

WASHINGTON WATCH

2009 and Beyond: Outlook for Environmental Issues

With a new Congress in town and a new administration in charge of the U.S. Environmental Protection Agency (US EPA), 2009 promises to be an exciting and eventful

year. This "Washington Watch" column provides a summary outlook on possible directional trends and developments in the regulation of key environmental issues over the coming months and years.

Readers should keep in mind that the policies and personnel discussed here are subject to change over the next few weeks and months as the Obama administration settles in. This discussion is intended simply to provide a snapshot of what is necessarily a "moving target."

Overview: Priority Environmental Issues

Climate Change and Energy Policy

Climate change clearly will be the dominant environmental issue at the federal level in 2009. Legislation and regulatory measures to curb global warming (if attained) will represent the signature environmental achievement of the Obama administration.

The climate change issue will dominate all US EPA operations, including those primarily focused on chemicals and pesticides. It will also

The Obama administration brings change to US EPA

consume the time and attention of senior US EPA leadership and will eclipse virtually all other issues, at least for the first year of the new administration.

Obama's appointment of Carol Browner as assistant to the president for energy and climate change, Heather Zichal as deputy director of the White House Office of Energy and Climate Change, and Lisa Jackson as US EPA administrator demonstrates unequivocally that climate change will be the overarching priority for this administration.¹

The related issue of energy policy will be a key second priority. This issue may in fact be addressed along with climate change in a "package deal," at least according to statements made by Senate Majority Leader Harry Reid (D-Nevada) and Speaker of the House Nancy Pelosi (D-California).²

Whether combined or not, the climate change issue may be in play soon: Senator Reid has stated that he will try to "pass a bill capping harmful greenhouse gas emissions from utilities and other industries by" mid-2009.³

The future of climate change and energy policy could be affected significantly by the selection

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of Representative Henry Waxman (D-California) as chair of the House Energy and Commerce Committee. Waxman took over the position from long-serving Congressman John Dingell (D-Michigan). Although the ultimate policy implications of this leadership change remain uncertain, Waxman is expected to press for a more aggressive position

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on emission caps and on the timing of emission reductions than was the case under Dingell, whose district includes suburban Detroit, where the auto industry plays a crucial economic role.

Other Significant Issues

Other significant priorities that are likely to consume the new US EPA administration's time include:

- chemical control legislation, including amending (perhaps significantly) the Toxic Substances Control Act (TSCA),
- reinstatement of the Superfund tax, and
- reauthorization of the Chemical Facility Anti-Terrorism Standards, which are set to expire in 2009.

The Change Mandate

President Obama ran for election on a platform that placed "change" front and center. As noted throughout this column, the mandate for change will affect all program areas at US EPA.

Key Personnel Who Will Influence Environmental Policy

Office of Energy and Climate Change Policy

Carol Browner has been named the assistant to the president for energy and climate

change policy, a new position that emphasizes the Obama administration's commitment to addressing climate change issues as a top priority.

Browner served as US EPA administrator during the Clinton administration. As noted below, several of Browner's ex-staff assistants will now occupy important environmental positions in the new administration. With so many of her former staff members sprinkled throughout US EPA and other key offices, some believe that Browner may again direct environmental priorities to a significant extent.

Browner's deputy, Heather Zichal, previously served as Senator John Kerry's (D-Massachusetts) legislative director, where she coordinated domestic and foreign policy issues. In 2004, Zichal was in charge of the Kerry presidential campaign's energy and environmental policies.⁴ Reportedly, Zichal is well versed on climate change and other key environmental issues, and is skilled at legislative negotiations.

Council on Environmental Quality

Nancy Sutley has been confirmed as chair of the White House Council on Environmental Quality (CEQ). Sutley was formerly deputy mayor for energy and environment with the City of Los Angeles, and served as a special assistant to Carol Browner during her tenure as US EPA administrator.

Environmental Protection Agency

Lisa Jackson, former head of New Jersey's Department of Environmental Protection, was confirmed by the Senate Environment and Public Works Committee as President Obama's pick to head US EPA. Jackson previously held positions at US EPA during Browner's tenure as US EPA administrator.

Administrator Jackson has named Robert Sussman as US EPA's senior policy counsel. Sussman served as US EPA deputy administrator during the Clinton Administration and as co-chairman of Pres-

ident Obama's US EPA transition team. Sussman is knowledgeable on climate change and is expected to play an important role in policy matters.

