

## Washington Watch

### Key Environmental Issues: Views from Inside the Beltway and Beyond

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With the mid-term elections fast approaching, the Bush Administration is probably feeling a bit unsettled about its ability to defend its record on environmental accomplishments. As Jim DiPeso's column in the spring issue of *Environmental Quality Management* confirmed, most Americans (74 percent of those questioned) profess to value government programs designed to keep pollution out of the air and water, and to protect wildlife. At some level, therefore, most Americans would appear to value environmental protection.

The Bush Administration's record on environmental accomplishments is, according to most environmental groups, weak if not downright bad. The Wilderness Society, for example, refers to the Bush Administration's record on public lands as "irresponsible."<sup>1</sup> The Sierra Club claims that the Bush Administration is "systematically turning back 30 years of environmental progress."<sup>2</sup> The Natural Resources Defense Council (NRDC) maintains a rolling record of specific instances of alleged Bush Administration environmental transgressions.<sup>3</sup> The list goes on and on.

This column identifies several key environmental issues that may elicit potential voter response. The environmental activist community (as well as others who might perhaps be viewed as less partisan) would agree that environmental protection has not been the cornerstone of the Bush Administration's policy on environmental matters. But a key question remains: Will this fact have any discernible impact on the mid-term elections? As the discussion below indicates, the short answer is no.

### Major Issues of Concern

While voter predilections are always difficult to discern, it is probably safe to say that voters nationwide are concerned about at least two "big picture" environmental issues: global climate change and the state of the environment in general.

Environmental issue trackers and policy mavens inside the beltway would likely tack on a few more issues -- including wetlands (in the wake of the recent Supreme Court oral argument in *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*<sup>4</sup>), EPA's ability to meet the fast-approaching August deadline for tolerance review, concerns about nanoscale materials, and enforcement issues. All these issues are discussed below.

### Big Picture Environmental Worries

#### *Global Climate Change*

Global climate change would appear to be very much on people's minds. Voters are constantly reminded of the pernicious effects of climate change by relentless media reports on

shrinking icebergs, rising sea levels, and dramatically more intense and frequent hurricanes. These facts make the issue of global warming "up close and personal," and are more compelling than a quick review of U.S. Department of Energy statistics.

As reported in *Cli-Mit Insights*, U.S. emissions of greenhouse gases continue to grow significantly. The year 2005 was the hottest year on record, and the last nine years have been the warmest years on record.<sup>5</sup>

While it is, of course, unclear whether global warming had a hand in Hurricanes Katrina and Rita, the political fallout from a painfully slow Gulf Coast cleanup effort is all too apparent. Blame has been placed squarely on those in office -- who are, nominally anyway, responsible for the slow return to normal.

The Bush Administration's official position on global warming has long been at odds with the stance of other nations and the views of scientists from many different sectors. The Administration has cited lingering uncertainties about the science of climate change as warranting its delay in pursuing more robust and mandatory efforts, including restrictions on carbon dioxide emissions and other tailpipe gases of one form or another.

Relatively recently, the Administration has seemed to become more receptive to the idea that global warming is a real issue. Whether this change is motivated by new data, international pressure, or other factors is unclear.

The overall political landscape is equally difficult to categorize and predict. In February, approximately 86 U.S. evangelical Christian leaders issued a statement pressing the federal government to take on climate change more urgently. The Evangelical Climate Initiative urges government and business leaders to address the "global warming crisis" and calls upon the U.S. government to establish mandatory limits on carbon dioxide emissions.<sup>6</sup> Plainly, this marriage of evangelical Christians and climate change advocacy makes for an interesting political calculus -- and one perhaps that the Republican leadership did not see coming.

Whether citizens will actually vote based on their perception that a candidate is or is not sufficiently addressing climate change is unclear. They appear unlikely to do so, however. The only exceptions are those voters who have been uniquely and adversely disadvantaged by events such as Hurricanes Katrina and Rita, and who thus may be motivated to send a message to incumbents they have singled out for blame because of the slow response.

### ***General Perceptions about the Environment***

A more critical factor likely to influence voters (though only at the margins) is the general perception that the current Administration is indifferent to the environment, or that its policies are even affirmatively damaging the environment. According to some pollsters, however, even among voters who care strongly about the environment, only a small percentage will vote based on environmental issues.

