

Changes Do Not Necessarily Bring About Change

Don't expect significant new environmental laws under a new administration and Congress

by Ernie Rosenberg

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The election of Sen. Barack Obama (D-Ill.) will result in political appointments to the environmental agencies and the policies they pursue which will be much more to the liking of the nongovernmental organization (NGO) community and much less so to industry. The impact of this change will be amplified by Rep. Henry Waxman's (D-Cal.) ouster of Rep. John Dingell (D-Mich.) as chair of the U.S. House of Representatives' Energy and Commerce Committee. Indeed, environmental policies will take on a distinctly California character with Rep. Nancy Pelosi (D-Cal.) as Speaker of the House and Sen. Barbara Boxer (D-Cal.) chairing the U.S. Senate Environment and Public Works Committee.

The new Congress is also almost certainly going to be more favorable to new environmental controls and have a more aggressive environmental agenda. However, the change in orientation and approach of the federal government after January 20, 2009, will not immediately result in a flood of new legislation or sweeping changes in regulations.

The list of issues awaiting congressional resolution is long. Just some examples: Under the Clean Water Act (CWA),¹ major controversies about such issues as the scope of jurisdiction, wetland regulation, water transfers, and the application of total maximum daily loadings of pollutants need congressional clarification or resolution. In the area of air pollution control, there are controversies surrounding new source review, regulation of hazardous air pollutants, emissions cap-and-trade programs for traditional pollutants and, of course, controls for greenhouse gases. Federal preemption of state mobile source (automotive) air pollution controls—or the lack of preemption—continues to fester. The issue of renewable fuels and their impacts on air and water quality, deforestation, and hunger will probably also get much more scrutiny than in the past. In fact, these and other major CAA or related energy requirements, both in the area of emission controls and in the setting of ambient air quality standards, would be enough to tie the cognizant congressional committees in knots for at least two sessions of Congress.

Wrangling over definitional issues and remediation requirements in the Resource Conservation and Recovery Act (RCRA)² and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)³ continue, though they increasingly are so arcane as to rob them of political force. There are significant implications in terms of costs and the interests of various groups that benefit from stringent waste management and remediation measures, but the difference in public health consequences are relatively minor and unlikely to create the broad national interest and pressure that will be needed to move any legislation.

Environmental protection is a mature field. Legislation over the past 40 years has given federal and state regulators broad authority to address the release of pollutants, disposal of wastes, and conservation of natural resources. Given the breadth of existing authorities, it is remarkable how much unfinished business there is under the existing body of law and how many major national issues still require legislation to be resolved.

Some of the issues that arguably require federal legislation for resolution already have been the subjects of regulation and/or litigation, but the results are unsatisfactory to stakeholders with political clout such as state regulators or important environmental NGOs. Others involve matters that have arisen since Congress was last able to move controversial environmental legislation—that is, more than a decade ago. Some would argue it has been much longer. Each of these unresolved areas is likely to be the subject of drives for federal legislative resolution.

Countering the preferences of the congressional leadership and the Obama Administration is the fact that with the possible exception of climate change, there is no broad public pressure for new laws but there is pressure for action in many other areas. Without such pressure, there will be no action. Even with such pressure, those wanting major changes in envi-

1. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.

2. 42 U.S.C. §§6901-6992k, ELR Stat. RCRA §§1001-11011.

3. *Id.* §§9601-9675, ELR Stat. CERCLA §§101-405.

ronmental law and regulation are not by any means assured of success.

The election is hoped by many to have opened the way for congressional action on many of the emerging or unresolved environmental issues and the enactment of some legislation indeed will be more likely than it has been in decades. But there will still be institutional impediments to the passage of federal legislation and significant constraints on the issuance of new regulations as well. Beyond the institutional impediments, new environmental action will be stymied by competition for federal resources from the economic crisis and other presidential priorities. In short, for those who are proponents of broad new authorities, or even new narrowly targeted but controversial authorities, the coming Congress is almost certainly going to be a disappointment. There will be few, if any major new legislated control programs. There will be more movement in the regulatory area, but even here, long recognized issues will be resolved slowly, if at all.