Another key US EPA appointment was the nomination of Jonathan Z. Cannon, a law professor at the University of Virginia, as Agency deputy administrator. Cannon (who was still awaiting confirmation as of this writing) once served as US EPA general counsel and in other Agency positions under Presidents Reagan, George H. W. Bush, and Clinton.

Several other key US EPA positions, such as new assistant administrators for the Office of Research and Development and the Office of Prevention, Pesticides, and Toxic Substances, have not yet been filled as of this writing. Historically, these have been among the last positions to be confirmed.

Office of Science and Technology Policy

Dr. John P. Holdren has been appointed as head of the White House Office of Science and Technology Policy, and his confirmation appears likely as of this writing.⁵ In his post, Holdren will serve as Obama's chief science adviser and will co-chair the President's Council of Advisers on Science and Technology.

Holdren previously served as director of the Science, Technology, and Public Policy program in the Belfer Center for Science and International Affairs at Harvard's John F. Kennedy School of Government. Holdren is a physicist who is well known for his contributions to climate and energy policy.

Department of Energy

Steven Chu has been confirmed to head the Department of Energy. Dr. Chu has been heavily involved in clean energy initiatives.

Department of the Interior

President Obama has chosen Ken Salazar to head the Department of the Interior. This de-

partment can play a key role on environmental policy, especially given the importance of Endangered Species Act (ESA) issues to chemical regulation in general and pesticide regulation in particular.

Salazar, who is considered a centrist by many, has taken positions on ESA issues that some environmentalists have opposed. For example, he has decided to adopt the Bush administration's decision to remove the gray wolf from the endangered species list, angering environmentalists and leading to talk of litigation.⁶

Obama's selection of David Hayes to serve as Deputy Secretary of the Interior, a position he held under the Clinton administration, was praised by many. Others on both the left and right have criticized Hayes for his past lobbying and political activities, however.⁷ Hayes is a seasoned veteran on Department of Interior matters, and led the Obama Transition Team at the department.

Department of Agriculture

Former Governor Tom Vilsack of Iowa has been confirmed as Secretary of Agriculture. He is expected to promote the use of biotechnologies and biofuels. Given his background in Iowa, Vilsack also is expected to support the bulk of federal farm programs as currently enacted.

Some observers considered Vilsack to be "too close" to agribusiness. By contrast, Obama's choice for Deputy Secretary of Agriculture, Kathleen Merrigan, is viewed as a champion of sustainability.⁸

Office of Management and Budget

Peter Orszag has been confirmed as director of the White House Office of Management and

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Budget (OMB). Orszag is the former director of the Congressional Budget Office.

It has been announced that Cass R. Sunstein, a professor at the University of Chicago Law School and visiting professor at Harvard, will be nominated as director of OMB's Office of Information

and Regulatory Affairs. President Obama's selection of Sunstein has drawn fire from the Center for Progressive Reform (a research and educational group of legal scholars mostly positioned to the left

of the policies maintained by the Bush administration), largely because of Sunstein's support for greater use of cost-benefit analysis when analyzing regulations.⁹

In the House of Representatives, the unexpected ascent by Congressman Waxman to leadership of the Energy and Commerce Committee will significantly affect US EPA's operating environment.

The 111th Congress

Congress will continue to have a significant impact on shaping US EPA programs and priorities. The 111th U.S. Congress, which took office on January 3, 2009, reflects the significant gains made by Democrats in the November 2008 elections.

Senate Environment and Public Works Committee

Senator Barbara Boxer (D-California) will serve as chair of the Senate's Environment and Public Works Committee, as she did last session. She will undoubtedly continue to press for strongly protective environmental policies, interpretations, and initiatives across US EPA's entire regulatory universe. A February 25 hearing on emerging climate change science signaled the committee's keen interest in this topic.

Boxer has reorganized the Environment and Public Works Committee and has created new subcommittees that telegraph an interest in Su-

perfund, as well as support for a legislative fix that would clarify the scope of the Clean Water Act. New subcommittees approved by voice vote on February 12 include:

- Transportation and Infrastructure—chaired by Senator Max Baucus (D-Montana);
- Clean Air and Nuclear Safety—chaired by Senator Thomas Carper (D-Delaware);
- Superfund, Toxics, and Environmental Health—chaired by Senator Frank R. Lautenberg (D-New Jersey);
- Water and Wildlife—chaired by Senator Ben Cardin (D-Maryland);
- Green Jobs and the New Economy—chaired by Senator Bernard Sanders (D-Vermont);
- Children's Health—chaired by Senator Amy Klobuchar (D-Minnesota); and
- Oversight—chaired by Senator Sheldon Whitehouse (D-Rhode Island).

