Message

From: Gibson, Neshawne [Gibson.Neshawne@epa.gov]
Sent: 1/29/2021 5:36:19 PM
To: AO OPA OMR CLIPS [AO_OPA_OMR_CLIPS@epa.gov]
Subject: Daily News Clips January 29, 2021 (morning edition)

Daily News Clips January 29, 2021 (**morning edition)**

Administrative
Inside EPA: EPA Selects Environmental Justice Expert For Deputy Waste Office Role
Newsmax: Blackburn Accuses Biden EPA Appointee of Breaking Law

PFAS
Inside EPA: EPA Plans To Seek Comprehensive BOSC Review Of PFAS Research Plan

Science
Bloomberg: Court Order Widens EPA Options to Drop 'Secret Science' Rule (2)
Government Executive: Judge Gives Biden Path to Quickly Repeal Trump's 'Secret Science' Rule
Reuters: Judge postpones 'secret science' rule, harbors doubts on rule's validity

Superfund
Bloomberg: Atlantic Richfield Agrees to $24 Million Montana Smelter Cleanup

Water
CBS7: Texas prepares to test for lead in schools' drinking water for the first time
++

EPA Selects Environmental Justice Expert For Deputy Waste Office Role

https://insideepa.com/daily-news/epa-selects-environmental-justice-expert-deputy-waste-office-role

By *Suzanne Yohannan*
January 28, 2021

EPA has selected Carlton Waterhouse, a Howard University law professor with extensive environmental justice credentials, to be the agency's deputy assistant administrator for the Office of Land & Emergency Management (OLEM), sources say.

Waterhouse, who has previous work experience at EPA, on Feb. 1 is slated to join the agency in the number two political position at OLEM, which does not require Senate confirmation, these sources say.
He is an international expert on environmental law and environmental justice, currently teaches environmental, property and administrative law at Howard University Law School and is building the school's Environmental Justice Center, according to his Howard University biography.

Waterhouse's selection to be the deputy assistant administration at OLEM means he will help oversee the agency's Superfund program as well as cleanup and permitting programs that fall under the Resource

Conservation & Recovery Act and its programs covering emergency management, underground storage tanks, brownfields and federal facilities restoration and reuse.

His selection is in stark contrast to his predecessors during the Trump administration at both the political deputy and assistant administrator posts -- both of whom previously served as corporate counsel to chemical companies.

Appointees who take the top jobs in OLEM will likely be under pressure to boost the Superfund program's decades-long flat budget. While a former official says funding for the program has been problematic for years, during the Trump administration, it was revealed last year that EPA's backlog in funding new construction work at Superfund sites had grown to its highest level yet, at 34 unfunded construction starts in fiscal year 2019, prompting backlash from Democratic lawmakers.

It was unclear at press time whether President Joe Biden will also consider Waterhouse for nomination to the role of OLEM assistant administrator that leads the office, which does require Senate confirmation.

Sources have told *Inside EPA* that the recently named principal deputy assistant administrators for other program offices already working at the agency, such as the water and air offices, are expected to be nominated for assistant administrator positions requiring Senate confirmation in their respective areas.

The appointments to positions not requiring Senate confirmation allows them to immediately begin work on implementing the administration's agenda and undoing Trump policies, sources have said.
A former EPA official who held a Senate-confirmed position has noted, "The deputy position gives them certainty of employment while they navigate the confirmation process," as well as being able to act as a deputy and participate in deliberations internally.

EPA did not respond to a request for comment on Waterhouse by press time.

Waterhouse's Background
Waterhouse is a Fulbright research scholar, on the Environmental Law Institute board and is publishing a book with Cambridge University Press that "explores the historic and contemporary role of the United States Supreme Court in maintaining racial hierarchy," the biography says.

He also "recently testified on the importance of reparations for African Americans before the inter-American Commission on Human Rights of the Organization of American States," it says.
Waterhouse previously worked at EPA following law school, serving in both the Office of Regional Counsel in Region 4 in Atlanta, GA, and at the Office of General Counsel at EPA's headquarters, his biography says.

At EPA, "he served as the chief counsel for the agency in several significant cases and as a national and regional expert on environmental justice, earning three of the Agency's prestigious national awards," it says.

