precautionary principle, could have significant adverse implications for the global chemicals market and promote hazard-based regulatory approaches as opposed to the United States' risk-based approach.

To date, there has been no recent legislative effort to ratify the convention. There was some speculation that TSCA reform would address the issue, but that did not happen. Whether the United States' ratification of the convention remains a domestic chemical industry priority and when and how U.S. legislation advances to assure this result, especially in an election year, is unclear.

 

## 4. Mercury Initiatives

Given the globally recognized risks posed by mercury exposure, the international community has been working steadily to ensure that the management of mercury is environmentally sound, while simultaneously reducing its use through increased regulations. The UNEP Governing Council has regulated mercury as a global pollutant since 2001 and catalyzed global action on mercury through the UNEP Global Mercury Partnership and the Minamata Convention on Mercury (Convention), a global treaty to protect human health and the environment from the adverse effects of mercury. The Convention is somewhat unique as it focuses narrowly on mercury, as opposed to a list of chemicals, and it specifically targets sources of mercury and specifies controls for processes, products, and industries, which is atypical for chemical treaties. President Obama's 2009 decision to support the development of a legal instrument, rather than the Bush administration's support for voluntary measures, catalyzed the international community to act, and over the subsequent four years, the United States and 140 other nations forged what ultimately became the Minamata Convention.

The United States was a major player in the Convention's development and the first country to ratify it; it entered into force on August 16, 2017. The United States ratified the Convention in November 2013 via President Obama's sole executive agreement. According to EPA, the United States' involvement is intended to ensure that the implementation of the Convention is consistent with U.S. regulations. New TSCA contains specific mercury provisions, for example, and aligning these regulations with the overarching goals of the Convention is a key area of the United States' interest. In ratifying the Convention, the United States included a declaration that amendments to any Convention annex can enter into force for the county only upon its ratification by the United States.

While the Convention was ratified under the Obama Administration, its implementation continues under President Trump. The first meeting of the Conference of the Parties to the Minamata Convention on Mercury (COP-1) took place in Geneva, Switzerland, on September 24-29, 2017. During COP-1, now Principal Deputy Assistant Secretary of State for the Bureau of Oceans and International Environmental and Scientific Affairs, Judith G.

Garber, served as the head of the U.S. delegation and participated in a special, High-Level Segment that convened ministers and other senior representatives to discuss national efforts to implement the Convention. Several key decisions were agreed on during COP-1, including:

- Formation of an ad hoc working group on mercury waste thresholds to support the prioritization of the types of waste most relevant to the establishment of thresholds and a compilation of possible approaches to the determination of such thresholds;

- Adoption of guidance on best available techniques and best environmental practices for the control of mercury emissions to the air from specified sources, including smelting and roasting processes used in the production of nonferrous metals (lead, zinc, copper, and industrial gold);

- Adoption of guidance on the preparation of national action plans (NAP) addressing the issue of artisanal and small-scale gold mining (ASGM);

- Adoption of a decision that encourages parties to identify relevant point sources of releases to land and water at the national level and to convey these to the UNEP Secretariat of the Convention (Secretariat), who will compile this information for submission to COP-2;

- Adoption of a decision that requests the Secretariat to undertake further revision of the guidance on the environmentally sound storage of mercury in conjunction with technical experts from the Basel Convention and that encourages the Secretariat to put the revised draft through a process of public consultation prior to submission to COP-2; and

- Agreement to the development of guidance on the management of contaminated land based on the draft structure and content proposed by the Secretariat and on the roadmap that had been further considered by a technical group at COP-1.

TSCA has long contained specific provisions relating to mercury. Under TSCA Section 6(f), for example, which has been in effect since 2008, federal agencies are prohibited from selling, distributing, or transferring elemental mercury unless the transfer is for the sole purpose of facilitating mercury storage or the conveyance, sale, distribution, or transfer of coal. Lautenberg added subsection (10) to TSCA Section 8(b), which requires EPA to create and publish an inventory of supply, use, and trade of mercury and mercury compounds in the United States every three years starting on April 1, 2017. This provision is intended to provide EPA with relevant information on any continued use of mercury in the United States so that EPA can identify opportunities for further mercury use reduction. This reduction could occur through proposed revisions of federal law or regulations on mercury use.

To support the implementation of the Minamata Convention, the U.S. government intends to utilize data from the inventory of mercury supply, use, and trade in the United States. Pursuant to TSCA Section 8(b), EPA published the initial mercury inventory on March 29, 2017, (EPA, 2017a) based on publicly available data on the supply, use, and trade of elemental mercury and mercury compounds, and proposed triennial electronic mercury reporting requirements on October 26, 2017,[5] (EPA, 2017b) to assist the preparation of future inventories. Congress also mandated in TSCA Section 8(b)(10)(C) that EPA "identify any manufacturing processes or products that intentionally add mercury; and … recommend actions, including proposed revisions of Federal law or regulations, to achieve further reductions in mercury use" (EPA, 2017b, p. 49564). EPA has yet to make such identifications or recommendations.

Lautenberg expanded Section 12(c), which originally addressed export of elemental mercury, to include mercury compounds and added a new provision, Section 12(c)(7), which prohibits the export of certain mercury compounds effective January 1, 2020.[6]

Exports of listed mercury compounds for environmentally sound disposal to member countries of the Organization for Economic Cooperation and Development (OECD) are excluded from the prohibition. This exclusion also does not apply if the mercury or mercury compounds are to be recovered, recycled, or reclaimed for use, or directly reused, after such export. By June 22, 2021, or five years after enactment, EPA is required to provide a report

 

to Congress that evaluates the mercury compound exports and management options in the United States for those mercury compounds.

