

Washington Watch

Obama's Second Term: What Does It Mean for US EPA and the Regulated Community?

Congress may be gridlocked, but the Administration will continue to move forward on its regulatory agenda

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President Obama won a decisive victory on November 6, 2012, and the forecast for the next four years is clearer now than it was pre-election. This column offers some preliminary observations on what lies ahead for domestic environmental management issues at the legislative and regulatory levels.

This column was written in December 2012 — after the election but before the new Congress began its work. The issues discussed here are likely to develop more fully as the new term unfolds.

The Hill: Little Prospect for Compromise

The 112th Congress will likely be remembered less for what it did than for what it failed to accomplish. Before adjourning for the November elections, Congress had approved only 196 bills that were enacted into law. By contrast, the 104th Congress produced legislation resulting in 333 public laws.

The hope is that the 113th Congress will be more productive. A quick reality check suggests a different conclusion, however. Both chambers have experienced significant turnover — due in part to redistricting and in part to dismay over Congressional gridlock. The newness of the chambers' inhabitants does not bode well for compromise.

Senate leadership for both parties will remain largely unchanged over the next two years. Majority leader Harry Reid (D-NV) will maintain his position. On the Republican side, minority leader Mitch McConnell (R-KY) also continues in his leadership position. In the House, Representative John Boehner (R-OH) will keep his position as speaker, while Eric Cantor (R-VA) will continue as majority leader. Representative Nancy Pelosi (D-CA) will continue to serve as minority leader.

Key Congressional Committees

Several Congressional committees have jurisdiction over environmental matters. The paragraphs that follow offer some brief observations on their leadership.

Senate Energy and Natural Resources Committee

With Senator Jeff Bingaman (D-NM) having retired, Senator Ron Wyden (D-OR) will chair the Senate Energy and Natural Resources Committee. This will be the first time since 1994 that a senator from a state other than New Mexico or Alaska will head the committee. Senator Lisa Murkowski (R-AK), whose father chaired the committee beginning in 1995, will continue as ranking member.

Senate Environment and Public Works Committee

Senator Barbara Boxer (D-CA) will continue as chair of the Senate Environment and Public Works Committee. Senator David Vitter (R-LA) will become the new ranking member now that Senator Jim Inhofe (R-OK) has become ranking member of the Senate Armed Services Committee. Senator Vitter, who has constituents in the oil and chemical sectors, has been an active participant on key environmental issues, including Toxic Substances Control Act (TSCA) reform and Integrated Risk Information System reform. Senator Vitter is widely rumored to be authoring TSCA reform legislation (with industry backing).

House Committees

Several House committees have jurisdiction over various aspects of environmental and energy legislation, including the Energy and Commerce Committee, the Natural Resources Committee, and the Ways and Means Committee.

Representative Fred Upton (R-MI) will continue to serve as chair of the Energy and Commerce Committee. Representative Henry Waxman (D-CA) will continue as ranking member.

Representative Doc Hastings (R-WA) will continue to serve as chair of the Natural Resources Committee (unless he becomes chair of the Rules Committee), with Representative Ed Markey (D-MA) continuing as ranking member.

Legislative Priorities

In terms of overall legislative priorities, the picture is clear: fiscal cliff in the short term, with tax and immigration reform thereafter. The picture for environmental legislation is less clear.

Given the makeup of the House, energy legislation is unlikely to emerge. The Republican majority in the House has been quite hostile to the United States Environmental Protection Agency (US EPA), and this is unlikely to change in the new Congress. This means that the courts and the executive branch will continue to be the primary drivers for domestic energy policy. As discussed below, the Obama Administration is expected to continue its greenhouse gas (GHG) regulatory agenda, but legislative efforts are not needed to continue these policies.

The need to reform TSCA remains one of the few legislative constants in Washington. Stakeholders have long agreed on the concept, but lack alignment on the details — a situation that has not changed post-election. The House remains under solid (and perhaps even more partisan) Republican control, while the Democrats held onto the Senate. Both chambers lost moderates, however, which means that gridlock is almost guaranteed to continue, even with Senator Vitter's rumored action on TSCA reform.