House Energy and Commerce Committee

In the House of Representatives, the unexpected ascent by Congressman Waxman to leadership of the Energy and Commerce Committee will significantly affect US EPA's operating environment. Waxman's success signals a significant shift toward more aggressive proposals on health care, energy, and environmental protection across the board.

In particular, TSCA reform is expected to be a priority. The Subcommittee on Commerce, Trade, and Consumer Protection convened a hearing on February 26 to discuss revisiting TSCA.¹⁰

Congressional Oversight Hearings

Congressional oversight hearings during the last two years have been quite critical of US EPA—and encouraging to the environmental advocacy community. Now, with Democratic control of both Congress and the White House, majority leadership in Congress will need to recalibrate their advocacy

in terms of being critical of the current US EPA administration's programs and practices.

Broader Options for Advocacy Groups

Given the advent of a Democratic administration and stronger Democratic majorities in Congress, advocacy groups will have a different menu of choices with which to pursue their goals, as well as expanded horizons for developing new initiatives.

Under the Bush administration, judicial activism was the option of choice, born in large part from the lack of alternatives. Now, nongovernmental organizations (NGOs) that institute lawsuits will be challenging positions put forth by a Democratic administration that is expected to be an ally.

In some cases, of course, fundamental differences will still drive activists' litigation strategy. In other cases, there will be a more cooperative approach that may foster more favorable settlements.

NGO advocates can be expected to use "investigations" and "exposés" to identify and promote issues of concern. There will also be an even more cooperative context for critical reports from the General Accountability Office, which may help move along issue sets.

New Directions—and New Assumptions

Given the overarching environmental priorities of climate change and energy policy, the new US EPA (as well as related federal agencies) will have a full agenda. At the same time, certain US EPA offices that are less directly involved with climate and energy issues will also have new leadership. They too will be busy with ensuring that their environmental constituencies are addressed and that agendas are identified and implemented.

It is simplistic—but relevant for a starting point—to assume that the new administration

will adopt a skeptical approach to environmental actions taken by their predecessors in the White House. Since the Bush administration was widely viewed as being anti-environment, the new administration might be expected to consider almost all environmental initiatives and decisions from the past eight years to be very suspect. This assumption may be contrary to reality in many cases, but it could well be an explicit consideration in evaluating continuing initiatives or approaches.

Thus, for example, although the implementation of the Food Quality Protection Act (FQPA) is generally considered to have been completed successfully, there probably will be some initial bias that "more needs to be done."

The new leadership will be prodded to make significant changes to address the errors of omission and commission that are presumed to have occurred under the Bush administration. For example, there are reports that transition team members have inquired about the current status of the US EPA Office of Pesticide Programs worker protection actions.

Making Changes and "Getting Tough"

Given the new emphasis on climate and energy concerns, there will be less attention paid to issues such as chemical management, at least in the earliest days of the new US EPA administration. At the same time, the new leadership will want to make an impression and show they are working toward change. Accordingly, the new team likely will begin to take action or make announcements starting midyear (or even earlier) in order to exhibit strong environmental leadership.

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This action could take many forms: new initiatives concerning “tougher enforcement,” investments in environmental research (in areas such as climate change or risks to children), or specific regulatory initiatives (e.g., revocations of tolerances for certain pesticides).

To some degree, this early period is the most likely time for public communications errors—especially since the new officials have to learn exactly what their programs do and how far their jurisdiction extends. As they learn (and after some initial period of adjustment), they likely will become more circumspect. The new US EPA leadership will soon realize that if they help cre-

ate a public panic over, for instance, chemicals or pesticide residues in food, they are the ones who will have to deal with it.

One important player for US EPA in this arena will be the Office of Research and

Development. The leadership of this office will play a pivotal role in setting the tone and direction for how the Agency navigates any ongoing or newly identified “chemicals of the week.”

As the full set of new US EPA appointees finally roll in, and as new regional administrators are appointed, there will be even more pressure to “make an impact” or announce new initiatives. This will likely come toward the last quarter of 2009, as the new team fully settles into place.

