Message

From: Daguillard, Robert [Daguillard.Robert@epa.gov]
Sent: 1/28/2021 11:55:07 PM
To: AO OPA OMR CLIPS [AO_OPA_OMR_CLIPS@epa.gov]
Subject: Afternoon Clips, January 28, 2021

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REUTERS LEGAL • January 28, 2021

The U.S. Environmental Protection Agency (EPA) sign is seen on the podium at EPA headquarters in Washington, U.S., July 11, 2018. REUTERS/Ting Shen

(Reuters) - Environmental Protection Agency political appointees announced on Wednesday include its former general counsel who, in more recent years, defended Chevron in cases where cities and counties are seeking to hold major oil companies liable for damages tied to climate change.

Avi Garbow, who joins the Biden administration as senior counselor to the EPA administrator, is the latest of a growing number Obama-era veterans to staff the agency's leadership team. He worked as EPA's top lawyer from 2013 to 2017 after being nominated by President Barack Obama.

The attorney also brings to the agency his experience as partner, from 2017 to 2019, at private law firm Gibson Dunn & Crutcher, according to his LinkedIn profile.

In that position, Garbow joined Chevron's legal team in about half-a-dozen lawsuits over the alleged role of major oil companies in exacerbating damages from climate change. That includes a case New York City lost in 2018 in Manhattan federal court against Chevron and its co-defendants including BP PLC. Garbow's name also shows in the San Francisco federal court docket for cases by cities and counties, including Richmond and San Mateo.

Garbow told Reuters: "I will be helping EPA's leadership, and the entire agency, implement the Biden-Harris administration's bold climate and environmental agenda. We have no time to waste in returning EPA to its mission

of protecting human health and the environment, with science, the rule of law, and environmental justice at the fore."

In other apointments, Dorien Paul Blythers, will be EPA's deputy chief of staff for operations. He has worked to promote the candidacy of Vice President Kamala Harris.

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The Hill: Court rules against fast-track of Trump EPA's 'secret science' rule
https://thehill.com/policy/energy-environment/536264-court-rules-against-fast-track-of-trump-epas-secret-science-rule
BY RACHEL FRAZIN - 01/28/21 10:07 AM EST

A federal judge in Montana late Wednesday ruled against the Trump administration's attempt to fast-track a controversial rule about how the Environmental Protection Agency (EPA) considers scientific evidence, endangering its future under the Biden administration.

The Trump EPA had characterized the rule, which would restrict the use of studies that don't make their underlying data publicly available, as procedural, allowing it to go into effect immediately.

Judge Brian Morris, an Obama appointee, disagreed, determining that the rule was substantive and ordering that it can't go into effect until Feb. 5.

Delaying the rule could jeopardize it, as it would now be subject to a new White House memo that freezes pending regulations for 60 days.

Under the memo, President Biden's administration can take action against rules if it determines that they raise "substantial questions of fact, law, or policy."

The Trump administration billed the rule in question as a transparency measure, with former EPA Administrator Scott Pruitt saying it would combat "secret science."

Critics argued that it could undermine the use of important public health studies that have legitimate reasons, such as privacy, to hide underlying data.

The rule didn't eliminate the use of studies with private data, but gave preference to those that made their data public, which critics argued could tip the scales in favor of industry.

In his ruling, Morris argued that that rule was substantive, rather than procedural as the agency contended, because it "determines outcomes rather than process."

"The Final Rule's status becomes particularly clear when one examines what it is missing—any kind of procedure. EPA itself noted in its rulemaking that it would have to issue future guidance on how the rule operates procedurally," he wrote.

He added that the agency lacked "good cause" to exempt the rule from the 30-day delay before it takes effect.

"EPA failed to show a need for urgent implementation when it took more than two-and one-half years to finalize this regulation," Morris wrote.

The ruling also raises questions about the Congressional Review Act (CRA), under which Congress can overturn agency rules issued at the end of a president's term.

Then-EPA Administrator Andrew Wheeler told reporters earlier this month that the CRA was not applicable because "this is an internal housekeeping regulation" and is not costly.

Deepak Gupta, one of the lawyers on the case, told The Hill that he thinks the court's decision that the rule is substantive, rather than just a housekeeping matter, means there's a better chance the CRA could be used against it.

"Yesterday's decision makes it much more likely that Congress may repeal this rule under the Congressional Review Act. The decision also makes it much easier for the EPA to postpone this rule and ultimately rescind it," Gupta said.