Another wildcard is the prospect of changes to the Chemical Facility Anti-Terrorism Standards (CFATS) in 2013. Widespread disappointment with the slow pace of the CFATS program may lead Congress to reconsider the Department of Homeland Security's jurisdiction over security measures at chemical production, storage, and transport facilities that could be targeted by terrorists.

US EPA Leadership

Administrator Lisa P. Jackson is expected to step aside and make way for a new US EPA Administrator. Administrator Jackson has endured heavy criticism from the Republican-led House, particularly on climate change and related air regulatory and policy issues. New leadership may offer a more promising platform on which to launch new environmental initiatives (and continue existing ones). In the aftermath of Super Storm Sandy, it is doubtful that President Obama's concern with climate change has diminished.

Deputy Administrator Bob Perciasepe is the presumptive successor to Administrator Jackson, but other names are also being circulated.

Perciasese is experienced, widely respected, and (perhaps most importantly) Senate “confirmable” — a trait the Obama Administration is desperately seeking.

Acting Assistant Administrator for Toxics Jim Jones is expected to be confirmed; he has proven to be a capable, respected, and effective leader. In the new term, Jones can be expected to pursue US EPA’s enhanced chemical management agenda. He will also most likely continue to rely upon innovative (and sometimes aggressive) interpretations of TSCA to achieve the Agency’s policy goals.

As for other assistant administrators, it is unclear whether Gina McCarthy, Assistant Administrator for Air, will continue. While she has received consistently high marks from stakeholders — and has been rumored to be on the short list for the Administrator slot — her desire to remain at US EPA is unclear. Politically, the Obama Administration can be expected to wish for strong and effective assistant administrators like McCarthy to remain in place; the Administration no doubt wants to avoid divisive and politically motivated confirmation hearings in the Senate.

The picture for administrators at the regional level is less clear, although changes are expected.

Regulatory State of Play

Despite predictions to the contrary, the Obama Administration has issued fewer rules than the previous two administrations at this point in the presidential cycle. Importantly, however, the Obama Administration has issued a significantly higher percentage of rules considered “economically significant” as compared with the first term of the Bush Administration.

Air Issues

Air issues generally, and GHG issues in particular, will continue to dominate the environmental agenda during President Obama’s second term. But while the Obama Administration might have been tempted to issue a large number of rules in the wake of its recent victory, a more temperate approach is in fact emerging. President Obama does not, for example, view his re-election as a mandate to push through new GHG rules. Instead, US EPA appears to be adopting a more balanced approach, at least in the early months (and pending resolution of divisive fiscal cliff issues).

It is clear that the Obama Administration continues to care deeply about climate change and related air issues. These issues are among the

most controversial, however. Thus, the Administration probably will not rush to issue rules in this area without carefully considering the political consequences of their issuance.

A number of climate change and air-related rules are expected to have an annual impact on the economy of greater than \$100 million. These include:

- the particulate matter (PM) National Ambient Air Quality Standard (NAAQS),
- the boiler Maximum Achievable Control Technology (MACT),
- the GHG New Source Performance Standards (NSPS) for utilities,
- the ozone NAAQS,
- the GHG NSPS for existing power plants,
- the GHG NSPS for refineries,
- the cement MACT, and
- the Tier III standard intended to curb pollution from motor vehicles and fuel.

In addition, US EPA is expected to re-propose the vacated Cross State Air Pollution Rule.

Some of these rules (for example, the PM air standard) are subject to court-ordered deadlines. But other controversial regulations are discretionary, including the GHG NSPS for existing power plants. Despite worries to the contrary, the Obama Administration is not expected to rush these discretionary rules through. In fact, now that the Administration has time to cultivate its agenda, the threat of a rash of “midnight” rules has all but disappeared.

Water Priorities

Water issues will also play an important part in the policy debate. Clean Water Act guidance is now under review by the Office of Management and Budget (OMB). If issued as written, it would extend the Act to streams that periodically go dry during the year and to wetlands that are considered geographically isolated. The mining, agricultural, and home-building sectors

are vigorously opposed to this guidance.

Also in the regulatory pipeline are rules addressing power plant effluent discharges, post-construction stormwater, and cooling water intake.