A similar galvanizing process is occurring within Congress, as members identify issues of concern and attempt to make decisions about what to pursue and when. There is one key difference from the executive branch, however: Members of Congress are less responsible for having to resolve any problems they highlight as they press federal agencies for action.

Issues for Industry

Several key issues may have a particularly direct effect on industry, especially the chemical manufacturing and processing sectors.

Chemical Testing and Control

Chemical control initiatives will likely be the most visible early priority directly pertinent to industry interests in the chemical manufacturing and processing sectors. In both US EPA and Congress, there will be renewed emphasis on chemical testing and control.

Indeed, this has already begun with US EPA’s vigorous launch of the Chemical Assessment and Management Program (ChAMP) and its two key component parts, the TSCA Inventory Reset Program and the Inorganic High Production Volume (IHPV) Challenge Program.¹¹

In her first message to US EPA employees, Lisa Jackson identified her top priorities. Importantly, TSCA reform would appear to be among them. With respect to “managing chemical risks,” she stated:

More than 30 years after Congress enacted the Toxic Substances Control Act, it is clear that we are not doing an adequate job of assessing and managing the risks of chemicals in consumer products, the workplace and the environment. It is now time to revise and strengthen EPA’s chemicals management and risk assessment programs.¹²

On the legislative side, the existing template is the Kid-Safe Chemicals Act, which was introduced by Senator Frank Lautenberg (D-New Jersey) and others last year, and which is expected to be re-introduced. The bill is an attempt to meld FQPA assessment standards (mandatory safety factors for children’s exposures) with approaches taken by the European Union’s (EU’s) Registration, Evalua-

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tion, Authorization, and Restriction of Chemicals (REACH) program (testing and control).

The bill as introduced in 2008, however, includes numerous provisions that are either contradictory or unlikely to be contained in any enacted final legislation. For example, it would legislate a firm risk assessment standard of one-in-a-million risk for B2 carcinogens—risk assessment terminology not relied on by US EPA even during the Clinton administration.

The expectation is that any new chemical control legislation ultimately adopted will make significant changes to all elements of the current law, requiring vastly more testing and many more use-specific evaluations. It also would likely be imposed on the entire universe of industrial chemicals regulated by TSCA, including both new and existing chemical substances.

Designing an approach that balances the goal of more thorough testing and evaluation of chemicals with the need to prioritize among a vast universe of potentially covered substances will not be accomplished within a legislative forum. Even assuming the adoption of an approach like that used under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), which has over time mostly proven successful, the question will remain as to how to triage tens of thousands of chemical substances—whether by volume, hazard indicator, or other identifier.

NNI Reauthorization

Legislation to reauthorize the National Nanotechnology Initiative (NNI) is being revisited early in the 111th Congress, as expected. The NNI Reauthorization bill that passed the House in the 110th Congress was reintroduced in early January, and the NNI Amendments Act overwhelmingly passed the House on February 11, 2009.

The bill may be headed for revision, however, in light of negative response by the National Research Council to the federal “Strategy for Nano-

technology-Related Environmental, Health, and Safety Research,” which was released in February 2008 by the Subcommittee on Nanoscale Science, Engineering, and Technology of the National Science and Technology Council.¹³

Chemical Facility Anti-Terrorism Standards

The currently existing Chemical Facility Anti-Terrorism Standards authorized by Congress (and issued by the Department of Homeland Security) are set to expire in October 2009.¹⁴ H.R. 5577, introduced last year, would extend and modify the current standards. It would also impose new private-sector mandates on owners and operators of certain types of chemical facilities, including requiring owners and operators to assess methods for reducing the impact of terrorist attacks on their facilities. Additional new legislation is expected to be introduced soon.

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OPPTS Activities

US EPA’s Office of Prevention, Pesticides and Toxic Substances (OPPTS) will likely play a key role in regulatory initiatives that directly affect industry over the next few months and years. Areas where OPPTS can be expected to be especially active are highlighted in the sections that follow.