In a 2005 survey of 800 registered voters, the Nicholas Institute for Environmental Policy Solutions at Duke University found that 79 percent favored stronger environmental standards, but only 22 percent allowed environmental concerns to influence their vote.<sup>7</sup>

According to this survey, the disconnect is attributable to several factors, including the perceived long-term nature of environmental problems, the complexity of environmental issues, and the fact that voters view few environmental concerns as affecting them on an individual basis.

Absent a “tipping point” event -- that is, a truly catastrophic occurrence caused by some environmental shortcoming that the Administration is believed to have caused or failed to avert - it is likely that issues such as homeland security, the war in Iraq, health care, the cost of gasoline, and related economic concerns will influence voters far more directly and profoundly than will environmental matters.

### **Focused Environmental Issues**

For science policy and environmental regulatory mavens inside the beltway, the Bush Administration must address a far larger and more complicated set of issues, many of which could have far-reaching consequences in ways most Americans will neither know nor appreciate. A few key issues are discussed below.

#### ***Wetlands***

As noted above, the Supreme Court heard oral argument on February 21, 2006, in the *Rapanos* and *Carabell* cases, two Michigan actions involving Section 404 of the Clean Water Act (CWA). Section 404 establishes a program to regulate the discharge of dredged or fill material into “waters of the United States” -- a phrase that has been the subject of litigation and vigorous debate for years. Under the program, an entity must obtain a permit from the U.S. Environmental Protection Agency (EPA) before any dredged or fill materials may be discharged into waters of the United States, including wetlands, unless an exemption applies.

*Carabell* involves a 20-year long dispute over whether a forested wetland in Macomb County, Michigan should remain intact and undeveloped. *Rapanos* involves questions regarding the scope of EPA’s authority under CWA Section 404, as well as the interface between the CWA and the Commerce Clause of the U.S. Constitution.

The Supreme Court’s decision in these consolidated cases will add a new chapter to the book on the scope of federal authority under CWA Section 404 by deciding whether this authority extends to non-adjacent and non-navigable “wetlands” and ditches, and what constitutes a “point source” under the CWA.

By all accounts, during oral argument the questions from the bench were all over the map, and the outcome of the case is difficult to predict. Adding to the uncertainty is the fact that the case was among the first to be heard by Justice Samuel Alito.

All agree, however, that the decision will be landmark in scope and will define the outer limits of CWA regulation under Section 404 for years to come. If the federal government’s authority is determined to be diminished under the ruling, there could well be renewed demands for legislation to blunt what will almost certainly be a rush of new development in areas previously spared under Section 404 wetlands protection.

## ***Tolerance Reassessment***

The overriding focus of EPA's pesticide program over the next several months will be the quest to meet the Food Quality Protection Act (FQPA) deadline for completing tolerance reassessments by August 2006. To meet this ambitious deadline, the pesticide program must produce a significantly greater number of reregistration eligibility decision (RED) assessments during this period.

Over the past several years, the average number of REDs issued has been in the range of 15 to 20. In its September 23, 2005, *Federal Register* notice regarding reregistration measures and goals, EPA stated that it intended to complete 30 to 40 REDs and interim REDs each year during fiscal years (FYs) 2005 and 2006 for pesticides with associated tolerances, as well as a total of 40 REDs in FYs 2007 and 2008 for pesticides with no food uses or tolerances.

A major obstacle to meeting the FQPA deadline was the issuance in February 2006 of a final rule regarding the use of human studies in pesticide assessments.<sup>8</sup> The pesticide program must now issue proposed REDs on active ingredients that have been delayed pending issuance of this rule (prior consideration of the tolerances for these active ingredients having been prohibited by law).

Importantly in this regard, the Natural Resources Defense Council (on behalf of itself and a coalition of health and environmental advocates, farmworkers, and doctors) filed suit against EPA on February 23, 2006, in two federal circuits, the Second Circuit in New York City and the Ninth Circuit in San Francisco. NRDC claims that the final rule violates a law passed by Congress last year mandating strict ethical and scientific precautions for pesticide testing on humans.

The final rule (which was scheduled to become effective in April 2006) and the NRDC lawsuit will almost certainly slow EPA's review of certain food tolerances, and thus make the ultimate resolution of the tolerance reassessment process uncertain. This uncertainty could make pesticide manufacturers less inclined to support certain agricultural chemical products -- which could, in turn, lead to diminished use of certain pesticides, or their withdrawal altogether from the market.