The rule was challenged by three environmental groups, the Environmental Defense Fund (EDF), Montana Environmental Information Center and Citizens for Clean Energy, which all hailed the ruling.

"The Trump administration broke the law by issuing a harmful rule to censor life-saving medical science, and broke the law again by trying to make the rule immediately effective," EDF senior attorney Ben Levitan said in a statement. "The Censored Science Rule weakens EPA's ability to protect Americans from dangerous pollution, toxic chemicals and other threats."

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Politico Pro: Biden brings back Obama's top EPA lawyer
https://subscriber.politicopro.com/article/2021/01/biden-brings-back-obamas-top-epa-lawyer-3986636
BY ANNIE SNIDER

|01/27/2021 02:01 PM EST
The Biden administration is bringing back the former top EPA lawyer who helped craft major Obama-era environmental rules to serve as senior counselor to the agency administrator.

The details: Avi Garbow will bring a deep legal and regulatory expertise to the Biden EPA as it seeks to aggressively address climate change and environmental justice, while reversing the Trump administration's environmental rollbacks.

Garbow served as EPA general counsel from 2013 to 2017, playing a key role in the crafting of virtually every major regulation of that era, from the Clean Power Plan and the Waters of the U.S. rule to rules governing coal ash and air pollutants. He has most recently worked as "environmental advocate" for the outdoor retailer Patagonia.

Other appointees: The Biden administration also named a handful of other appointees to EPA:

— Dorien Paul Blythers to be deputy chief of staff for operations. Blythers served as regional political director for Vice President Kamala Harris' presidential campaign.

— Kathleen Lance to be director of scheduling and advance for the administrator. Lance most recently served at North Carolina's Department of Environmental Quality as special assistant to secretary Michael Regan, now Biden's nominee to lead EPA.

— Fernando Mercado-Violand to be deputy White House liaison. Mercado-Violand most recently worked as deputy state and political director for the Biden-Harris campaign in Virginia.

What's next: Additional appointees are expected to be announced in the coming days.

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Associated Press: As Biden seeks a turn on environment, Trump rules to linger
https://abcnews.go.com/Technology/wireStory/biden-seeks-turn-environment-trump-rules-linger-75541150

Longtime safeguards for U.S. bird populations that were stripped away by the Trump administration are among more than 100 business-friendly rules getting a second look under President Joe Biden
By JOHN FLESHER and MATTHEW BROWN Associated Press
January 28, 2021, 11:47 AM

President Joe Biden wasted little time seeking to turn things around. Hours after taking office, he ordered a review of his predecessor's decision to weaken enforcement of the century-old Migratory Bird Treaty Act. It was among more than 100 business-friendly Trump actions on the environment that Biden wants reconsidered and possibly revised or scrapped.

A White House statement Wednesday described them as "harmful rollbacks of standards that protect our air, water, and communities." And the president targeted oil and gas leasing on federal land and subsidies for those industries in his bid to slow climate change, while promising stepped-up land and water conservation.

Despite the quick start, it will take months or years to reverse policies set in motion by Trump's team — including those involving the bird treaty rollback, which happened as North American populations continued a decline that has reached 3 billion — a one-third overall drop — since 1970.

Many rules Trump went after originated with former President Barack Obama and took him years to undo, continuing a decades-old, back-and-forth between Democratic and Republican administrations with starkly differing approaches to environmental regulation.

"You have the worst-case scenario of partisan ping pong," said Clint Woods, a former Environmental Protection Agency deputy assistant administrator under Trump.

Environmental activists are pressing for fast action. They say returning to the pre-Trump status quo is no longer enough as hundreds of millions of birds die annually at the hands of industry, global temperatures rise and poor communities remain vulnerable to air and water pollution.

Biden faces similar challenges as he inherits Trump's actions across the environmental spectrum — from removal of endangered species protections for gray wolves, to loosened energy standards for washers and dryers and reversal of the Obama administration's proposed ban on chlorpyrifos, a crop pesticide some scientists say could harm children.

Business groups lobbied for Trump's deregulatory approach. Critics said it crippled bedrock environmental protection laws, slashed agency funding and slackened enforcement.

"There's a huge amount of work to be done," said Erik Olson, a senior strategic director with the Natural Resources Defense Council. "The Trump administration not only did their best to roll back rules, but tried to eviscerate the basic infrastructure of the agencies. They brought in people who viewed it as their job to keep agencies from carrying out their missions."