Chemical Control Initiatives

Using ChAMP, OPPTS will work to fulfill U.S. commitments made pursuant to the Security and Prosperity Partnership of North America, which gave rise to the Montebello Agreement on assessment and management of chemicals. Under this agreement, the United States committed to complete screening-level hazard and risk characterizations and to initiate action (as necessary) on

more than 6,750 chemicals that are produced in quantities of over 25,000 pounds. These actions are to be completed by 2012.¹⁵

US EPA's commitment to ChAMP—and to the more recently announced ChAMP enhancements (the TSCA Inventory Reset Program and the IHPV Challenge Program)—is expected to command significant Agency time and resources in 2009 and beyond. Senior OPPTS staff plainly are enthusiastic about the program. In addition, the output achieved through ChAMP will provide a much-needed response to growing concerns about the state of domestic chemical regulatory measures in the United States.

While administrative initiatives are unlikely to prevent legislative action to further regulate chemicals, they may well soften the “hit” that OPPTS might otherwise take without them.

It is anticipated that both Congress and environmental advocates will show increased interest in enhanced chemical regulation, particularly in light of REACH's growing momentum within the EU. While administrative initiatives are unlikely to prevent legislative action to further regulate chemicals, they may well soften the “hit” that OPPTS might otherwise take without them.

Regulation of Nanotechnology

OPPTS is also expected to focus extensively on all things nano. The year 2008 saw an unprecedented number of regulatory/policy developments pertinent to nanoscale materials. Early in the year, OPPTS launched its Nanoscale Materials Stewardship Program (NMSP).

On January 12, 2009, the office issued its interim report on the NMSP, reporting some success with attracting participants to its Basic Program, but less success recruiting In-Depth Program participants.¹⁶ US EPA has announced that it will issue a final evaluation in April 2010. The

results of these assessments could well inspire additional regulatory action or accelerate the pace of initiatives in the pipeline.

In October 2008, OPPTS stated publicly that carbon nanotubes are presumed to be “new chemicals,” thus requiring TSCA Section 5 pre-manufacture notification. Manufacturers and importers of carbon nanotubes were given until March 1, 2009, to file any required notifications. Those who neglected to do so could potentially be on the receiving end of Agency enforcement action after that date.¹⁷

US EPA also has taken TSCA regulatory action on alumina and silica nanoparticles, issuing significant new use rules for these substances in November 2008.¹⁸

Moreover, the Agency has requested comment on a citizen petition filed last May seeking regulation of nanosilver and products containing nanosilver. This request for comment telegraphs cross-program interest in the citizen petition and suggests that US EPA wants to address the petition in a thoughtful, deliberate way.

Many believe that these initial regulatory initiatives are merely the start of more comprehensive regulatory measures that US EPA will pursue in 2009 and after with respect to nanoscale materials.

Other Areas of OPPTS Interest

In other areas affecting OPPTS, the Agency's agenda for change likely will also include:

- greater emphasis on risks to children and special caution when regulating chemicals or products that children might be exposed to;
- renewed emphasis on environmental justice issues, which could affect decisions in both pesticides and toxics programs;
- increased scrutiny regarding the effectiveness of the Office of Pesticide Programs' Worker Protection Standard for Agricultural Pesticides

and consideration of tougher standards and requirements (this will also be incorporated as an environmental justice issue);

- attention to the results of biomonitoring studies showing exposure to chemicals from uncertain pathways (with limited data about potential risks that might result);
- “right to know” initiatives requiring disclosure of information on chemical use and releases, along with product labeling disclosures (pressure to disclose certain information that currently is allowed to be claimed as confidential business information, including wider and earlier release of production data or toxicological studies);
- more peer review of proposed decisions in order to ensure that they are based on “good science,” with increased emphasis on conflict-of-interest screening criteria;
- renewed emphasis on the potential for risk assessment modeling to incorporate the effects of low-dose exposures;
- interest in how chemicals and pesticides may possibly affect the endocrine systems of humans and animals (this will be especially driven by the FQPA requirements for endocrine effects testing);
- more cross-media initiatives that might continue to blur the autonomy of FIFRA authority over regulated products (e.g., requiring certain pesticide uses to have water permits);
- toxics use reduction activities, perhaps wrapped in the cloak of chemical plant security provisions and hazardous material transportation restrictions;
- initiatives to inform consumers and foster market adoption of greener products, encourage recycling of packaging, reduce carbon footprints, and the like;
- proposals aimed at requiring international trade agreements to include greater assurance of compliance with environmental standards

in order to help “level the playing field” for U.S. entities; and

- greater emphasis on international approaches and agreements for attaining environmental objectives (e.g., not only seeking Senate ratification of the Stockholm Convention on Persistent Organic Pollutants, but actually using it).