Of course, there will also be efforts to address some of these issues by the states, but in most cases, state laws and state resources are insufficient to resolve national, interstate, or emerging issues. At best, state action can create pressure for federal legislation. At worst, state regulation can create a patchwork of inconsistent, duplicative, even conflicting laws. This is particularly a problem for the interstate movement of products.

Turning first to Congress, the institutional impediments to the passage of major environmental legislation are somewhat independent of who is in the White House or even who controls Congress, even if one party has a filibuster-proof majority. Both parties are actually coalitions, with members whose receptivity to environmental legislation varies considerably in general as a function of personal philosophy, or when it comes to specific legislation, because of the impact on his or her state or district. For this reason, the effective need for a supermajority to overcome filibusters and pass major legislation is a major block.

The risk to proponents of legislation also should not be discounted. They may be pursuing new authorities, or even relief from existing rules, but the legislative process is somewhat unpredictable. Opening up any of the major environmental laws to make desired changes raises the risk of getting undesirable changes. This risk particularly has to be a concern for those who want stronger controls on industry.

The existing environmental statutes give the agencies, especially the U.S. Environmental Protection Agency (EPA), very broad authority. Most of what the proponents (mainly activists and state regulators) of new controls want could be accomplished by regulation under existing authorities. The problem, from the proponents' perspective, has been that the agencies have been unwilling or unable to use discretionary authorities to do what the activists or state regulators want. Often the objective of proponents of new laws is simply to get congressional mandates with enforceable deadlines for actions that are discretionary, but may well be authorized under existing law. Those wanting such new mandates have to weigh the value of such legislation against the risk of getting legislative provisions they do not want.

The election of an administration more willing to use discretionary authorities may well tilt this risk assessment in the direction of a renewed drive for regulatory action. Added to this is the likely extension of the economic downturn well into the next Administration. This raises the risk to activists of provisions being included in legislation that would relieve industry of some regulatory burdens.

For many years, Congress has dealt with major environmental policy as the source of issues on which political points could be scored, but it has failed to pass new laws. In addition to the considerations discussed above, once an environmental issue becomes a regulatory program, it largely ceases to have political value for several years.

Nevertheless, there are major issues on which the pressure for resolution has been building and that resolution appears to require congressional action.

One area in which there may well be legislation passed relates to the regulation of toxic substances. The United States is a signatory to several chemical management treaties, e.g., the Stockholm Convention on Persistent Organic Pollutants, but is not at the table as they are being put into effect and are evolving. To be a Party to these treaties, congressional authority is needed, but the needed implementing legislation has been stuck in Congress for years. Such legislation, which would not actually impose significant new burdens on industry, may well pass.

These treaties are relatively narrow in scope. Passage of broad toxic substances control legislation is less likely. Still, in both Congress and in the agencies, this will be the focus of some major changes, though the likelihood of regulatory action is considerably greater near term than the passage of broad amendments to the Toxic Substances Control Act (TSCA).⁴ TSCA has not been amended since 1976. The chemical controversies of the last few years need not be repeated here. It is clear that since 1976, the issue of chemicals in the environment has changed tremendously, in the knowledge we have about chemicals, the focus of activists on such issues and the degree of public interest. This is also an area in which *industry* may well seek federal legislation in coming years.

The background for consideration of new requirements for toxics is rich with new influences. In Europe, a sweeping new law known as REACH is coming into force. REACH stands for Registration, Evaluation, Authorization, and Restriction of Chemicals. This will affect almost all chemicals made, imported into, or used in products in Europe—with global ripple effects. Although something like REACH is desired by some activists (and would certainly be welcomed by Europe), it would not be workable in the relatively rigid and open regulatory and legal processes in the United States. It almost certainly will not work as written in Europe either, but the structure of European regulation and enforcement lends itself to the passage of laws with high aspirations but more modest implementation.

In Canada, all chemicals have been screened by Health Canada and Environment Canada under the country's Chemical Management Plan (CMP). Of the 23,000 chemicals on

4. 15 U.S.C. §§2601-2692, ELR Stat. TSCA §§2-412.