Mandy Gunasekara, EPA chief of staff for part of Trump's term, said Biden's early acts signaled a turnaround from the Republican administration's efforts to balance economic growth with environmental protection. Those include canceling a permit for the Keystone XL oil pipeline and halting energy leasing in the Arctic National Wildlife Refuge.

"In the real world where people are breathing air and drinking the water and living on once-contaminated land, we made considerable progress," Gunasekara said. "Instead of trying to wipe the slate clean, they should build off the good work we've done."

One cause for optimism, environmental advocates said, is that most of Biden's initial appointees to key posts are former insiders. Gina McCarthy, the national climate adviser, served as Obama's EPA chief. Michael Regan, tapped to lead EPA, was an air quality specialist there.

"This is a team of experts as opposed to a team of novices," said Ann Mesnikoff, federal legislative director for the Chicago-based Environmental Law and Policy Center.

Some Trump actions were taken through decrees and documents that can be rescinded or revised. Biden staffers will comb through a flurry of measures from Trump's last days that haven't taken effect and could be pulled back, such as the bird death rule.

But some policies can be undone only through multi-year grinds involving scientific research, public comment periods and lobbying from advocacy groups.

Among them: last year's weakening of the National Environmental Policy Act, a Nixon-era law requiring federal agencies to consider how projects such as oil pipelines could harm natural surroundings. Trump's revision shortened reviews and exempted some projects.

Restoring the law's reach is "an essential tool for achieving climate goals and equity for vulnerable communities" — both Biden priorities, said Oday Salim, an assistant professor of environmental law at the University of Michigan.

Other Trump rollbacks include a reduction of water bodies protected from pollution under the Clean Water Act and changes in how the EPA evaluates science and calculates benefits from pollution reductions. Biden called for action on those two EPA rules as soon as possible.

Courts already intervened to halt some Trump rules and policies, including attempts to open vast western lands to energy development, grazing and mining. An appeals court last week tossed a redo of an Obama-era plan to regulate greenhouse gas emissions from power plants.

The Trump administration lost or withdrew proposed rule changes in almost 80% of 109 court challenges tracked by the Institute for Policy Integrity at New York University law school. Past administrations have lost or backed down in 30% of cases, said adjunct professor Bethany Davis Noll, who helped compile the data.

Yet the federal judiciary became more conservative under Trump, who appointed nearly 30% of active judges, according to the Pew Research Center. Six of the Supreme Court's justices are Republican appointees.

Environmental advocates acknowledge the hurdles but want an aggressive response to Trump's actions, particularly those undermining policies that had survived under both parties.

The law protecting migratory birds is one.

Under Trump, the government stopped pursuing punishments for accidental but preventable bird deaths, such as when they collide with power lines or drown in oil waste pits. Enforcement cases against companies dropped from almost 60 cases annually on average to zero.

Virginia's Democratic governor blamed the change for the 2019 destruction of a nesting ground for 25,000 shorebirds to make way for a road and tunnel, after federal officials said conservation measures were no longer required.

A judge later rejected the Interior Department's justification for the bird policy change. So the department adopted a regulation doing the same thing.

Although Biden's administration could withdraw it, bird advocates want even stronger protection than before, which would require a time-consuming new rule.

"We have to think smarter, we have to think broader than the Obama administration to accomplish conservation and environmental protection," said Sarah Greenberger, former senior advisor in Obama's Interior Department and now an Audubon Society vice president.

Flesher reported from Traverse City, Michigan, and Brown from Billings, Montana. Contributing to this story were AP writers Christina Larson in Washington, D.C., Tammy Webber in Fenton, Michigan, and Janet McConnaughey in New Orleans.

On Twitter follow John Flesher: @JohnFlesher and Matthew Brown: @MatthewBrownAP

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EcoWatch: EPA Launches Environmental Justice Investigation in Chicago
https://www.ecowatch.com/environmental-justice-chicago-2650168769.html?rebelltitem=1#rebelltitem1
Climate NexusJan. 28, 2021 11:51AM ESTCLIMATE

The U.S. EPA launched an environmental justice investigation this week into the relocation of a polluting scrapyard from a predominantly white and wealthy neighborhood on Chicago's North Side to a predominantly poor and Latinx neighborhood on the city's Southeast Side last year.