While at EPA, he was responsible for "enforcement actions under numerous environmental statutes, the development of regional and national policy on Environmental Justice and the application of the Title VI of the Civil Rights Act of 1964 to the EPA permitting actions," it says.

He has also previously served on an advisory panel to the U.S. Commission on Civil Rights, it says.

Blackburn Accuses Biden EPA Appointee of Breaking Law

https://www.newsmax.com/politics/blackburn-epa-hoffer-environment/2021/01/28/id/1007723/

By Brian Trusdell

Thursday, 28 January 2021

(Jason Andrew-Pool/Getty Images)

Tennessee Sen. Marsha Blackburn has accused one of President Joe Biden's appointees to the Environmental Protection Agency of potentially violating the law by requesting the Department of Justice halt all litigation involving the EPA undertaken during the Trump administration.

The 68-year-old Republican has written to the EPA Inspector General Sean O'Donnell and Comptroller General Gene Dodaro, who also heads the Government Accountability Office — Congress' investigative arm, to probe the actions of EPA Principal Deputy General Counsel Melissa Hoffer.

Blackburn encouraged them to investigate Hoffer for "violations of the Federal Vacancies Reform Act of 1998 (FVRA) and other potential violations of ethics rules."

"On her first day on the job, Ms. Hoffer swiftly sent a memorandum to the U.S. Department of Justice (DOJ) requesting that the department's Environment and Natural Resources Division attorneys 'seek and obtain abeyances or stays of proceedings in pending litigation seeking judicial review of any EPA regulation promulgated between January 20, 2017, and January 20, 2021,'" Blackburn wrote in her letter.

"Ms. Hoffer electronically signed the letter in her purported capacity as EPA's Acting General Counsel. In her haste to deliver her message, Ms. Hoffer neglected to acknowledge that the Acting General Counsel role is vacant, and she only serves in the inferior role of Principal Deputy General Counsel, as confirmed by EPA's current organizational chart."

Blackburn claimed that Hoffer would only have the authority to ask the Justice Department to take the actions she requested if she was designated as the acting general counsel, had already been confirmed by the Senate in another position at the EPA and was designated by Biden — or someone at the EPA Biden had already appointed — to the role.

"It does not appear she can hold the position through any of these three paths," Blackburn wrote. "She was not the 'first assistant' when the vacancy arose; she had not been serving in a Senate-confirmed office; and she had not been employed by any other EPA component in the year prior to the vacancy.

"And, if the President has not directed Ms. Hoffer to serve as the Acting General Counsel under one of these scenarios, she may not take it upon herself to install herself into a position the Senate has not confirmed."

EPA Plans To Seek Comprehensive BOSC Review Of PFAS Research Plan

https://insideepa.com/daily-news/epa-plans-seek-comprehensive-bosc-review-pfas-research-plan

By *Lara Beaven*
January 28, 2021

EPA's research office is planning to ask its external advisory panel later this year to review the agency's research plan for addressing per- and polyfluoroalkyl substances (PFAS) in a variety of media, with the agency hopeful it will have some screening results by then to guide risk assessment as well as some data on PFAS destruction technologies.

Bruce Rodan, the associate director for science for the Office of Research and Development (ORD), approached the Board of Scientific Counselors (BOSC) executive committee at its Jan. 27 meeting about a possible PFAS review in "late summer."

Rodan said that instead of presenting charge questions to one of BOSC's subcommittees first -- the usual process for BOSC action -- EPA wants the review to start with the executive committee because the research plan is so broad and touches on multiple media. For example, he said, questions about PFAS in biosolids, or treated wastewater sludge, involve issues usually overseen by three different BOSC subcommittees: Safe and Sustainable Water Resources (SSWR), Sustainable and Healthy Communities, and Air and Energy.

EPA's PFAS action plan includes high throughput testing of over 100 PFAS, which is intended to provide a more complete understanding of PFAS toxicity for a large set of chemicals without conventional toxicity data and allow prioritization of actions to potentially address groups of PFAS, according to the plan.

Rodan said the high throughput testing, which was slowed last year by the COVID-19 pandemic, should be completed by the summer.

