

Part 3: Environmental Policy Under Obama: A Changing Climate in Washington

Below is the third 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 3. Increased Threat of Environmental Regulation

Almost from day one, former President Bush found himself in a fight with environmental groups over most environmental issues. Indeed, one of the first major “scandals” of the Bush Administration, only several months after being sworn into office, was Vice-President Cheney’s energy task force, which was roundly criticized for driving a pro-drilling, anti-conservation energy platform through a non-transparent, industry-centric process. From its effort to overhaul the Clean Air Act’s (“CAA”) New Source Review (“NSR”) program, to EPA Administrator Stephen Johnson’s repeated refusals to regulate carbon dioxide (or turn over related documents), the Bush Administration’s positions on environmental issues continually outraged the environmental community. As a result, latent pressure to increase environmental regulation has reached a boiling point.

The new Administration is faced with restoring integrity to an EPA that many environmental groups characterize as a worn and battered Agency, whose

credibility before Congress and the courts has been stripped. Perhaps the two most significant regulatory moves EPA is expected to make almost immediately under President Obama is an “endangerment” finding paving the way for carbon dioxide to be regulated under the CAA, and a reversal of EPA’s decision to deny California a waiver under the CAA allowing the State to regulate greenhouse gases (“GHGs”) from automobiles. The latter has already been the subject of a signed Executive Order and notice for public hearing published in the federal register on February 12, 2009. As with many of former President Bush’s policies, Obama will undoubtedly chart a new course with respect to environmental regulation.

On April 2, 2007, the U.S. Supreme Court, in perhaps the most significant environmental decision during the Bush Administration, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), reversed a federal appeals court ruling that upheld a finding by EPA that carbon dioxide emissions are not subject to regulation under the CAA. The Court remanded the case to EPA with instructions to make a determination as to whether carbon dioxide “cause[s] or contribute[s] to air pollution, which may reasonably be anticipated to endanger public health or welfare” (i.e., an “endangerment finding”). The Court also demanded that EPA give reasons for either its action or inaction. An “endangerment” finding is a necessary prerequisite for regulation of any air pollutant under the CAA. In due course, EPA staff prepared the endangerment finding, but it was ultimately held up by the Bush White House.

In lieu of making an endangerment finding, EPA issued an Advanced Notice of Proposed Rulemaking (“ANPRM”), presenting various options for the regulation of GHGs under the CAA, and soliciting public

comment on all aspects of GHG regulation. Through the ANPRM, EPA essentially delayed making a decision on whether to regulate GHGs under the CAA, some feel in contravention of the Supreme Court's mandate. Administrator Stephen Johnson recently issued a memorandum interpreting EPA regulations as not requiring the Agency to consider the potential for major sources (e.g., power plants) to emit carbon dioxide when issuing permits under the CAA, thereby reaffirming EPA's position under former President Bush with respect to the regulation of GHGs under the CAA.

Consequently, resolution of this issue, including compliance with the Supreme Court's directive under *Mass. v. EPA*, falls squarely to the Obama Administration. By all accounts, EPA is expected to reverse the Bush Administration's policy, and make an endangerment finding within the first few months of Obama's Administration. Despite broad disagreement over which CAA mechanism (e.g., New Source Performance Standards, NSR, mobile sources, Hazardous Air Pollutant program) is best suited to regulate GHGs, such a finding is necessary to clear the way for EPA to begin regulating GHGs under the CAA.

The second most significant regulatory move EPA will likely make is to reverse the decision to deny California's waiver petition seeking permission from the Agency to promulgate its own GHG regulations for motor vehicles. In December 2007, EPA denied California's petition that would have allowed the State to enforce its own regulations to control GHGs from motor vehicles ("tailpipe emissions"). This marked the first time EPA had ever denied California (or any other state) a waiver to implement more stringent standards than federal requirements. On January 26, 2009, less than one week after taking office, President Obama signed an Executive Order directing EPA to review Bush's decision to deny the waiver. Shortly thereafter, the Agency announced it will reconsider the decision and will hold a public hearing on the matter on March 5, 2009. An Obama Administration reversal of this denial would not only allow California to move forward with its regulations, but would also affect

the 16 other states that have either adopted the California regulations or plan to adopt them, and would represent a significant step in GHG regulation.

The most monumental change under the Obama Administration, although one that will take considerably longer and is not entirely within executive control, will be mandatory cap-and-trade legislation. President Obama included a mandatory cap-and-trade bill to cut U.S. GHG emissions to 1990 levels by 2020 and 80 percent below 1990 levels by 2050 as part of his campaign platform, and there is no doubt that he will support such legislation in the coming months. As of July 2008, members of Congress had introduced approximately 235 climate-related bills, with one prominent bill co-sponsored by Senators Barbara Boxer (D-CA), Joseph Lieberman (I-Conn), and John Warner (R-VA) reaching the Senate floor but failing to garner enough votes to pass. The Democrats have seized control of both houses of Congress, and Rep. Waxman (D-CA) has replaced Rep. Dingell (D-MI) as chairman of the all important House Energy and Commerce Committee – the primary committee for a House bill. With the full support of the President, the timing is ripe for a major piece of climate change legislation to clear both houses of Congress, and be signed into law.