The investigation stems from complaints brought by Southeast [Chicago] Environmental Task Force and the Chicago Southeast Coalition to Ban Petcoke, which allege state environmental regulators colluded with city agencies and developers to move polluting industries out of gentrified neighborhoods into already heavily polluted neighborhoods predominantly populated by people of color.

"We refer to ourselves as a sacrifice zone," Peggy Salazar, a lifelong Southeast Side resident and director of SETF, told Grist.

"The revitalization of parts of Chicago are planned, and they frame the [South and West Sides] as the accommodating communities. To them, we're here to accommodate — not participate — in the revitalization."

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National Law Review: New Administration Focus on Environmental Issues Signals More Changes Ahead in Auto Industry
https://www.natlawreview.com/article/new-administration-focus-environmental-issues-signals-more-changes-ahead-auto
Thursday, January 28, 2021

The auto industry has been planning for the impact on a change in administration on many fronts. As previously discussed, the new administration has a strong focus on environmental policy, and is expected to make sweeping changes. What is potentially in store for the auto industry? The first few days in office provide clues to what will be coming.

A week into office, the Biden administration has made the following moves, among others pertinent to the auto industry:

Rejoining the Paris Agreement. The Paris Agreement is an international treaty aimed at reducing greenhouse gas emissions. The Trump administration had withdrawn from the Paris Agreement.

Fuel Economy. Issuing an executive order for immediate review of agency actions taken during the Trump administration, including fuel economy. This includes direction to consider suspending, revising, or rescinding the: "Establishing Ambitious, Job-Creating Fuel Economy Standards: 'The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program,' 84 Fed. Reg. 51310 (September 27, 2019), by April 2021; and 'The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks,' 85 Fed. Reg. 24174 (April 30, 2020), by July 2021." Biden further ordered that "in considering whether to propose suspending, revising, or rescinding the latter rule, the agency should consider the views of representatives from labor unions, States, and industry." This follows a campaign promise to pursue more stringent fuel economy standards rolled back under Trump.

Electric Vehicles. Issuing an executive order regarding transforming the federal fleet of vehicles to electric or clean energy vehicles, made in the US. This follows announcements earlier this week by Biden that he intended to move the 650,000 federal fleet to EVs, in conjunction with his Buy American executive order.

Charging Infrastructure. Focusing on building an electric vehicle charging infrastructure. This goes hand in hand with the federal fleet but aims to transform the current charging station infrastructure to be broader and more accessible.

California Emissions. The industry is also expecting Biden to reverse the Trump administration's waiver on California to set stricter standards. This had left the auto industry divided, with manufacturers picking sides in the battle.

In remarks on January 27 in conjunction with his climate change, Buy American, and environmental executive orders, Biden described his administration's goals as "one million new jobs in the American automobile industry." As the administration continues ramping up its actions, we will continue tracking the developments and impact for the auto industry.

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Washington Post: The Energy 202 - *Republicans prepare to fight Biden's climate actions they call 'divisive and illegal'*
https://www.washingtonpost.com/politics/powerpost/the-energy-202/?gsBNFDNDN=undefined&utm_campaign=wp_the_energy_202&utm_medium=email&utm_source=newsletter&wpisrc=nl_energy202
1/28/21
By Dino Grandoni
with Alexandra Ellerbeck
Republicans prepare to fight Biden's climate actions they call 'divisive and illegal'

We are only one week into Joe Biden's presidency, and Republican lawmakers are raring for a fight as his administration begins an ambitious effort to address global warming.

A flurry of early actions – culminating with a sweeping executive order Biden signed Wednesday – has prompted swift backlash from GOP lawmakers ready to defend the fossil fuel sector and the jobs it sustains in many of their states.

Republicans say the president's initial calls for unity feel empty with what they consider an attack on the energy sector during an economic recession that already has the industry ailing.

"You can't just go cold turkey overnight," Rep. Bruce Westerman (Ark.), the top Republican on the House Natural Resources Committee, said in a recent interview. "You've got to figure out a way to keep the economy strong."

President Biden signs an executive order on climate change at the White House. (Anna Moneymaker/EPA-EFE/Shutterstock)

Biden and his environmentalist allies, however, say there is a high cost to waiting to stop the dangerous warming that climate scientists warn will happen if the world continues burning oil, gas and coal at the current rate over the next decade.

"In my view, we've already waited too long to deal with this climate crisis," Biden said in a speech at the White House Wednesday. "We can't wait any longer."

Biden's energy secretary nominee is bearing the brunt of the Republican pushback so far.

