

How the Elections Could Impact the EPA

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This article provides a summary outlook on possible implications of the 2010 congressional midterm elections on policy and legislative developments in the U.S. Environmental Protection Agency's regulation of chemicals and pesticides.

The dramatic decline in the number of elected Democratic members, especially the loss of the majority in the House of Representatives, will make for some significant differences in the prospects for the EPA's budget, legislative proposals and general operations (e.g., policy initiatives).

In the Senate, the Democrats not only lost much of their plurality, but also some of the newly elected members have indicated a very hard-line attitude against any expansion in the role of government and an overriding concern on federal deficit spending, commitments that could affect the future of the EPA and most other government agencies.

The year 2011 promises to be eventful, even if by way of what does not occur. Many factors, including committee leadership assignments, are as yet undetermined, but important considerations are already established.

Committees of Jurisdiction

In the House, the changes in committee leadership will be monumental. Most notably for the EPA, current House Energy and Commerce Committee chairman Henry Waxman, D-Calif., is expected to be replaced by Rep. Fred Upton, R-Mich. This will affect any prospects for climate legislation.

Even President Obama has declared the cap-and-trade approach as "dead." Almost every element of the EPA's operational programs will be impacted as well. Waxman held numerous hearings and developed or promised significant initiatives to expand the EPA's regulatory authorities and to implement aggressively all of its enabling authority across all media programs (air, water, waste and toxics).

The new goal for many interested parties, who a short time ago hoped for expansion of the EPA's programs and reach, will now be to fight to maintain the current status quo. Toxic Substance Control Act (TSCA) reform legislation, discussed more below, is one example where the likely outcomes are radically different due to the change in leadership of the committee.

Changes in the Energy and Commerce Committee are not the only place where an immediate impact will be felt. The champion of expanding the reach of the Clean Water Act, James Oberstar, D-Minn., not only will not be chairman of the Transportation and Infrastructure Committee, but was himself defeated in his re-election bid. The EPA's budget will be subject to

an expected freeze in domestic discretionary spending, and less likely to be allowed exceptions to freezes or special initiatives directed by the Appropriations Committee.

The expected chairman of the Oversight and Government Reform Committee, Darrell Issa, R-Calif., has already stated that he intends to conduct extensive oversight hearings on various programs and agencies, on the EPA generally and on “EPA science.”

In the Senate, where Democrats retain majority control, much less change in committee leadership is expected. Sen. Barbara Boxer, D-Calif., was re-elected, and is expected to continue as chairwoman of the Senate Environment and Public Works Committee. Sen. Frank Lautenberg, D-N.J., was not up for re-election, and is expected to continue to champion TSCA reform and attempt to keep it high on the committee agenda.

Concerning the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the fact that the Agriculture Committees, in both the House and Senate are the most nonpartisan of any committee will limit the implications for the EPA’s pesticide program. In the House, Rep. Frank Lucas, R-Okla., is expected to become chairman, and he is more likely to pursue some level of oversight critical to the EPA’s implementation of FIFRA. His views, however, are not expected to be radically different from the previous Democratic chairman.

In the Senate, current chairwoman Sen. Blanche Lincoln, D-Ark., was defeated, leaving Sen. Debbie Stabenow, D-Mich., as likely chairwoman. Although Michigan is not as dependent on agriculture as Arkansas, this is not expected to result in significant change in the way the committee operates.

EPA Appropriations

In addition to any expected widespread freeze in domestic program spending, the EPA could be subject to a variety of restrictions or reductions in its operating programs.

For example, if the cap-and-trade approach to climate change is not available, many will want to have the EPA continue its efforts to control carbon emissions via existing authority.

This could inspire an effort by those opposed to such a plan to use the appropriations process to restrict the range of possible EPA options.

Similarly, some could attempt to use appropriations restrictions to limit any EPA program or policy. The key difference for the next two years is that opponents of EPA actions will have a much friendlier forum for this approach to direct or deflect EPA behavior.

At the same time, the EPA budget tightening could soon adversely impact its ability to process pesticide registrations (notwithstanding the Pesticide Registration Improvement Act), respond to data submittals (even potentially pre-manufacture notice (PMN) submissions), slow down any pending rulemaking and generally crimp the EPA’s ability to implement even noncontroversial components of its operating programs.

As the budget situation further deteriorates, some impacts could be felt on personnel — via direct cuts or hiring freezes, threats of pension cutbacks leading to earlier retirements or salary freezes — which could hinder the EPA’s ability to attract or retain the more talented of current staff.