Additionally, the agency expects to have completed some research on PFAS destruction technologies by then, he said.

BOSC members were receptive to the idea of a broad PFAS review, with Joseph Rodricks, principal with Ramboll Environ, noting that addressing PFAS "is one of the most complicated issues."
BOSC Chairman Paul Gilman, chief sustainability officer with Covanta, said it seems likely the executive committee would take a first look at the issue but in the longer run, the discussions might need to take place in the subcommittees.

Rodan emphasized that EPA would like the review and recommendations to come from the executive committee in order to keep the subcommittees free to provide advice on non-PFAS issues, which are also important to the agency.

Finalizing Draft Reports
The Jan. 27 meeting also included the executive committee agreeing by consensus to finalize draft reports from the SSWR panel and the Homeland Security Subcommittee, with some minor changes to ensure consistency in formatting.

The draft final report from the SSWR Subcommittee largely reflects discussions in subcommittee meetings last fall, where panel members praised the agency's approach to microplastics research but sought to redirect some aspects of research connected with mapping waters subject to the Clean Water Act and revising recreational water quality criteria.

The SSWR report makes three recommendations, starting with saying that measurement methods to characterize microplastics is the appropriate starting point for research but that looking forward, EPA should begin work now towards developing a strategy for incorporating both environmental and human health effects into the next strategic research action plan for SSWR.

On mapping waters, the report "recommends the use of probabilistic metrics as a more accurate way to represent 'real world' hydrological conditions, to inform discrete classification approaches," and encourages EPA to quantify uncertainties in existing regional datasets on waters and wetlands as well as their applications. "This will help with research prioritization and provide a more quantitative way to communicate success, progress, and key limitations among stakeholders," the report says.

On water quality criteria, the report says that while all of the research EPA has proposed is appropriate, "the research focus that has the most significant opportunity for impact and should be prioritized is the further development of methods for the detection and quantification of coliphages as indicators of fecal contamination in surface waters."

The Homeland Security report includes multiple recommendations dealing with cybersecurity at water utilities, technology to decontaminate water after an unexpected contamination event, and to examine the fate of priority pathogens in wastewater collection system infrastructure and in wastewater treatment plants. The report also includes recommendations related to oil spill remediation research.

Specifically, the report calls on EPA to increase the focus on cybersecurity research; prioritize consequence research and research on vulnerabilities in drinking water system security and system elements common to drinking water and wastewater systems; and leverage investments by other federal organizations and the private sector to customize sensors for priority molecules for deployment in systems critical to the water resources portfolio.

Other recommendations call for EPA to develop a broad end-user stakeholder involvement process so that researched treatment technologies have a better chance of being used for actual emergencies and to better understand the fate and transport of a contaminant that is discharged from a drinking water treatment plant into the sewer system.

EPA should also improve the connection between pilot scale studies and field studies by partnering with municipalities researching priority pathogens in full scale operating wastewater systems, and the agency should increase research into the nature and extent of stormwater-related releases of priority pathogens in untreated sewage from treatment plants in natural disasters to address a limitation of the existing research portfolio, the report says.

Oil Spills

Regarding oil spills, the report recommends EPA establish a working group to identify and eliminate institutional barriers to procuring reference oils used for product testing used to support the maintenance of the National Oil and Hazardous Substances Pollution Contingency Plan Product Schedule, which lists commercially available spill-treating agents for oil spill response operations.

EPA also asked for recommendations on how to expand or improve experiments on oil behavior and the impact of oil on ecosystems.

And the report calls for the agency to establish a task force with a variety of stakeholders to identify and eliminate barriers to the timely acquisition of small amounts of oils, fuels, and related materials at reasonable cost for research purposes, as well as strengthening the relationship between EPA researchers and product users.

Furthermore, EPA should identify and address priority gaps in research and products for effective handling of spills to inland freshwaters, the report says.

Judge Gives Biden Path to Quickly Repeal Trump's 'Secret Science' Rule

The EPA rule faced criticism for placing restrictions on the scientific research career employees can use.

https://www.govexec.com/management/2021/01/judge-gives-biden-path-quickly-repeal-trumps-secret-science-rule/171709/

BY ERIC KATZ
JANUARY 28, 2021

The Biden administration can now quickly do away with a controversial rule that limited the research some federal employees can use when conducting their work, after a federal judge ruled Trump officials improperly rushed it through.