Endangered Species Act

Pesticide Registration and Use

Endangered Species Act (ESA) issues will continue to garner considerable attention—with potentially significant effects on pesticide registration decisions and pesticide use. NGOs have focused sizeable resources on challenging ESA compliance in the courts, with some major successes. This has required industry to devote considerable attention to defending litigation and ensuring that appropriate information is before the courts, as well as implementing court decisions and making efforts to ensure that the regulatory process is improved.

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ESA Consultation Process

The Bush administration’s attempts to resolve the various issues that plague the ESA consultation process between US EPA and the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) had limited success. These issues will likely remain a key concern for the Obama administration.

Recent headlines have focused on a final rule published jointly by FWS and NMFS on December 16, 2008. This rule is intended to allow other federal agencies to decide for themselves whether

federal actions threaten protected species. Even if they make that determination, federal agencies could nevertheless consult with FWS and NMFS informally, but that process would be limited to 60 days, which would be a significant change from current requirements. The rule also is intended to minimize consideration of the impacts of climate change on protected species.¹⁹

Several NGOs are challenging the rule in U.S. District Court in the Northern District of California. The Obama administration will also be expected to support efforts to propose changes to the rule to address NGO concerns.

Polar Bear Protection

Another recent action that has garnered much attention—and will likely be a focus of Obama administration efforts—is the Interior Department's December 16 final special rule adopting for the polar bear the protections contained in the Marine Mammal Protection Act and the Convention on International Trade in Endangered Species of Wild Fauna and Flora.²⁰

The polar bear was listed as threatened based on climate change concerns, although Bush administration officials were reportedly reluctant to do so. The December 16 rule, which was issued under ESA Section 4(d), has been criticized by NGOs for not doing enough. The final rule helps streamline determinations regarding which activities are allowed in the bears' habitat, but it does not impose any new requirements.

The rule is of particular interest because it is being driven by climate change issues. This is another case where the Obama administration's focus on climate change may well have wide-reaching impacts.

Pesticide-Related Issues

Endocrine Disruptor Screening Program

US EPA made progress toward implementing its Endocrine Disruptor Screening Program in 2008: developing a battery of validated assays to screen chemicals for their potential to interact with the endocrine system; identifying an initial group of chemicals for testing (many of which are pesticide ingredients); and describing procedures for issuing test orders.²¹

These actions evoked response from industry, which pointed out that a rich collection of data has already been gathered on pesticide chemicals. Industry argued that screening-level studies should not be required for pesticides when more substantial studies are already available for these chemicals. There was also considerable comment provided on the Agency's proposed endocrine-disruptor policies and procedures.

US EPA expects to begin issuing test orders for Tier 1 screening of the initial list of chemicals in early 2009. Testing for potential endocrine effects was a priority for the Clinton administration and could be the subject of more aggressive activity by the Obama administration. FQPA-mandated endocrine testing requirements have been a continued focus of the advocacy community, so the new US EPA leadership team can be expected to make this issue an early priority.

Food Quality Protection Act

FQPA implementation during the Bush administration is generally considered to have been a success. Only a few pesticide reviews have not been completed. For those that remain, however, there may be significant battles over US EPA positions on restricting or eliminating certain pesticide products.

There will be questions about underlying policies used so far during FQPA implementation, especially the additional tenfold (or 10X) safety

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factor for infants and children. Some reports suggest that the transition team has inquired about end-use product reregistration. The questions reportedly have centered on whether the requirements and timelines for end-use product changes outlined in the Reregistration Eligibility Decisions (REDs) for active ingredients have actually been captured in end-use product labels. This interest may lead to a renewed emphasis on the legal significance of REDs and on the basis for the US EPA decisions they contain.

Pesticide Use Reduction

The new administration will likely renew calls for “pesticide use reduction” and less prophylactic use of pesticides. Pesticide use in schools will again become an issue, with school districts perhaps being encouraged to use fewer pesticides, or none at all.

There may also be calls for allowing—if not encouraging—states to develop their own (differing) approaches to these issues. This potentially could lead to an array of conflicting or inconsistent standards for using pesticides in homes, schools, and public facilities.

