

Environmental Policy Under Obama: A Changing Climate in Washington

Below is the first in a four-part series examining how environmental policy, regulation, legislation, and jurisprudence is set to change under the Obama Administration, and how these changes might affect regulated industry. The Kelley Drye & Warren Environmental/Occupational Health and Safety Practice Group counsels clients on legislative and regulatory policy, and compliance and litigation strategies under the full range of environmental and OSHA programs.

SERIES 1. Obama's Environment Team – The Perfect Storm?

As the new Obama Administration begins to take shape, future implications for environmental regulation and enforcement loom large. During the course of the campaign, and into the Administration transition, President Obama has continued to place environmental and energy issues among his top and immediate priorities. He has repeatedly voiced support for an aggressive mandatory Greenhouse Gas (“GHG”) cap-and-trade program and also supports regulation of GHGs under the Clean Air Act (“CAA”). He is a proponent of a federal renewable portfolio standard, a more stringent federal fuel economy standard, and the impending stimulus package is likely to include significant resources and incentives focused on the development of an expansive renewable energy infrastructure. Indeed, as the economic crisis deepens, Obama continues to call for more “green jobs” as a primary means of putting Americans back to work.

The President has continued to signal he is serious about environmental and energy issues through his

picks for top posts in this area. Along with others, he has named former Environmental Protection Agency (“EPA”) Administrator, Carol Browner, to act as the first-ever “energy czar” within the White House, Rep. Hilda Solis (D-CA), a staunch supporter of “green jobs” to head the Department of Labor, and Lisa Jackson, a former EPA employee and a strong supporter of climate change regulation and clean energy infrastructure to be the EPA Administrator. In short, the Obama environmental team has the motive, the opportunity, and the means for bringing forth wide-sweeping and comprehensive changes to environmental policy, regulation, and enforcement; marking a significant departure from the approach of the Bush Administration.

Carol Browner

Perhaps the largest signal that Obama is serious about tackling climate change and other broad energy issues is the creation of a new assistant to the president for energy and climate change, with Carol Browner, the former Clinton EPA Administrator, as its head. Ms. Browner was the longest serving EPA Administrator, serving from 1993 until 2001, and has been a popular figure among environmentalists. She has been an outspoken critic of the Bush Administration’s environmental policies, and its decision to deny the California waiver in particular. Ms. Browner supports EPA’s authority for regulating GHGs under the CAA as well as mandatory cap-and-trade GHG legislation, and has urged the Congress to act quickly while warning that the new Administration might unilaterally act to regulate GHGs in case of Congressional delay. The new post is designed to help Obama coordinate various initiatives including cap-and-trade climate legislation, job creation, and the promotion of renewable energy

infrastructure, and Ms. Browner is poised to become an extremely influential figure in the Administration's new environmental policy initiatives.

Lisa Jackson

President Obama picked Lisa Jackson to serve as the EPA Administrator. Ms. Jackson has significant experience in both the U.S. EPA and the New Jersey Department of Environmental Protection ("NJDEP"). Jackson has made statements in the past indicating she would support a cap-and-trade program to regulate GHGs, and helped to initiate the Regional Greenhouse Gas Initiative ("RGGI") during her tenure as the head of NJDEP.¹ She has also been an outspoken critic of the Bush Clean Air Mercury Rule ("CAMR") program and has called for aggressive air toxic rules regulating a variety of industries. Jackson, while enduring some criticism for perceived failure to adequately address brownfield and superfund sites during her tenure in New Jersey, has received widespread praise from environmental groups and Democratic officials as being knowledgeable, smart and innovative and will be looked to to restore a beleaguered Agency, which many argue has become closely aligned with industry and subject to too much influence from the White House.

Several days after being confirmed, Ms. Jackson named Lisa Heinzerling, a Georgetown University Law Professor and lead author on the legal briefs to the Supreme Court challenging the Bush Administration's position in *Massachusetts v. EPA* to serve as her top climate change regulatory adviser. Ms. Heinzerling has been an outspoken critic of the Bush Administration's environmental policies and regulatory efforts in particular and will play an instrumental role in EPA's efforts to craft climate change policies and potential regulations. Ms. Heinzerling is an expert in EPA regulatory policy, and Ms. Jackson's move indicates that she is positioning the EPA to take a very aggressive stance towards climate change and other EPA regulation.