While such actions could jump-start the development of new products, it could also cause temporary disarray in the agricultural commodity market. This could drive up costs for certain fruits and vegetables, as well as adversely impacting the markets for lawn care products, antimicrobials, and other agricultural chemical products.

Complicating matters further, EPA's pesticide program is slated to move its offices (in May 2006) into newly constructed space in another part of Crystal City, Virginia. This will inevitably lead to some further delay in processing times and assessment work. Once the move is made, the sole focus of the program and its assessment resources will (with rare exceptions) be the march to meet the deadline.

## ***Nanoscale Materials***

EPA devoted considerable energy to the review of engineered nanoscale materials in 2005, and is continuing to do so in 2006. As nanoscale materials increasingly find their way into a wide range of consumer products and applications, the Agency has stepped up its efforts to ensure that new engineered nanoscale materials consisting of chemical substances be reviewed appropriately under the Toxic Substances Control Act (TSCA) new chemicals program. This program currently is developing a modified premanufacture notification (PMN) review process for new engineered nanoscale chemicals.

In November 2005, the National Pollution Prevention and Toxics Advisory Committee (NPPTAC) forwarded to EPA Administrator Stephen Johnson its *Overview Document on Nanoscale Materials*. This document outlines a framework for an EPA voluntary program on engineered nanoscale materials, a complementary approach to new chemical nanoscale requirements under TSCA, and other relevant issues.

EPA is expected to launch a voluntary program for engineered nanoscale materials later this year. The Agency's consideration of such a program reflects EPA's continued preference for voluntary initiatives -- with the possible hammer of eventual TSCA Section 8(a) and 8(d) rules should stakeholders not rise to the challenge of providing the Agency with information on engineered nanoscale materials sufficient to enable EPA to assess the risks and benefits posed by such materials.

Other voluntary testing activities that have demonstrated successful track records include the high production volume (HPV) Challenge Program and the Voluntary Children's Chemical Evaluation Program (VCCEP).

Some environmental activists support the NPPTAC nanomaterials approach. Other environmental activists, however, believe that the launching of a voluntary program, without more, is by no means adequate. Whether, when, and how EPA proceeds in this regard will be the subject of considerable debate in 2006.

EPA's actions on this issue will, in the long run, have an important impact on the success of this emerging technology. The Agency has demonstrated remarkable agility in reviewing new engineered nanoscale materials under its TSCA authorities. As EPA gains experience in reviewing these new materials, its success will provide much needed assurance to the public that commercial applications of nanotechnology are safe.

Alternatively, EPA's inability to engage, for whatever reason, could impact adversely the marketing of nanoscale materials and compromise the continued growth of this technology.

## ***Enforcement Concerns***

One of EPA's more high-profile enforcement initiatives over the past several years has been its effort to reduce emissions from coal-fired power plants. In 1998, the Agency began an industry-wide enforcement initiative against such plants. EPA alleged that these power plants had for years been violating New Source Review (NSR) requirements regarding "major

modifications” of plant equipment -- thus avoiding installation of Best Available Control Technology for nitrogen oxides, sulfur dioxide, and particulate matter.

Some contended that EPA’s expansive interpretation of NSR, adopted during the Clinton Administration, was overly broad, and that the Agency was trying to effectuate significant changes in the utility industry that could best be accomplished through other means.

Despite the change of Administration brought on by the 2000 elections, settlement of lawsuits filed pursuant to the utility enforcement initiative have been slow in coming. When they are announced, some claim that the agreements “reflect little more, if anything, than what the settling companies had already started doing for business and regulatory reasons under other CAA programs and what they expect to do in the next decade.”<sup>9</sup>

The Administration’s management of this enforcement matter raises some important issues, as noted in the discussion that follows.

- ***Getting Away with It?***

First, there is a perception, rightly or wrongly, that the utilities have “gotten away with” violating the CAA. For the most part, settlements have imposed relatively modest penalties. They also typically offer protection from civil liability for future maintenance, repair, and replacement projects during the duration of the settlement agreement, and require the utilities to undertake supplemental environmental projects in one form or another.

President Bush’s response to more aggressive command-and-control regulation was the 2002 introduction of the Clear Skies Initiative. Competing bills in Congress have been reintroduced over the years in various permutations to achieve reductions in utility emissions (including mercury) and impose limitations on greenhouse gases (which the Clear Skies bill omits). Some environmental groups have criticized Clear Skies, claiming that it would lead to an increase in premature deaths and asthma attacks, as well as increasing exposure to mercury.