It should be noted that most discussions of pesticide use do not recognize that antimicrobial cleaning products could possibly be included in requirements concerning “pesticides.” This misunderstanding might cause problems if, for example, a city or school district proposes not to use any pesticides in its facilities. Many may assume that such a proposal would cover only insecticides and herbicides, not realizing that antimicrobial cleaning products also could be affected.

Training for Persons Who Apply Pesticides

There likely will be proposals to require mandatory minimum training for persons who apply general-use pesticides commercially. Policymakers will have to wrestle with the question of what

training requirements, if any, are appropriate for the various categories of workers who may apply pesticides, including pest control operators, landscape technicians, and institutional custodial staff.

Concerns About Chemical Testing With Human Research Subjects

Chemical testing that involves human research subjects remains a controversial issue. As such, it can be expected to face further scrutiny, and perhaps increased restrictions. At a minimum, chemical testing will be slowed down as the new Obama administration team is briefed on the issue.

Once they come to understand the options and trade-offs, the new administration most likely will acknowledge the need for some testing with human participants.

There is a small chance that some kind of blanket prohibition could be proposed. The reach of any such ban would have to be relatively narrow, however, so as not to adversely affect the ability of the Agency’s chemical testing program to meet its objectives (which include producing reliable information about potential occupational risks).

Some believe that Senator Boxer plans to seek restrictions on human studies as part of a TSCA reform package. Moreover, any such TSCA provision also might be made applicable to FIFRA studies if Senator Boxer believes that the current FIFRA rule is not sufficiently protective.

The direction these policies may take could in some measure depend on the impetus they are given by challenges to the rule currently pending in the courts—most notably in the Second Circuit Court of Appeals, where a decision could be issued at any time.

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Superfund Issues

The current emphasis on promoting economic recovery may lead to more intense interest in Superfund issues over the next year. US EPA believes that its continued focus on cleaning up and redeveloping contaminated sites could contribute to economic growth by creating “green” jobs. Moreover, US EPA Administrator Jackson’s personal experience

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with Superfund cleanups may provide a further impetus for action in this regard.

Additional regulatory and legislative priorities related to Superfund include:

- reducing the number of sites where human exposure to contamination is not yet under control;
- establishing institutional controls (e.g., zoning restrictions) at sites where cleanup and construction have been completed;
- issuing final cleanup plans (known as “records of decision”) for certain larger, more complex sites;
- backing efforts to enact “good Samaritan” legislation, previously introduced by Senator Udall (D-Colorado), which would benefit the Superfund program by giving liability protection to environmental advocacy groups that volunteer in the cleanup of contaminated sites; and
- reinstating the Superfund tax, which expired in 1995 (the expired provision used revenue from a tax on oil and chemical company profits to create a trust fund); several reauthorization bills have been introduced, but none has been enacted.

US EPA Administrator Priorities

In her inaugural memo to US EPA employees, Administrator Lisa Jackson identified several

regulatory priorities, as noted in the following sections.²²

Reducing Greenhouse Gas Emissions

Jackson’s memo emphasized once again the importance that the Obama administration will place on climate change, stating:

The President has pledged to make responding to the threat of climate change a high priority of his administration. He is confident that we can transition to a low-carbon economy while creating jobs and making the investment we need to emerge from the current recession and create a strong foundation for future growth. I share this vision. EPA will stand ready to help Congress craft strong, science-based climate legislation that fulfills the vision of the President. As Congress does its work, we will move ahead to comply with the Supreme Court’s decision recognizing EPA’s obligation to address climate change under the Clean Air Act.

Improving Air Quality

Administrator Jackson also signaled an interest in air quality issues, stating:

The nation continues to face serious air pollution challenges, with large areas of the country out of attainment with air-quality standards and many communities facing the threat of toxic air pollution. Science shows that people’s health is at stake. We will plug the gaps in our regulatory system as science and the law demand.

Managing Chemical Risks

As noted above, Administrator Jackson emphasized the need to “revise and strengthen” US EPA’s management of chemical risks.

Cleaning Up Hazardous Waste Sites

With respect to hazardous waste sites, Jackson stated, “EPA will strive to accelerate the pace of cleanup at the hundreds of contaminated sites across the country. Turning these blighted properties into productive parcels and reducing threats to human health and the environment means jobs and an investment in our land, our communities and our people.”