Confirmation hearings for even his uncontroversial Cabinet picks have become forums for Republican lawmakers to air their grievances with recent Biden decisions, including calls to calculate the cost of carbon emissions to society and to pause oil and gas leasing on federal lands and waters.

Biden and his team say his climate agenda doubles as a plan to create thousands of union jobs constructing and installing wind turbines, solar panels, electric cars, charging stations and the like. "I am obsessed with creating good-paying jobs in America," energy secretary nominee Jennifer Granholm told senators during her hearing Wednesday.

But Republicans from oil- and gas-producing states grilled her on how quickly those jobs would come to fruition.

"If you've lost a job that is putting food on the table now, it's cold comfort to know that years from now — perhaps in a different state with a different training within which you have — there'll be another job available," said Sen. Bill Cassidy of Louisiana, whose coastline is dotted with offshore oil platforms.

Sen. John Barrasso of Wyoming, the nation's top coal-mining state, grilled Granholm about the halt in new oil and gas leasing on federal lands and waters. "I'm not going to sit idly by," he said, "if the Biden administration enforces policies that threaten Wyoming's economy." His office issued a statement calling Biden's decision on leasing "divisive and illegal."

In response, Granholm noted Biden's executive order does not ban drilling on the thousands of leases already sold to drillers.

Environmental activists and think tanks allied with Democrats were quick to come to the defense of the Biden administration when attacked by Republicans and the fossil fuel sector, arguing industry has influenced the debate around climate policy for too long.

"Big Oil's sky-is-falling claims are unfounded," said Jenny Rowland-Shea, a senior policy analyst for public lands at the Center for American Progress.

Biden's other Cabinet picks are also being pressed.

Sen. Dan Sullivan (R-Alaska) said in an interview Tuesday that he's asked every Biden Cabinet nominee whether they're committed to sustaining oil and gas development along with renewable energy in the United States.

"I can't find a Cabinet official that I've interviewed who has said, 'I am going to be a strong advocate for a robust energy sector that makes us energy independent," he said "I've asked them all. Not a one." He added it was this sort of attitude that prompted him to vote against Treasury Secretary Janet Yellen despite the fact that she's "incredibly qualified, amazingly qualified."

Meanwhile, Ted Cruz of Texas, the top oil-producing state, asked commerce secretary nominee Gina Raimondo about Biden's decision to nix the Keystone XL pipeline.

"What would you say to those 11,000 construction workers whose jobs have been destroyed by the stroke of a pen?" Cruz said, though that number refers to temporary jobs, barring 50 or so permanent positions.

"I would say that we're going to get you to work," she responded. "I would say that climate change is a threat to all of us."

A handful of GOP moderates, such as Sens. Lisa Murkowski (Alaska) and Mitt Romney (Utah), are willing to break with their party on former president Donald Trump's second impeachment trial and other big issues. But as representatives of oil- and gas-producing states, they are not as apt to cheer on Biden's climate agenda.

"For us in resource-based states, I just hope you hear the concern," Murkowski told Granholm. "We're a state that's seeing the daily impact of climate change, so we know that we need to be aggressive. But we also know that we have to be [an energy] provider."

Republicans are mulling ways of shaping — or stalling — Biden's climate agenda.

The initial reaction put a damper on hopes of much of the rest Biden's climate agenda, which will require approval from Congress, getting bipartisan support.

With a 50-50 split in the Senate, Democrats need some GOP help to overcome the 60-vote filibuster threshold to pass sweeping legislation. Riled-up Senate Republicans may be primed to block much of Biden's legislative agenda on climate.

On the other side of the Capitol, top Republicans plan to talk to Democrats from oil, gas and coal states. The path for bills to pass the House got narrower for Democrats after losing seats in the 2020 election.

"Republicans, Democrats and independents all breathe the air and drink the water, but I don't think this is the right approach," said Westerman, who advocates for planting and harvesting trees to keep carbon out of the air.

"We've got to make that argument to our friends across the aisle," he added. "If you're a Democrat in Texas, Colorado, New Mexico, Pennsylvania, Louisiana — go down the list of these states that this is going to have dramatic negative impacts."

Outside Washington, six Republican attorneys general warned Biden not to overstep his authority with his executive actions. West Virginia Attorney General Patrick Morrisey, who led the letter, sued to block the Obama administration's efforts to curb greenhouse gas emissions from power plants.