As everyone knows, however, crafting legislation is a time consuming, sometimes ugly process, and with the economic crisis in full swing, this will be particularly true for any major GHG cap-and-trade bill. Significant disagreement exists over major components of a bill, including the appropriate long-term reduction levels, the method of distributing emission allowances, and the proper array of regulated entities – all issues that center on economic impact and will have to find consensus among enough members before any legislation can move forward. Whether the final legislation is passed in one year or more is unclear, but in the meantime with an endangerment finding and reversal of the California waiver denial, the Obama Administration will go a long way towards beginning to tackle climate change.

Aside from the high profile regulatory and legislative changes related to climate change, the new Obama Administration is likely to usher in new regulatory frameworks that will affect regulated industry in other areas. Several programs under the CAA will be at the top of the list. Following its vacatur of EPA's Clean Air Interstate Rule ("CAIR") in July, the D.C. Circuit Court of Appeals, on December 23, 2008, reversed its prior decision striking down the rule and remanded it to EPA for correction. Until EPA promulgates a revised CAIR rule, the original rule will remain in effect. The turmoil created by the initial CAIR decision, and now its reversal, will require industry to pay close attention to how EPA will regulate sulfur dioxide ("SO₂") and nitrogen oxides ("NO_x") in the Eastern United States. EPA's efforts to promulgate a revised CAIR rule may also impact parallel legislation, such as Senator Thomas R. Carper's (D-DE) multi-pollutant clean air legislation aimed at reducing emissions from power plants. If EPA drags its feet, it is likely that a Carper bill (or something similar) will move.

The Obama EPA will also be confronted with the D.C. Circuit's February 2008 vacatur of the Clean Air Mercury Rule ("CAMR"), which would have imposed an emissions trading system designed to reduce mercury emissions from power plants. The Bush EPA and utility groups petitioned the U.S. Supreme Court to review the D.C. Circuit's opinion. On February 5, 2009, the Obama Administration dropped its request that the Court review the rule, indicating that EPA will be working on plans that would force each utility to curb mercury emissions as opposed to the cap-and-trade approach. The utilities, however, have not dropped their petitions for Supreme Court review. If the Court decides not to hear the case, it is likely that EPA will develop a new rulemaking with stricter controls on utilities. In fact, Robert Myers, former principal deputy Administrator of EPA's Office of Air and Radiation, indicated in a memo just recently that EPA intends to

impose Maximum Achievable Control Technology ("MACT") on power plants to control mercury under section 112 of the CAA – a reversal of its earlier position in the CAMR rule.¹

Democrats also have their eyes on the Toxic Substances Control Act ("TSCA") as a major area for reform. Congressional Democrats have suggested that now might be the time to advance TSCA reforms to move away from voluntary programs towards mandatory programs such as the European Union's Registration, Evaluation, and Authorization of Chemicals ("REACH") program, which places significant burdens on industry to register and comply with toxic testing and information supply requirements.

In addition, during the 110th Congress, Rep. Waxman (D-CA), along with Sen. Frank Lautenberg (D-NJ) and former Rep. Hilda Solis (D-CA) introduced a bill designed to require EPA to conduct safety determinations on chemicals used in commerce in the United States. Given Rep. Waxman's powerful chairmanship, and support from Rep. Hilda Solis, a likely new Cabinet member, it is likely this bill will move. The EPA, however, towards the end of Bush's term, placed more focus and resources towards developing voluntary TSCA initiatives like the Chemical Assessment and Management Program ("ChAMP"). These programs are moving forward, which may make it considerably harder for broad TSCA reforms that focus on mandatory industry regulation to succeed. That said, recent support from industry for TSCA reform, including the American Chemistry Council, combined with a Democratic Congress makes an overhaul of TSCA very possible under the Obama Administration. The result would be a new TSCA that places significantly more burden on regulated industry to provide information on the chemicals it uses.

Finally, should EPA see increased funding, regulated industry can expect more activity in each of EPA's

¹ See Browanden, Robin, EPA Signals Reversal on Mercury Cap and Trade, Greenwire, Jan. 13, 2009.

national priority areas for enforcement and compliance assurance. These include the air toxics and NSR programs under the CAA, sewer and stormwater infrastructure under the Clean Water Act (“CWA”), financial responsibility, and mineral processing under the Resource Conservation and Recovery Act (“RCRA”).

For the reasons mentioned above, regulated industry can expect a lot of change in how it does business with EPA. Along with substantial efforts in the area of CAA regulation, and climate change in particular, all signs point to a more robust and active Agency. Funding is likely to increase, and with it a likely increased emphasis on enforcement and regulation. Combined with a Democratic Congress and a President, whom by all accounts will take a more aggressive approach to environmental issues, the Obama Administration’s EPA is shaping up to look a lot different from the Agency of the past eight years.

Environmental Law/Occupational Health and Safety Practice

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