The EPA’s Office of Chemical Safety and Pollution Prevention (OCSP)

TSCA

The future of the EPA’s toxics program is one of the most affected by the 2010 election. The particulars of the discussion of possible changes to the TSCA during the past two years are mostly moot at this point.

Although the leadership and majority in the Senate remain largely unchanged, the absence of Waxman as chairman will have radical implications for any possible TSCA legislation.

Waxman’s proposals, actively discussed in the past two years, will need to be greatly reduced in scope and detail to have any realistic chance of enactment in the current Congress.

Lautenberg in the Senate is expected to continue to support more extensive changes, but in the Senate some of the new members may oppose any legislation that seeks to “expand government,” let alone those which could be in any way can be considered to have an adverse impact on jobs. This is not to predetermine any analysis of any legislation yet to be introduced, but many of the likely hot-button rhetorical issues have already been identified.

The most interesting question lies with the response of the chemical industry and its allies to the change in House leadership. Notwithstanding the rhetoric of agreeing on many, if not all, of the “principles of TSCA reform,” no legislative proposal was forthcoming from industry trade groups or any of its members.

Perhaps now with expected friendlier forums for any discussion of TSCA amendments, industry representatives will be less hesitant to develop specific amendments they believe will give expression to the stated principles. This alone will not lead to agreement, as environmental groups will almost certainly expect and hope for more extensive changes. The discussion could nonetheless begin in a way which could lead to some areas of agreement.

What the new Congress would do, even if such groups agree on some or all issues, is a separate unknown.

FIFRA/FQPA

From the perspective of Congress, FIFRA implementation has generally been quiet over the first two years of the Obama administration. The new Republican majority in the House, however, will likely lead to some level of aggressive oversight of all EPA programs, pesticides included.

For the pesticide program, immediate candidates for an increased level of scrutiny include the use of “good science” in decision-making, the use of FIFRA or Food Quality Protection Act

(FQPA) authority in removing pesticide uses from the market without going through the FIFRA cancellation process, specific product decisions (carbofuran tolerance revocation, atrazine reevaluation), and the overall transparency and participation in developing new program initiatives (e.g., additional safety factors in occupational health assessments, new public review loops in pending new registrations, use and review of existing data in Office of Pesticide Program's endocrine disruptor screening program, and the economic impact of EPA pesticide decisions).

At the same time, some of the most difficult issues facing the pesticides program, such as implementation of the Endangered Species Act, the Clean Water Act and even the issue of pesticide drift, are likely to remain as intractable as ever. Another consideration is that some of these oversight opportunities will come from outside of the House Agriculture Committee (science policy issues and procedures could be reviewed by the House Science Committee).

Administration Reaction

As President Bill Clinton reminded the leaders of the Republican "takeover" in 1995, the president is still relevant, even if Democrats retained control of the Senate.

If, as expected, the House attempts to undermine budget or legislative priorities of the administration, the executive branch (and its allies in the Senate) retains numerous ways to attempt to control the agenda in the environmental arena. Large areas of discretion remain in existing authority under both FIFRA and TSCA.

Past cries of "good science" have regularly been met with the retort of "protect children" — which in the current context could lead to a greater emphasis on pesticide use in schools, indoor air pollution, "warnings" about various chemical exposures or products in the home and the results of biomonitoring studies of children, among other things.

Presidents can unilaterally sign executive orders or determine priorities under current law. One such example for President Clinton came in 1995, when partly in response to the 1994 election losses, the president ordered the EPA to accelerate the expansion of the Toxic Release Inventory (TRI) and issued an executive order mandating greater TRI reporting obligations on federal contractors. One can expect similar initiatives to be considered by the Obama White House, starting immediately.

Another opportunity in this regard is to exert greater influence in the area of international environmental programs and agreements, since that is often viewed as an area of greater autonomy or control of the executive branch.

One additional implication of the 2010 elections is that the 2012 presidential election cycle officially started on Nov. 3. This will color any activity by either party or the administration over the next two years. Environmental issues are often used to make clear distinctions between the two parties, and this could lead to initiatives or pronouncements by either party intentionally driven to illustrate or exacerbate those differences.

What is less clear is the immediate message the current administration perceives to be in its best interest in light of the 2010 election results. Will the administration be more sensitive to predictions of the impacts on businesses from environmental programs? Will the administration push more extensive environmental initiatives as part of the “jobs and the environment go together” theme?

If the climate cap-and-trade approach is dead, then will the administration attempt to placate its environmental constituencies in more aggressive behavior in other program areas? Will the Tea Party role in the Republican caucus mean that no compromise is possible on anything proposed or sought by the administration?

Stay tuned.

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