Fracking Concerns

Hydraulic fracturing (or “fracking”) has given rise to a variety of environmental concerns that span the Clean Air Act, the Clean Water Act, and TSCA. A key rule being closely watched is US EPA’s initiative to regulate hydraulic fracturing practices in gas drilling activities.

One initiative expected to invite attention is the Agency’s anticipated draft report addressing the impacts of hydraulic fracturing on drinking water. The draft is expected to be released by the end of the year, and a final report is due in 2014. Depending upon the report’s conclusions, it could galvanize opposition to fracking operations if they are shown to have an adverse impact on drinking water.

Chemical Regulation

Chemical management issues will also remain front and center during the second Obama term. In 2012, US EPA’s emphasis on chemical action plans waned because of pushback from stakeholders and the demands placed on the limited resources of the Office of Pollution Prevention and Toxics (OPPT). The Agency’s more recent chemical priorities program will continue, however. On June 1, 2012, US EPA announced that an additional 18 chemicals were scheduled for assessment under the program during 2013 and 2014.

▪ *Rulemaking Initiatives Languishing at OMB*

The fate of other rulemaking initiatives is unclear. Several important actions remain pending at OMB. A key proposed action is US EPA’s effort to propose a “chemicals of concern” list under TSCA Section 5(b)(4). The long-delayed proposed rule, which was submitted to OMB in May 2010, nominally remains under OMB review but is presumed to be a non-starter.

On November 22, 2010, the Agency submitted a proposed rule regarding TSCA Section 8(a) reporting to OMB, where it remains. US EPA’s February 13, 2012, Regulatory Agenda stated that the Agency intends to combine the TSCA Section 8(a) rulemaking with a significant new use rule (SNUR) for nanoscale materials.

The SNUR was expected to require manufacturers of nanoscale substances to obtain US EPA approval for uses of existing nanoscale substances deemed to be “significant new uses” and to identify existing nanoscale substances that share the same molecular identity as their conventionally sized counterparts listed on the TSCA Inventory as a “category” of chemical substances. OMB concerns have apparently caused US EPA to reconsider its approach, however, and the planned SNUR for nanoscale materials is now considered dead.

▪ ***Using SNURs as an Administrative Response to Chemical Concerns***

In 2012, US EPA turned to SNURs as a potential administrative response to chemical concerns. The Agency’s March 2012 proposed amendments to the polybrominated diphenylethers (PBDE) SNUR are noteworthy in particular because US EPA would include “processing” as a significant new use (in addition to the more customary manufacturing and importing activities). The Agency also broke new ground by proposing to include within the rule’s scope imported articles containing pentaBDE, octaBDE, and/or decaBDE.

Over the next few years, US EPA can be expected to continue its now routine use of SNUR authority.

▪ ***Chemical Data Reporting***

The Agency will likely highlight the availability of data collected under the Chemical Data Reporting (CDR) Rule, for which reports were due in August 2012. The CDR Rule is intended to enable US EPA to collect and publish information on the manufacturing, processing, and use of commercial chemical substances and mixtures listed on the TSCA Inventory. This includes current information on chemical substance production volumes, manufacturing sites, and how the chemical substances are used. Whether these data will help the Agency prioritize chemical substances for more intense review is unclear.

▪ ***Nanoscale Materials***

Other areas to watch include initiatives involving nanoscale materials. How the new Administration will balance innovation and trade restrictions with the need for premarket review is unclear. The Administration will likely be mindful of complaints that regulations of any kind are job killers. On the other hand, activists are likely to renew their charges that US EPA has failed to protect workers and consumers from latent or ill-defined potential

chemical risks.

There is also nano activity pending within the Office of Pesticide Programs (OPP). In June 2011, US EPA proposed several possible approaches for obtaining certain additional information on the composition of pesticide products. The Agency focused particularly on information about what nanoscale materials are present in registered pesticide products. The notice represents a significant departure from — and a considerable improvement over — US EPA’s initial description of its intended “nano-pesticide” rule, which appeared to reflect a pre-ordained approach to require reporting under Section 6(a)(2) of the Federal Insecticide, Fungicide, and Rodenticide Act. It remains to be seen how the Agency will decide to proceed, but many consider its approach to be a non-starter.

