

Environmental

Times Are Changing in D.C.

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Until President Obama took office, it had been eight years since we had a change in administration and sixteen years since a Democratic administration took control from a Republican administration. While it is old news, the two parties differ in their view of the philosophy of environmental regulation. The first year of the Obama administration has highlighted the more critical differences. The result will be dramatically different outcomes in not only federal policy but also in day-to-day decisions and interactions with field-level environmental inspectors, permit processors, and enforcers. The contrast between what has passed (Bush administration) and what will pass (Obama administration) is particularly dramatic, as both administrations represent stereotypical archetypes at the further margins of their parties' positions.

As I opined in the 2001 *GATF Technology Forecast*, "Unlike former Vice President Al Gore, President George W. Bush does not have a special interest in EH&S affairs . . . However, his reticence about commenting on these matters should not be construed as indicating future neglect in these areas. Rather, President Bush views many of these issues from a different perspective, as 'business' issues as opposed to 'EH&S' issues." For better or worse, this summary held true throughout the Bush administration—no major environmental laws were proposed or passed, changes in environmental regulation were driven primarily by their underlying effect on the business of business, and there was a dramatic increase in the number and scope of voluntary programs that married business issues (streamlined permitting, etc.) with improved environmental performance.

The Obama administration is moving forcefully and quickly to swing the tone and tenor of the discussion on environmental issues—from a "business-impacts" viewpoint to an "ecological-impacts" viewpoint. Where the Bush administration reviewed, discussed, and primarily focused on the impact of environmental regulation on business, the Obama administration has been crystal clear that its primary focus is on the impact to the environment, whether it be water, air, flora, fauna, or (especially) climate. Understanding this basic change in how environmental policy will be crafted and evaluated will help the reader understand what will come to pass during this administration.

Legislation

At the time of this writing, a cap-and-trade-styled climate change bill has passed the House of Representatives and is being actively debated in the Senate. This bill is fully supported by the Obama administration (in fact, the administration's criticisms are that the bill has too many pro-business compromises) and would be the most wide-sweeping new environmental law since at least the 1980 passage of the Comprehensive Environmental Response, Compensation and Liability Act (Superfund). Addressing climate change (see Gary Jones's companion article) has been characterized as one of the new administration's top two policy issues (health care reform, of course, being the other) and using the legislative process to further that policy goal is a dramatic departure from the Bush administration.

Prediction: Regardless of whether a cap-and-trade climate change bill passes in this session of Congress, the Obama administration will continue to push this issue throughout his term. In addition, it is clear the Obama administration will use the legislative process to address environmental issues.

Regulation

During the Bush years, there was a distinct lack of new environmental regulations issued by the United States Environmental Protection Agency (USEPA). Those that were issued generally were required to be issued under existing law or court order. For the most part, the exceptions—environmental regulations issued "voluntarily" by the USEPA—provided additional compliance flexibility to the regulated community and were generally issued to benefit the portion of the regulated community in the energy exploration/generation/delivery industries. Some of these regulatory efforts applied narrowly to energy companies (those pertaining to mountaintop mining and water impacts of mining, for example), but others had broad applicability across the industries—especially those in the area of air pollution regulation.

For example, air regulations beneficial to business were issued during the Bush administration relating to the implementation of the "New Source Review" and/or "Prevention of Significant Deterioration" portions (collectively "PSD/NSR") of the Clean Air Act.

Many of these regulations were highly controversial, not only for their substance, which was generally at the extremes, but also as to whether they were the proper subject of the rulemaking process at all. On those rare instances where the administration chose to act voluntarily, it did so in a very aggressive manner and with dubious legal authority. Every glass was full or empty—the Bush administration never saw any environmental issue as half-full or half-empty—and refused to negotiate or compromise. As a result, an inordinate number of legal challenges ensued.

Ultimately, the Bush administration's almost exclusive reliance on the regulatory process backfired badly. In several instances, the courts found the USEPA overstepped its legal authority in issuing the regulations. In other cases, courts found that USEPA's published reasoning in carrying out its duties was so flawed as to be illegal. And finally, because some of the rules were so extreme, especially those issued in the eleventh hour of the administration, the Obama administration took quick and wide-reaching action to suspend or repeal the regulations.

On environmental issues, the Bush administration's legacy will be one of overreaching and clockkilling. The regulations the Bush administration wanted, and ultimately issued, went too far and were quickly and ultimately reversed. In other areas, such as climate change, the Bush administration simply delayed the ultimate decisions, losing a chance to frame the debate or take action that ultimately would have been more acceptable than what the Obama administration will do.