Nancy Sutley

President Obama has nominated Nancy Sutley to head the White House Council on Environmental Quality ("CEQ"). Ms. Sutley served as special assistant to Carol Browner at EPA and currently serves as the Los Angeles deputy mayor for energy and environment. She has a strong background in managing all types of local environmental issues and appears to be loyal to Carol Browner. The CEQ traditionally coordinates environmental policies among the White House and the federal agencies. Due to the creation of Ms. Browner's post as energy czar, Sutley's role at CEQ is somewhat uncertain.

Dr. Steven Chu

Dr. Steven Chu, a Nobel Prize-winning physicist and director of the Lawrence Berkeley National Laboratory has been confirmed to head the Department of Energy ("DOE"). Dr. Chu has extensive experience in renewable technologies and energy efficiency, including harnessing solar energy to create transportation fuels. He has also been outspoken about the effects of climate change and is a strong advocate of controlling GHG emissions through a price on carbon emissions. Several of the climate change legislative proposals give the DOE significant responsibility in implementing various aspects of the program, and depending on how the final bill is structured, Dr. Chu and the DOE could play a major role in climate change regulation.

Peter Orszag

Peter Orszag, former director of the Congressional Budget Office ("CBO"), will head the Office of Management and Budget ("OMB"). Orszag is widely held as an expert on climate changes issues, and this pick will mean that the OMB will play a significant role in shaping domestic environmental policy and possible cap-and-trade legislation. Mr. Orszag has an extensive background in the economic efficiency of cap-and-trade programs and has been a staunch advocate of

¹ Geman.; Boyle, Katherine, Nominees slated to discuss Obama climate, air and water policies with Senate panel, Greenwire, January 12, 2009.

including relief measures such as safety valves and banking of emissions allowances under a cap-and-trade program. Obama's economic team, Mr. Orszag included, will undoubtedly weigh heavily in the debate over the appropriate scope and economic impact of a cap-and-trade program.²

In addition, Mr. Orszag is inheriting an OMB that has a very controversial history under the Bush Administration. Former President Bush implemented several measures, Executive Order 13,422 being the most prominent, which elevated OMB's involvement in the agencies' rulemaking process to unprecedented levels.³ Executive Order 13,422, supported by most major business groups, allowed the Bush White House to play a much more hands-on role across all federal agency rulemaking by providing for OMB review not only of agency regulations but also agency guidance. The Order also required each agency to designate a Presidential Appointee within the agency to serve as its regulatory policy officer with authority to approve or deny any regulation and required each agency to identify a specific "market failure" intended to be corrected by any given regulation. In short, Executive Order 13,422 allowed the Bush Administration to wield considerable control over the rulemaking process, generally resulting in an anti-regulatory environment focused on market failures and cost-benefit analysis. Some have argued that of all the agencies, EPA was particularly

affected by OMB's heightened review.⁴ Although President Obama will undoubtedly want to retain a level of White House control over agency rulemaking, he has vowed to return some rulemaking autonomy removed by Executive Order 13,422 back to agency officials. Just recently Obama revoked Executive Order 13,422⁵ declaring it will have no further force or effect, and directing the heads of all executive branch agencies and departments to rescind any orders, rules, regulations, guidelines, or policies enforcing the Bush order. This move will likely result in a more pro-regulatory OMB, and facilitate increased agency rulemaking activity and EPA rulemaking activity in particular.

Cass Sunstein

President Obama has tapped his former colleague at the University of Chicago and recently appointed Harvard Law School professor, Cass Sunstein, to head the OMB's Office of Information and Regulatory Affairs ("OIRA"). OIRA, as part of the OMB, is responsible for reviewing draft agency regulations (and guidance) and assessing costs and benefits. OIRA has played a controversial role under the Bush Administration, with many critics accusing it of slowing down or even stopping agency regulations.