Moreover, under the current Administration, EPA has attempted to reform the existing NSR program to authorize most of the activities that are the subject of its enforcement initiative.

- ***EPA = Enforcement-Program Averse?***

Second, and regardless of one’s views on the NSR debate, some believe that the outcome of the NSR enforcement initiative is illustrative of a broader problem -- namely, that EPA is enforcement adverse.

Some analyses support this view. The Environmental Integrity Project (EIP), for example, reported in 2004 that EPA “engineered a 75 percent reduction in civil lawsuits filed against polluters.”<sup>10</sup> The report compares the record of the first three years of the Bush Administration to the last three years of the Clinton Administration.

Another factor sometimes mentioned in assessing enforcement strength is EPA’s enforcement budget. The 2006 budget reflected a reduction (for the second year in a row) in the

amount of money available to the states. This translates into diminished resources for enforcement since the states are largely responsible for enforcing delegated environmental programs. The proposed FY 2007 budget continues this trend.

There may be many good reasons for the diminished enforcement effort. The Bush Administration plainly is oriented more toward “compliance assurance” than toward enforcement, and resources may well be deployed to other EPA program initiatives more consistent with this approach. And it is not the case that enforcement is dead. In late 2005 EPA did, after all, settle an action that imposed the largest civil administrative penalty the Agency has ever obtained under any federal environmental statute.<sup>11</sup>

Nonetheless, enforcement actions would appear not to be a priority. The effect this may have on environmental protection in the immediate future, and for years to come, is unclear. But it is probably, on balance, not good.

## **Conclusion**

Few would challenge the notion that environmental protection is a value most Americans hold dear. As the mid-term elections approach, there may be occasional media mentions of environmental issues. The Democrats will claim they are champions of environmental protection and accuse the White House and their majority colleagues in Congress of favoring polluters.

As far as election results are concerned, however, the overall effect is likely to be minimal. History, polling surveys, and human nature demonstrate that although voters harbor strong views on environmental matters, they will cast their vote based on other issues.

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## Notes

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- <sup>1</sup> The Wilderness Society (2005, November). Bush Administration Record on Public Lands: Irresponsible Management of the People's Land. Available at <http://www.wilderness.org/library/documents/bushrecord.cfm>.
- <sup>2</sup> Sierra Club (2003, December 23). Sierra Club Picks Worst Bush Administration Environmental Exploits of 2003. Available at <http://www.sierraclub.org/pressroom/releases/pr2003-12-23.asp>.
- <sup>3</sup> NRDC, The Bush Record. Available at <http://www.nrdc.org/bushrecord/2005.asp>.
- <sup>4</sup> U.S. No. 04-1034 (oral argument February 21, 2006).
- <sup>5</sup> Cli-Mit Insights (2006, January 19). A Closer Look at U.S. Emissions Trends. Available at [http://www.climateservices.com/pdfs/Cli-Mit\\_Insights\\_US\\_Emmissions\\_Revised.pdf](http://www.climateservices.com/pdfs/Cli-Mit_Insights_US_Emmissions_Revised.pdf).
- <sup>6</sup> Evangelical Climate Initiative (2006, January). Climate Change: An Evangelical Call to Action. Available at <http://www.christiansandclimate.org/statement>.
- <sup>7</sup> Duke University, the Nicolas Institute (2005, fall). Environmental Survey Results: Why Pro-Environmental Views Don't Always Translate into Votes. Available at <http://www.nicholas.duke.edu/dukenvironment/f05/f-survey.html>.
- <sup>8</sup> 71 Fed. Reg. 6138 (February 6, 2006).
- <sup>9</sup> Jaber, M.B. (2004, winter). Utility Settlements in New Source Review Lawsuits. *Natural Resources and Environment*, 18(3), 29.
- <sup>10</sup> Environmental Integrity Project (2004, October 12). EPA Taking 75% Fewer Polluters to Court, Major Polluter Cases Down 90%. Available at [http://www.environmentalintegrity.org/pubs/101204\\_EIP\\_news\\_release\\_FINAL3.doc](http://www.environmentalintegrity.org/pubs/101204_EIP_news_release_FINAL3.doc)
- <sup>11</sup> EPA (2005, December 14). E.I. Dupont de Nemours and Company Settlement. Available at <http://www.epa.gov/compliance/resources/cases/civil/tsca/dupont121405.html>.