Now, Morrisey told Fox News that Biden's climate plan is "much more radical" than President Barack Obama's. "The president is really taking a wrecking ball to many of the states that have oil, gas, coal, manufacturing jobs."

Juliet Eilperin contributed to this report.

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Bloomberg: Court Order Widens EPA Options to Drop 'Secret Science' Rule (1)
https://news.bloomberglaw.com/environment-and-energy/court-order-gives-epa-more-options-to-drop-secret-science-rule
Jan. 28, 2021, 4:05 PM; Updated: Jan. 28, 2021, 5:29 PM

- Federal decision opens several pathways for Biden administration
- Regulatory scholars see no harm in trying all options
- A federal court decision delaying the effective date of the EPA's science transparency rule gives the Biden administration a pathway to unravel it, including the use of the same procedural tool the Trump administration team used to write it, legal scholars say.

The U.S. District Court for the District of Montana said on Wednesday that the Environmental Protection Agency hadn't justified its decision to put the rule in effect right after its publication in the Federal Register—instead of after 30 days, as is standard practice. That created an opportunity for the Biden administration to try sweeping the rule into a Jan. 20 memo that pauses all Trump-era rules that hadn't taken effect by that date, said Amit Narang, a regulatory policy expert with the watchdog group Public Citizen.

The memo tells agencies to consider postponing Trump-era rules for 60 days, and possibly open a 30-day comment period to rethink them.

The Strengthening Transparency in Regulatory Science (RIN:2080-AA14) rule limits the EPA's ability to write regulations that are unpinned by scientific research that can't be reproduced or is based on underlying data that isn't public—seen by critics as a bid to block tough new environmental regulations

Sidney Shapiro, an administrative law professor at Wake Forest University, said it's possible that freezing the rule would be challenged in court, since the executive order technically applies to rules that haven't taken effect. The EPA rule had already taken effect, kicking in on Jan. 6.

Still, that doesn't mean the Biden EPA shouldn't try—then see if anyone tries to sue, Shapiro said.

"It seems to me the best strategy for them is throw everything against the wall and try to get rid of it one way or another," he said.

Asking for More Time

Jonathan Martel, a partner at Arnold & Porter Kaye Scholer LLP, added that, because the Jan. 20 memo is only a memo, it's not subject to the same rigorous standards of interpretation as a statute or regulation.

"A more natural reading of the regulatory freeze memo is that it would apply," Martel said.

Whether the Biden administration chooses that path or not, it now has until Feb. 5 to claim a longer extension on the rule's effective date under the "good cause" exemption under the Administrative Procedure Act, according to Cary Coglianese, a regulatory law professor at the University of Pennsylvania Law School.

If that exemption is challenged in court, it could well be seen as reasonable, given the need for a new administration to "simply ask for time to take a look at the rule," Coglianese said. The shorter the extension the EPA wants, the likelier it is to be successful in court, he said.

The Trump administration itself used the "good cause" exemption as a rationale for putting the rule into effect right away, arguing its goal of ensuring transparency "is crucial for ensuring confidence in EPA decision-making."

Whatever extension the EPA ends up with, it could use that time to kick off its own, separate rulemaking to undo the Trump rule.

Ignore for Now

In the meantime, the agency could keep working on other rulemakings as if the Trump rule essentially doesn't exist, said Adam Finkel, a professor of environmental health at the University of Michigan.

Even if the rule survives, it won't affect any of the EPA's work until the next time it finalizes a major regulation which is then challenged in court, according to Finkel.

"This gives them a good, long time—maybe a year, maybe two—before it really matters," he said.

The EPA didn't immediately respond to a question about what it plans to do. However, just hours before the Montana decision, Biden signed a memo pledging to use "well-established scientific processes" in federal decision-making, underscoring the strong likelihood that his administration will try to undo the rule.

'Like Herpes'

Still another option is for the EPA to order a longer postponement under section 705 of the Administrative Procedure Act, which lets agencies stay effective dates if rules are being legally challenged, said Richard Revesz, an administrative law professor at New York University.

In addition to the Montana suit, a separate federal lawsuit has already been filed against the science transparency rule in New York.

Letting those suits play out, and hoping courts rule against the Trump regulation, is one way of nixing the rule permanently, said Dan Costa, who served as national program director of air, climate, and energy at EPA's Office of Research and Development under President Barack Obama.