The controversial Strengthening Transparency in Regulatory Science rule, colloquially referred to as the "secret science" rule by its supporters, was finalized by the Trump administration's Environmental Protection Agency just two weeks before it left office. A federal judge in Montana issued a summary judgment on Wednesday evening finding the administration did not sufficiently justify why the rule merited a rushed implementation timeline. First proposed in 2018, the rule was met with significant pushback from critics who said it would improperly prevent EPA employees from using legitimate scientific research.

The rule limits agency employees' ability to use data that is not fully available to the public. Opponents of the plan have argued that is often the case data is not public due to privacy concerns of individuals in testing and surveys. Lawmakers and thousands of commenters on the rule called it an attack on science that could have a chilling effect on career federal employees working on regulatory and enforcement issues. Former EPA Administrator Andrew Wheeler defended the rule as a pro-transparency effort that would give the public more confidence in the agency's regulatory actions.

The rule now faces an uncertain fate, as President Biden has paused all regulatory actions pending on Jan. 20 for review by his administration. Biden had already identified the "secret science" rule for review, one of dozens of such administrative actions now under the microscope at EPA. Wheeler and the Trump administration had sought to avoid that fate for the rule, saying it was an internal issue that amounted to "federal housekeeping" and therefore could go into effect immediately when EPA attempted to finalize it on Jan. 6. Any finalized rule requires a much more time-consuming and labor-intensive process for repeal.

The judge dismissed that argument from Trump's EPA, saying the policy amounted to a "substantive rule" and thus required 30 days before implementation as spelled out in the Administrative Procedures Act. The judge, Brian Morris, said a "housekeeping" rule would amount to "nuts-and-bolts procedural guidelines," but the secret science regulation makes a determination "of how the agency should weigh particular scientific information" and deals with "outcomes rather than process." Absent intervention from the Biden administration, the rule would now go into effect on Feb. 6.

Ben Levitan, a senior attorney at the Environmental Defense Fund, which brought the lawsuit against the rule, said the judge's finding undercuts the rule's legal basis and vowed to keep fighting until it is formally rescinded.

"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," Levitan said. "The Censored Science Rule weakens EPA's ability to protect Americans from dangerous pollution, toxic chemicals and other threats."

An EPA spokesperson did not say whether the agency would revoke the rule, noting only that it was under review.

"EPA is committed to making evidence-based decisions and developing policies and programs that are guided by the best science," the spokesperson said.

Jennifer Orme-Zavaleta, a career EPA scientist currently serving as acting assistant administrator for the Office of Research and Development and the agency's acting science advisor, added EPA has a robust scientific integrity program.

"It is essential that the environmental policies, decisions, guidance, and regulations that impact the lives of Americans are informed by the best available science," Orme-Zavaleta said. "EPA will remain committed to ensuring that the Agency rests upon a strong foundation of science."

Biden has made clear he will aim to give career federal scientists the ability to conduct their work without political interference, and issued a memorandum to that effect on Wednesday.

Dan Costa, former national program director for EPA's Air, Climate and Energy Research Program who retired in 2018, said he has already received emails from his former colleagues celebrating the judge's decision.

"It pulls the bottom out of all the regulatory and science decisions at the agency," Costa said of the rule. "I know everybody is breathing a sigh of relief on this." He cautioned, however, that relief could be temporary as it is likely "only a matter of time" until another administration seeks to reimplement the rule.

This story has been updated with comment from EPA.