While the United States remains engaged in activities focused on the environmentally sound management and diminished use of mercury, further efforts are required to advance initiatives established under the previous administrations, specifically the provisions established under the Mercury Export Ban Act of 2008 (MEBA). MEBA is designed to reduce the availability of elemental mercury and mercury compounds in domestic and international markets. Lautenberg amended it in 2016 by extending the timeframe for temporary generator accumulation from 2013 to 2019 and mandated that a U.S. Department of Energy (DOE) long-term mercury storage facility be operational by January 1, 2019. The DOE completed the final supplement to its Environmental Impact Statement to identify a location for the long-term mercury management and storage facility in 2013, but it has yet to issue a final decision regarding the location of the facility.

## 5. Conclusion

The United States' engagement in global industrial chemical management issues appears largely unchanged at this early stage of the Trump Administration. Since the passage of Lautenberg, EPA has continued to focus extensively on addressing the many implementation challenges required under the new law -- leaving little time for other chemical issues, domestic or otherwise. If the U.S. chemical industry had its way, United States participation in SAICM post-2020 would continue. The U.S. chemical industry, along with the global chemical industry, is expected to step up its support for and commitment to the 2030 Sustainable Development Agenda. The forthcoming WBCSD report will reveal much about how the SDGs will be achieved. Similarly, the United States' ratification of the Stockholm Convention, a priority of the U.S. chemical industry in 2017, remains high on the list of goals, but legislative action this year is unlikely. Domestic efforts to support the Minamata Convention will continue.

## References

EPA (2017a). Mercury; Initial inventory report of supply, use, and trade. Federal Register. 82 Fed. Reg. 15522 (March 29, 2017). Pp. 15522-15523.

 

Available at: https://www.gpo.gov/fdsys/granule/FR-2017-03-29/2017-06205

EPA (2017b). Mercury; Reporting Requirements for TSCA Mercury Inventory. Federal Register, 82 Fed. Reg. 49564 (Oct. 26, 2017). Pp. 49564-49585. Available at: https://www.gpo.gov/fdsys/pkg/FR-2017-10-26/pdf/2017-23225.pdf

United Nations (2015). Transforming our world: the 2030 Agenda for Sustainable Development. UN Sustainable Development Knowledge Platform. Pp. 1-41. *available at* https://sustainabledevelopment.un.org/post2015/transformingourworld

United Nations Secretary-General (2016). Deputy Secretary-General's Remarks at 2016 World Government Summit [As Delivered]. United Nations. February 9, 2016. Available at: https://www.un.org/sg/en/content/dsg/statement/2016-02-09/deputy-secretary-generals-remarks-2016-world-government-summit

## End Notes

[1] Further extensive information is available on the Bergeson & Campbell, P.C. (B&C®) TSCA Reform News & Information website, available at: http://www.lawbc.com/knowledge-resources/tsca-reform-news-info

[2] For examples, see:

https://www.edf.org/blog/2018/05/01/5-ways-chemical-safety-eroding-under-trump;

http://blogs.edf.org/health/2017/12/20/systematic-slowdown-epa-indefinitely-delays-virtually-all-proposed-actions-to-restrict-chemicals-under-tsca/?_ga=2.210750483.782636255.1529500435-726664816.1529004301; and

http://blogs.edf.org/health/2017/12/11/edf-comments-at-epas-public-meeting-on-identifying-chemicals-for-prioritization-stress-legal-requirements-and-urge-adoption-of-sound-and-fair-policies/?_ga=2.51234351.782636255.1529500435-726664816.1529004301.

[3] On January 5, 2018, the Natural Resources Defense Council (NRDC) filed a Petition for Review in the U.S. Court of Appeals for the Second Circuit of what is characterized as an EPA "final rule" issued November 7, 2017, entitled "New Chemicals Decision-Making Framework: Working Approach to Making Determinations under Section 5 of TSCA." The Framework Document, as it has come to be called, is the "final rule" at issue and was posted in EPA's docket opened for comments related to its two TSCA public meetings that took place in December 2017. It is reasonable to assume that EPA does not refer to the Framework Document as a final rule and it was not published in the *Federal Register* as a final rule because EPA believes it is a document that outlines a "conceptual" approach to how EPA may go about making decisions on new chemicals. EPA specifically states that the document, referred to as a "draft" in the *Federal Register* notice that announced the two public meetings, "outlines EPA's approach to making decisions on new chemical notices submitted to EPA under TSCA section 5" as amended by

 

Lautenberg, and includes EPA's "general decision framework for new chemicals" and a breakdown of how EPA "intends to approach each of the five types of new-chemical determinations required under the statute." The citizen action petition raises novel and interesting legal questions and is quite different from the other petitions for review that are pending, in that one was submitted for each framework final rule.

[4] According to the ACC, since 2010, chemical companies have announced more than $185 billion in new chemical investment in the U.S., more than half of which is foreign-direct investment. From: Rose-Glowacki, H.R., (2017)., Investment in the Future, Trade and Industry Investment of the US Chemical Sector. CHEManager International, December 12, 2017, pp. 30-31. Available at: https://www.chemanager-online.com/en/topics/economy-business/trade-and-industry-investment-us-chemical-sector

[5] On May 7, 2018, the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) received the mercury reporting requirements final rule for review. Pursuant to the OIRA 2018 Spring Regulatory Agenda, EPA will have issued the final rule by June 2018.

[6] The compounds are: Mercury (I) chlorine or calomel; Mercury (II) oxide; Mercury (II) sulfate; Mercury (II) nitrate; Cinnabar or mercury sulphide; and any mercury compound that the Administrator adds to the list published on determining that exporting that mercury compound for the purpose of regenerating elemental mercury is technically feasible.

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