"This has been going on for 25 years," said Costa, professor of environment sciences and engineering at University of North Carolina. "It's like a herpes infection that comes back every few years to go after the environmental community to try to undermine the science. And it'll come back again unless they come up with some way of putting it to rest in a permanent way."

Role for Congress
Still another option is for Congress to invoke the Congressional Review Act, which gives the House and Senate time after a rule is finalized to scrap it with a simple majority vote, said Daniel Walters, an assistant professor at Penn State Law.

"At the end of the day, using the Congressional Review Act to nullify this rule prevents a future administration from issuing another rule that is substantially the same, and I think that prospect would be more attractive than a general rescission or vacatur in court for the Biden administration," Walters said.

"I suspect they'll return to the Congressional Review Act in the end, and this decision probably doesn't affect that avenue," he said.

But Mandy Gunasekara, a former EPA chief of staff during the Trump administration, questioned the wisdom of trying to scrap the rule at all.

"I hope the new administration resists the partisan temptation to undo our work, and instead builds off of our comprehensive efforts to increase public awareness and trust in the scientific underpinnings of agency decisions," Gunasekara said.

(Updates with additional commentary in final two paragraphs.)
To contact the reporter on this story: Stephen Lee in Washington at stephenlee@bloombergindustry.com

To contact the editor responsible for this story: Anna Yukhananov at ayukhananov@bloombergindustry.com

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Chemical and Engineering News: Solvay withheld PFAS toxicity data, group claims
https://cen.acs.org/environment/persistent-pollutants/Solvay-withheld-PFAS-toxicity-data/99/web/2021/01
Environmentalists petition US EPA to impose $434 million penalty under toxic substances law
by Britt E. Erickson
JANUARY 28, 2021

An environmental advocacy group is urging the EPA to fine Solvay for allegedly withholding toxicity data on chloroperfluoropolyether carboxylates, chemicals that have varying numbers of perfluoroethyl (red) and perfluoropropyl (black) groups.

Environmental advocates are urging the US Environmental Protection Agency to fine Solvay Specialty Polymers a total of $434 million for allegedly withholding information about the toxicity of per-and polyfluoroalkyl substances (PFAS) used by the company as processing aids to make fluoropolymers.

At issue are compounds called chloroperfluoropolyether carboxylates that Solvay used as replacements for surfactants containing salts of perfluorononanoic acid (PFNA) or perfluorooctanoic acid (PFOA).

Solvay stopped using those two chemicals more than a decade ago because they are toxic and persist in the environment. Both are known drinking water contaminants.

In a Jan. 26 petition, the Environmental Working Group (EWG), an advocacy organization, claims that Solvay violated reporting requirements under the Toxic Substances Control Act (TSCA) by waiting more than 5 years to notify the EPA about potential risks to human health and the environment posed by chloroperfluoropolyether carboxylates. According to the EWG, Solvay identified risks in a 4-week oral toxicity study in rats in 2005, but the company didn't send the information to the EPA until 2011. The EWG also claims that Solvay has known since at least 2011 that chloroperfluoropolyether carboxylates accumulate in human blood, but the company didn't send biomonitoring data of its workers to the EPA until late 2019.

"We suspect that Solvay deliberately kept these damning toxicity studies from the EPA—a serious violation of federal law that requires companies to immediately report any evidence they uncover that a chemical may pose a substantial health hazard," Ken Cook, president of the EWG, says in a statement. The group is encouraging the EPA to fine Solvay the maximum penalty under TSCA.

In an emailed statement, Solvay calls the allegations from the EWG "misguided and without merit." The company says that it is in compliance with TSCA requirements.

The toxicity data and identities of the compounds in question were made public 2 months ago when Solvay announced that it was phasing out the chemicals, the EWG says. The company previously claimed that the identities of the compounds was confidential business information.

A Solvay spokesperson confirmed in an email that the company has developed new nonfluorosurfactant technologies and is phasing out the use of fluorosurfactant processing aids.

The move comes after scientists from the New Jersey Department of Environmental Protection and the EPA reported last year finding several chloroperfluoropolyether carboxylates in soil near Solvay's West Deptford plant in Gloucester County, NJ (Science 2020, DOI: 10.1126/science.aba7127). The New Jersey researchers claimed that the compounds are potentially just as toxic as PFOA and PFNA. In November, New Jersey sued Solvay and Arkema, which owned the facility in the 1980s and used several PFAS to make fluoropolymers, to pay for remediation of contaminated drinking water near the site.

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