▪ ***Immediate Final Rule Under TSCA Section 8(d): Stretching the Agency’s Authority***

A recent final rule issued very shortly after the election suggests that OPPT will continue to use TSCA authority broadly to achieve its goals. On December 3, 2012, US EPA published an “immediate” final rule adding cadmium and cadmium compounds to the TSCA Section 8(d) model rule. This means that manufacturers and importers of cadmium and cadmium compounds (including as part of an article) must report health and safety studies to the Agency if the cadmium or cadmium compounds have been, or are reasonably likely to be, incorporated into a consumer product.

US EPA also announced that it plans (under a separate notice and comment rulemaking) to propose requiring submission of TSCA Section 8(d) health and safety studies from processors and distributors of cadmium or cadmium compounds (including as part of an article) that have been, or are reasonably likely to be, incorporated into a consumer product.

The December 2012 “immediate” final rule has precedent-setting implications. First, the scope of the rule is very broad. The term “consumer products” is broadly defined — and the definition sweeps in products far beyond what the original non-governmental organization petitioners envisioned (they focused on children’s products). Impurities are not covered.

Second, “health and safety studies” are broadly defined under the rule. US EPA seeks “any data that bear on the effects of a chemical substance on health or the environment.” Human and environmental exposure studies are within the scope of the rule, as are monitoring data. Studies showing “any measurable content of cadmium or cadmium compounds” are reportable.

Arguably, this would include information outside of “health and safety studies” as these terms traditionally have been defined.

Third, as in the case of many SNURs that have been proposed, the rule covers health and safety studies pertinent to cadmium in articles. This is similar to requirements under the TSCA Section 8(d) rule for lead. In that case, however, the nexus between the scope of the rule and children’s exposure to lead was more direct. Here, the scope of the rule is much broader: It brings in entities that have little or no impact on the factors that led petitioners to seek US EPA action on cadmium exposures in children’s products.

Finally, why the Agency issued this regulation as an “immediate” final rule — given all the precedent-setting implications — is a mystery. Despite the many issues involved, US EPA essentially limited comment to 14 days, and imposed a high burden on commenters who opposed amending the TSCA Section 8(d) model rule.

While we may be reading too much into this immediate final rule, it suggests that US EPA has no intention of backing away from its heavy reliance upon new and innovative interpretations of TSCA to achieve its chemical management goals.

State Regulatory Forecast

The absence of meaningful TSCA reform can be expected to result in new waves of state chemical and/or chemical product initiatives. In 2010, California’s Department of Toxic Substances Control (DTSC) proposed (and re-proposed) several iterations of its Safer Consumer Products regulations, which are intended to implement the California Green Chemistry Initiative. The latest version, issued in July 2012, includes as its core elements the identification of chemicals of concern and priority products that include chemicals of concern; the development of alternatives analyses for chemicals of concern in priority products; and DTSC regulatory responses to alternatives analyses conducted by industry. In October 2012, DTSC announced that it intends to revise the proposed regulations and issue them in final form by spring 2013.

As currently drafted, the proposed Safer Consumer Products regulations will have broad implications for companies manufacturing products that are in the stream of commerce in California. DTSC states that it “does not expect the regulations to result in cost increases, given the wide variety of comparable safer products readily available at competitive prices.” Others question this assessment, however. On October 1, 2012, State

Senator Michael J. Rubio (D-Shafter) and other state senate and assembly members sent a letter to California Governor Jerry Brown requesting a delay of the regulations until a more thorough economic impact analysis can be completed. The governor is not expected to acquiesce to the request.

Other state initiatives — not as robust as California's, but nonetheless important and consequential — are expected to continue in 2013, perhaps at an even faster clip.

What Does the Future Hold?

2013 will to be a busy and important year for environmental law and policy. The White House is reenergized, President Obama is likely to double down on climate change regulation and enhanced chemical management, and the states are restless in light of Congress's failure to act on TSCA reform.

Chemical manufacturers — and all industry stakeholders — need to stay attentive and focused on advocacy. They should redouble their efforts to ensure that their product stewardship, compliance, and business goals are aligned with all that we can expect to see over the next presidential term.

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