It is too early to tell how the Obama administration will use the regulatory process, but early indications are it has not learned the lessons of the Bush administration. The so-called "Tailoring Rule" (see Gary Jones's companion article) has been roundly criticized by legal commentators as overreaching and beyond the USEPA's legal authority. The Obama administration's defense to those allegations has been less than rigorous, generally along the lines of "it's a good rule that benefits everyone, so nobody will challenge it in court."

The Obama administration has also hinted it views the regulatory process as a tool to influence Congress. For example, many believe the Endangerment Finding was made in its current form more to push Congress into passing cap-and-trade legislation than it is to initiate the direct regulation of Green House Gases (GHGs) by USEPA.

Prediction: The tailoring rule will be appealed (likely by large GHG emitters) and will be overturned by the courts in a legal decision that echoes the last eight years. However, the Obama administration will continue to use the regulatory process, both to issue environmental regulations it wants and as a way to pressure Congress into acting. Regardless of whether a cap-and-trade climate change bill passes in this session of Congress, the Obama administration will continue to push this issue throughout his term. In addition, it is clear that the Obama administration will use the legislative process to address environmental issues.

Voluntary Environmental Leadership Programs

The Bush administration initiated a number of "voluntary" environmental leadership programs that offered industry an incentive for achieving environmental performance above and beyond what is required under the law. There are literally dozens of programs, such as the Climate Leaders program (focusing on voluntary reduction of GHG emissions). Some of these programs are narrowly tailored (GreenChill, for example, focuses on commercial/industrial refrigeration issues) from industry-specific (PrintSteps) to broad-based (National Environmental Performance Track).

The Performance Track program has been under particular scrutiny due to several high-profile missteps, such as allowing companies with poor environmental records to participate in a program that provides a reduced inspection schedule to participants. Where the Bush administration used some of these programs as justification not to regulate directly (Climate Leaders, for example), the Obama administration has already noted its disapproval of voluntary programs substituting for regulatory programs. In fact, less than one month into the Obama administration, the highest profile program, Performance Track, was suspended.

Prediction: The heyday of voluntary programs is in the past. While some programs will remain, they are likely to provide little-to-no regulatory advantages (i.e., reduced/eliminated permitting streamlining, no changes in inspection schedules) and will likely only exist in areas where USEPA lacks regulatory authority to act and/or is providing sector-specific, detailed information.

Environmental Justice

USEPA's website states, "Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. EPA has this goal for all communities and persons across this Nation. It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work."

The environmental justice movement, hesitantly embraced by the Clinton administration, was silent throughout the Bush administration. The Obama administration has announced environmental justice is a priority, and the USEPA has already initiated a number of steps to make this true.

Prediction: In the near future, public input into environmental decisions at the facility and local level (i.e., permitting new or expanded facilities, such as printing operations) will be subject to additional public input and regulatory oversight from a "fairness" standpoint. The impact of local opposition groups to delay or halt facility relocations and expansions will grow exponentially. The USEPA is already in the process of increasing funding to environmental justice groups, including an ongoing \$1 million round of grants directly to these groups.

Enforcement

While most commentators agree environmental enforcement was not a high priority of the Bush administration, national enforcement statistics indicate there was not a substantial drop in enforcement activity during the Bush administration. One notable difference is how enforcement results were communicated—the Bush administration focused on the amount of pollution reduced as a result of enforcement activities, while previous administrations have generally focused on the amount of total penalties issued. Critics believed these "avoided" pollution figures were subject to a bit of spin and manipulation.

In terms of “how” it discusses the results of enforcement activities, the Obama administration will likely meld the two approaches and discuss both the pollution prevention and financial standpoints. The most dramatic difference will be that companies subject to enforcement will be portrayed much more negatively in press releases and other public documents.

In terms of how it performs enforcement activities, at the USEPA regional office level, there appears to be a significant number of enforcers who have become energized and emboldened by the change in administration. Whether this is because enforcement was truly lessened during the Bush years, or because these enforcers simply perceive a Democratic administration will smile benevolently on heavier enforcement efforts (a traditional Democratic bastion) is unclear.

Prediction: More enforcement actions, higher penalties, a lot of press releases with the word “Polluter” in the title.

Final Comment

The next three to seven years will see additional environmental regulation, particularly regulations that impose new requirements on business. Climate change legislation, very likely a cap-and-trade bill, will be passed. Many voluntary assistance programs at the federal level will either be killed outright (Performance Track) or allowed to quietly wither. Enforcement efforts will be elevated, as will the rhetoric used to describe those efforts.