The pick surprised some observers who had speculated that Obama would choose Lisa Heinzerling, a member of the Obama transition-team and staunch opponent of

² Lawrence Summers, the head of Obama's economic team, has recently urged restraint in regulating carbon emissions for fear of damaging an already tenuous U.S. economy. (*See Greenwire*, January 5, 2009, Top Obama's Adviser's Climate Views Differ). Summers' position conflicts with Carol Browner's statements indicating the Administration is ready to act unilaterally on climate changes unless Congress acts quickly. (*See Id.*). Thus, a battle within the Administration over the economic impact of a cap-and-trade program is just heating up.

³ *See* Executive Order 13,422, January 18, 2007.

⁴ *See* Bravender, Robin, Will Obama Relax OMB's Hold on Rulemaking, *Greenwire*, December 22, 2008. (EPA was targeted because of its role in writing and issuing broad, systematic regulations citing OMB and White House involvement in EPA's secondary ozone air standard).

⁵ *See* Lindeman, Ralph, White House Revokes 2007 Bush Order Concerning OMB Regulatory Review Process, *BNA Daily Environment Report*, January 4, 2009. Obama's revocation will formally be published in the Federal Register on February 4, 2009, but was not available at the time of this article's publication.

the Bush Administration's environmental policies. Sunstein has been one of the most prolific legal scholars in the country over the past twenty years and brings significant academic background in risk analysis, including in the areas of climate change, and occupational safety and health. Surprisingly, he is a strong supporter of including cost-benefit analysis in regulatory decisions, has pushed to amend the CAA to include cost-benefit analysis, and publicly questioned efforts to remove arsenic from drinking water—all positions supportive of the Bush Administration. Many advocacy and environmental groups have voiced disappointment over the choice, fearing that Sunstein won't advocate as strongly for broad regulatory change in the environmental arena as someone like Heinzerling might have. Of course, it is possible that Sunstein will alter his views, such as strict adherence to cost-benefit analysis, views that have thus far only been expressed in academic settings, once at OIRA, and there is no doubt he is loyal to Obama.

Conclusion

One interesting trend developing as the Obama Administration and the 111th Congress take shape is California's potential influence on environmental issues. Nancy Sutley and Hilda Solis both have strong California roots, which are sure to influence their leadership. Phil Shiliro, who until recently served as Representative Waxman's Chief of Staff, will serve as Assistant to the President for Legislative Affairs and will undoubtedly play a large role in shepherding upcoming environmental legislation. In Congress, Senator Barbara Boxer chairs the Environment and Public Works Committee, San Francisco Congresswoman Nancy Pelosi serves as Speaker of the House, and Los Angeles Congressman Henry Waxman is the newly-elected chair of the House Energy and Commerce Committee. With these key players in powerful positions, look for influence to come from California programs in the areas of greenhouse gas ("GHG") emissions from motor vehicles, renewable portfolio standards ("RPS") established in 2002 and strengthened

in 2006, and low-carbon fuel standards established by Executive Order in 2007, and currently being implemented.

In addition to California's potential influence, a review of Obama's top environmental/energy team reveals that widespread change in environmental regulation, enforcement, and legislation is coming to regulated industry. Over the past eight years, for a number of reasons (Bush Administration policies, OMB/OIRA involvement), significant EPA regulation has diminished and those rules that have been passed have often been challenged and struck down in court (*e.g.*, CAMR). President Obama has assembled an environmental/energy team steeped in regulatory experience, and broadly supportive of not only climate change efforts, but environmental and public health regulation in general. From Carol Browner, who will likely be the Administration's most public face behind a groundbreaking push towards a carbon constrained society, to Peter Orszag who will play a more backstage nuts and bolts role, Obama has paved the way for a significant change in terms of environmental/energy regulation from the previous eight years. With the serendipitous timing of a stronger Democratic majority in Congress, and the California influence, right now just might be the perfect storm for the most significant increase in environmental regulation and legislation in recent memory.

Environmental Law/Occupational Health and Safety Practice

Kelley Drye's Environmental/Occupational Health and Safety Practice Group specializes in providing comprehensive solutions for complex problems to facilitate effective business strategies. We provide both advice and representation for clients participating in rule-making and policy-making activities by federal regulatory agencies, including the U.S. Environmental Protection Agency, the Occupational Safety and Health Administration, the U.S. Fish and Wildlife Service, and the U.S. Army Corps of Engineers.

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