Protecting Water Resources

Jackson also emphasized the importance of improving water quality regulation, stating:

EPA will intensify our work to restore and protect the quality of the nation’s streams, rivers, lakes, bays, oceans and aquifers. The Agency will make robust use of our authority to restore threatened treasures such as the Great Lakes and the Chesapeake Bay, to address our neglected urban rivers, to strengthen drinking-water safety programs, and to reduce pollution from non-point and industrial dischargers.

Some Early Predictions

At this early stage, predictions are difficult and speculative. Nonetheless, there are a few key points that should be kept in mind:

- Both the Obama administration and Congress will have many pressing issues to address. Environmental concerns likely will be viewed (at least initially) as less significant than certain other problems, such as the economy.
- The highest priority for the new US EPA administrator will be climate change. This has little immediate connection to issues that most clearly affect industry, such as regulation of chemicals and nanotechnology (ex-

cept that any increased resources used to design or implement climate change programs will siphon resources from other parts of the Agency, such as OPPTS, that deal with these issues).

- The new leadership team will probably assume (at least initially) that all decisions made and initiatives undertaken by the Bush administration were strictly “anti-environment” across the board. This bias will gradually subside, but actions taken in the first months of the new administration could be strongly influenced by this belief.
- Although FQPA implementation is generally viewed as a success, some clamor will be heard about pesticides, especially with regard to children’s exposure and endocrine disruptor effects.
- The head of OPPTS will likely need to spend more time, at least initially, on chemical testing and control issues (including TSCA amendments, ChAMP, and nanotechnology) than on pesticides.
- There is always a risk that some new “chemical of the month” will suddenly appear on the public’s radar screen, giving rise to calls for regulation. It is difficult to predict how the Obama administration might react in such a case. With a new team in charge trying to establish a reputation, past models of interaction may not be good predictors of the path that will be followed.

Environmental concerns likely will be viewed (at least initially) as less significant than certain other problems, such as the economy.

At this early stage, the best advice is, by definition, of a generic nature: Entities regulated by US EPA (and especially by OPPTS) will benefit from good corporate stewardship. Now more than ever, it is crucial to comply with all applicable environ-

mental requirements. Regulated companies and their trade associations should strive to maintain good working relationships with all levels of US EPA and with Congress, engaging constructively with regulatory authorities even when there are disagreements over particular matters or policies.

Notes

1. See, e.g., Walsh, K. T. (2009, March 9). Carol Browner on climate change: "The science has just become incredibly clear." U.S. News & World Report. Available online at <http://www.usnews.com/articles/news/energy/2009/03/09/on-climate-change-the-science-has-just-become-incredibly-clear.html>.
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11. See ChAMP Web site at <http://www.epa.gov/champ/>.
12. Jackson, L. P. (2009, January 23). Memo to EPA employees. Available online at <http://www.epa.gov/administrator/memo-toemployees.html>.
13. Available online at http://www.nano.gov/NNI_EHS_Research_Strategy.pdf.
14. For discussion of the standards, see:
Bergeson, L. L. (2007, Summer). Washington watch: Chemical Facility Anti-Terrorism Standards: The final rule is out, but the debate continues. *Environmental Quality Management*, 16(4), 75–82.
Bergeson, L. L. (2007, Autumn). Washington watch: Chemical Facility Anti-Terrorism Standards: Chemicals of interest. *Environmental Quality Management*, 17(1), 71–74.
15. For discussion of the Montebello Agreement, see Bergeson, L. L. (2008, Spring). Washington watch: Chemical management, North American style. *Environmental Quality Management*, 17(3), 89–94.
16. The report is available at <http://www.epa.gov/oppt/nano/nmsp-interim-report-final.pdf>.
17. Toxic Substances Control Act Inventory status of carbon nanotubes, 73 Fed. Reg. 64946–64947 (October 31, 2008).
18. Significant new use rules on certain chemical substances, 73 Fed. Reg. 65743–65766 (November 5, 2008).
19. Interagency cooperation under the Endangered Species Act, 73 Fed. Reg. 76272–76287 (December 16, 2008).
20. Endangered and threatened wildlife and plants; special rule for the polar bear, 73 Fed. Reg. 76249–76269 (December 16, 2008), amending regulations at 50 C.F.R. part 17.
21. See Endocrine Disruptor Screening Program Web site, <http://www.epa.gov/endo/index.htm>
22. Jackson, L. P. (2009, January 23). Memo to EPA employees. Available online at <http://www.epa.gov/administrator/memo-toemployees.html>.

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