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Environmental LAW

Federal environmental regulations: substantial battles ahead

Following Election Day and the shift in Senate control, it may be worth a look ahead at environmental issues that are likely to be confronted in 2015. While the administration of President Obama has already been very active in the regulatory arena, the next two years are likely to continue that trend in key policy areas.

With the upcoming 2015 Congress under Republican control, the scrutiny and opposition to the environmental policies of this administration are likely to be heightened. Based on the incredible impact and cost of proposed environmental regulation, additional scrutiny and principled opposition seems warranted.

The administration has issued or is in the process of proposing far reaching environmental regulations that will affect all aspects of American life, including greenhouse gas emission standards, methane gas emission standards, rules for handling and storage of coal ash, and hydraulic fracturing on federal lands. The most recent and far-reaching proposals also include considerable expansion of the definition of "waters of the United States" and significantly tightened ozone emission standards.

The administration has proposed sweeping new regulations of "navigable waters" under the Clean Water Act. The proposed rule is supposed to address recent U.S. Supreme Court decisions that have left uncertainty about the reach of the federal authority. In April, the United States Environmental Protection Agency proposed a rule known as "waters of the United States" that would substantially increase the federal authority over water, use of water and adjoining land. The reach of the proposed rule is striking and its potential impact on property rights, farming, business and federalism is ominous. The public comment period expired Nov. 28.

The volume of comments on the regulation was extensive. For example, the U.S. Chamber of Commerce joined with almost 400 other business groups that requested EPA withdraw the rule which redefines agency jurisdiction over ponds and streams. Significantly, opponents argue that the proposed rule would expand EPA's authority over creeks, ponds and wetlands broadly and would put millions of rivers and streams under federal control, as well as ditches, puddles and dry creek beds. The expanded jurisdiction could create

the need for additional permits for a variety of routine activities near these water sources, such as excavating ditches and building fences.

In striking comments, the American Farm Bureau Federation said that the rule "provides none of the clarity and certainty it promises" but "[i]nstead, it creates confusion and risk by providing the agencies with almost unlimited authority to regulate, at their discretion, any low spot where rainwater collects, including common farm ditches, ephemeral drainages, agricultural ponds, and isolated wetlands found in and near farms and ranches across the nation." Despite the EPA's suggestion that CWA jurisdiction would only marginally increase, the regulatory community is not accepting that statement.

Thus far, the draft rule that received over 500,000 comments and galvanized industry, business, farms and municipalities in opposition has not garnered much public support aside from environmental interest groups. In September, the House of Representatives voted to block the rule and Senate bills have been sponsored as well.

However, as with other policy matters, it is unlikely that opposition will dissuade either the administration or regulatory agencies. Consequently, new congressional fights and budgetary restrictions seem to be ahead in 2015.

The likely chairman of the Senate Environment and Public Works Committee, James Inhofe, R-Okla., is no fan of the EPA. Inhofe may support his colleagues, Sen. David Vitter, R-La., and Rep. Bill Shuster, R-Pa., who commented that the rule "presents a grave threat to Americans' property rights, and its finalization will force landowners throughout the country to live with the unending prospect that their homes, farms, or communities could be subject to ruinous Clean Water Act jurisdictional determinations and litigation." The EPA is slated to issue a final rule in spring 2015 after reviewing comments.

Similarly, on Nov. 25, the EPA proposed tightened ozone regulations under the Clean Air Act that would reduce the permissible level to between 65 and 70 parts per billion (ppb). Ozone is the primary component of smog and is addressed under the CAA. In

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2008, EPA issued an ozone standard of 75 ppb, but has been trying to make the standards more restrictive ever since. These efforts have caused significant concern among the business, regulated community and elected officials outside the current administration. The regulations need to be finalized by October 2015.

If the new standards are promulgated, it will force many U.S. metropolitan areas out of compliance with the CAA. The consequences are significant. The states where these areas are located will be forced to develop State Implementation Plans that specify steps that each non-attainment area will undertake to meet the new standard. Additionally, businesses in the non-attainment areas generally have to purchase new air pollution equipment and obtain new permits. Hence, the non-attainment zones may be red-flagged by site selectors for new business opportunities and force businesses to look elsewhere.

Incredibly, the EPA considered a 60 ppb standard despite the agency's predictions that it would cost the U.S. up to \$90 billion per year. In 2011, EPA settled on a proposal for 70 ppb, but in the midst of a presidential election season and concerns about business imports, the president directed the agency to shelve the regulatory proposal. Free from election concerns, the president and EPA are now moving ahead irrespective of the costs to American business and citizens. The Republican Senate and House are likely to take legislative and budgetary steps to try to halt the ozone rule.

The National Association of Manufacturers has predicted that the ozone rule would be the costliest regulation in U.S. history. A study performed by NERA Economic Consulting for NAM estimated that a 60 ppb standard would have the following effects: reduce gross domestic product by \$270 billion on average per year from 2017 through 2040; cause an average annual loss of 2.9 million jobs through 2040; and impose \$2.2 trillion in costs from 2017

through 2040. The EPA's information suggests that if the standard is lowered to 60 ppb, 93 percent of the counties in the U.S. with ozone monitors would fail to meet them.

Republicans in Congress have been very critical of the ozone proposals. This summer, Sen. Vitter and Rep. Lamar Smith, R-Texas, wrote to the EPA requesting the agency to comply with the CAA statutory requirement to have the Clean Air Scientific Advisory Committee evaluate the adverse effects, including economic impacts, of attaining and meeting a tighter ozone standard. It does not appear that EPA has complied with this requirement in moving forward with the proposed regulations.

Shortly after the proposed regulations were issued, House Speaker John Boehner, R-Ohio, issued stinging comments calling the ozone regulations a job killer and "the most expensive rule ever proposed by the EPA." Aside from the economics, the potential environmental benefits and science of the regulation are in serious doubt. The proposed standards are below naturally occurring ozone levels near Yellowstone Park in Wyoming.

Regardless of one's perspective on environmental regulation, elected members of Congress should exercise their legislative role to evaluate and act on these and other pending environmental regulations that could gravely impact the U.S., as a whole, and each and every citizen. The cumulative impact of EPA's aggressive proliferation of regulations to the U.S. needs to be carefully considered.

The EPA, like other federal agencies, needs to be accountable to the country and not overstep its regulatory bounds by re-making federal environmental laws without accountability or reasonable limits.

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