Canada's inventory, reviewers found a basis for giving greater scrutiny to 4,300. That is not to say that the other 19,000 have been deemed safe; rather, the agencies found no reason to be concerned and decided that the other 4,300 should be given priority. Of the 4,300, Canada assigned high priority to about 500. These are now undergoing review and control. For the other 19,000, it would be hard to justify the allocation of resources or the sacrifice of tens of thousands of animals to find some chemicals that merit control. Even in those cases, product liability may well have resulted in management sufficient to avoid actual injuries to human health.

The Canadian program was the principal basis of an agreement (the Montebello Agreement) reached by Canada, Mexico, and the United States to upgrade North American chemical management. The Montebello Agreement includes the Canadian program described above. U.S. contribution to the program is known as the Chemical Assessment and Management Program (ChAMP). It includes a screening of all chemicals on the EPA inventory that are produced or imported in quantities over 25,000 on a very aggressive schedule. Under ChAMP, EPA will also "reset its inventory" of 83,000 chemicals, since only a small fraction of the 83,000 are actually discrete chemicals in use today. EPA is also calling for toxicity data to be submitted on high production volume (one million pounds per year or more) inorganic chemicals. Separately, EPA has stepped up its control of new nanomaterials.

ChAMP is thus far largely a voluntary program. EPA has accomplished a great deal with industry cooperation in voluntary programs. Unfortunately, the fact that TSCA does not produce many formal regulatory actions and that the effort to regulate asbestos was a spectacular failure have convinced many, particularly the Government Accountability Office (GAO), that the Act itself is a failure and needs to be amended.⁵

The GAO largely misses the point. Quietly and without much fanfare or issuance of mandatory control regulations, orders or enforcement actions, TSCA has transformed the design, production, and use of chemical products. It has made safety a core criterion in product development. At the same time, TSCA has allowed chemical innovation—which often reduces risks to human health and the environment—to move forward in the United States faster than anywhere else in the world.

ChAMP and the CMP also support a relatively new phenomenon in chemical control: "deselection" of chemicals listed by governments as presenting problems, whether or not any formal controls have been issued. Many among the producers of consumer products see such private deselection as more powerful—and of greater concern—than governmental restrictions. Unlike formal controls, deselection is not subject to legal, political, or scientific discipline. This allows deselection to be triggered by less evidence, by organizations not subject to counterpressures in the way government is. Moreover, the transition from listing (or even just a media campaign) to

deselection can be virtually immediate, while the issuance of regulatory control measures typically takes years.

ChAMP has some flaws and it certainly does not meet the aspirations of the activist community, but together with the Canadian CMP, it will review and manage many more chemicals more quickly than REACH. It will do so far faster than any congressional action, with far fewer animals sacrificed, and at far lower cost to industry and the government. ChAMP and the Canadian CMP are much better models for any TSCA amendments than REACH, but that is something about which Congress is at best skeptical. ChAMP badly needs additional resources to meet its targets, though, a problem that will face any effort to create a new program, legislative or regulatory. It may be possible to pass some authorizing legislation, but EPA is stretched to the limit. The Agency will need appropriations and much more personnel to implement any new program more challenging than ChAMP—and this is true of any other regulatory program.

Still, it is becoming more widely accepted that with improvements that do not need legislation, ChAMP is valuable and should be continued by the new Administration, though this would not forestall efforts to amend TSCA. Although there will be hearings and reports and chemical scares, TSCA amendments are very unlikely in the next Congress, absent some event that brings sustained nationwide concern and pressure.

There is considerable pressure for new legislation and there may well be serious efforts to pass legislation addressing issues such as climate change and the definition of federally protected wetlands, but the success of such efforts is in doubt, the outcomes of the election notwithstanding. For those who want new laws, my expectation is that there will be more disappointment than progress, at least in Congress. The economic downturn, competing priorities, structural obstacles to the passage of major environmental legislation, i.e., the need for supermajorities, and pressures on the federal budget make such legislation unlikely.

5. See, e.g., GAO, COMPARISON OF U.S. AND RECENTLY ENACTED EUROPEAN UNION APPROACHES TO PROTECT AGAINST THE RISKS OF TOXIC CHEMICALS (2007) (GAO-07-825).