Judge postpones 'secret science' rule, harbors doubts on rule's validity

https://today.westlaw.com/Document/I8b9e12b061a611ebb6e6b72c09f3144a/View/FullText.html?transitionType=SearchItem&contextData=(sc.Default)

By Sebastien Malo
January 28, 2021

(Reuters) - A federal judge in Great Falls, Montana has ruled that the Trump administration was wrong to fast-track a final rule that limits what scientific research the Environmental Protection Agency can use to formulate regulations, adding his findings cast doubt on the so-called "secret science" rule's legality.
Chief U.S. District Judge Brian Morris late on Wednesday sided with plaintiffs Environmental Defense Fund (EDF), the Montana Environmental Information Center and others in their lawsuit filed Jan. 11 against the EPA, concluding that the agency violated the Administrative Procedure Act (APA) by making the rule effective immediately upon its publication on Jan. 6, rather than 30 days after. The judge reasoned that the EPA unlawfully circumvented the APA's month-long notice requirement by casting the rule as procedural rather than a substantive one.
EDF senior attorney Ben Levitan told Reuters: "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."
The EPA did not immediately comment.
The "Strengthening Transparency in Regulatory Science" rule provides that the EPA can no longer rely on scientific research that is underpinned by confidential medical and industry data when crafting regulations.
In his ruling, Morris said the agency wrongly issued the rule as a procedural one under a "housekeeping" statute, a move that had the effect of exempting it from the APA's 30-day notice requirement for final substantive rules.
The judge said the rule was, in fact, a substantive one because it lacked the housekeeping characteristics of procedural ones, and rather made a substantive determination that "narrowly limits the agency's discretion."
On occasion, substantive rules can be made effective less than 30 days after publication if a "good cause" is established.
But Morris said that EPA's "good cause" argument - that the rule was crucial in ensuring transparency and boosted confidence in the agency's decisions - fell short.
"EPA failed to describe the crisis of 'confidence' it sought to address," he said.
Wednesday's summary judgment was limited to the plaintiffs' single count on the timing of the rule's effectiveness. The court has yet to issue a decision on a second count that alleges that the rule itself is unlawful.
But Morris said in his ruling that his "determination that the Final Rule represented a substantive rule rather than a procedural rule casts into significant doubt whether EPA retains any legal basis to promulgate the Final Rule."
The case is Environmental Defense Fund et al v. U.S. Environmental Protection Agency et al, U.S. District Court for the District of Montana, No. 4:21-cv-00003.
For Environmental Defense Fund et al: Deepak Gupta of Gupta Wessler
For Environmental Protection Agency: Joshua Edward Gardner
with the U.S. Department of Justice

Texas prepares to test for lead in schools' drinking water for the first time

https://www.cbs7.com/2021/01/29/texas-prepares-to-test-for-lead-in-schools-drinking-water-for-the-first-time/

By Erin Douglas
Jan. 29, 2021

In Texas, it will be the first time the state's roughly 25,000 schools and child care facilities will undergo mandated water inspections for lead and copper — the state did not previously have any testing requirement.(Allie Goulding/The Texas Tribune)

TEXAS TRIBUNE - Texas will soon begin a program to test drinking water in thousands of elementary schools and child care facilities across the state following an update to federal standards on lead and copper exposure.

The change comes in the aftermath of the Flint, Michigan, water crisis that began in 2014. Michigan had switched the community's water source to the Flint River but failed to properly treat the water to ensure it did not corrode the pipes. Lead and other contaminants leached into the predominantly Black community's water supply as a result, a problem that went ignored for more than a year.

In one of the last actions by a Trump-led Environmental Protection Agency, the December update to the 1991 federal rule on reducing lead and copper in drinking water — which hadn't been updated in decades — requires water utilities to test water at elementary schools and child care facilities. The rule also lowers the threshold for doing corrosion control treatments on pipes and replacing lines that contain lead.

In Texas, it will be the first time the state's roughly 25,000 schools and child care facilities will undergo mandated water inspections for lead and copper — the state did not previously have any testing requirement. Young children are particularly vulnerable to the health effects of lead poisoning on the brain and nervous system, according to the EPA. Lead exposure in children is known to cause slowed growth, behavior and learning problems, difficulty hearing and lower IQs.

ADVERTISEMENT

The Texas Commission on Environmental Quality, the state's environmental agency, at times assisted school districts in testing water in the past, but only if the school district requested help, said Toby Baker, the agency's executive director.

Now, the agency will be responsible for overseeing a plan to test tens of thousands of water systems that serve children throughout the state over the next three years.

That means Texas parents and guardians will get information on whether the water in their child's school or care facility contains unsafe levels of lead. But it will take time and money to correct any problems discovered through testing — details the state is still working out.

"At this early stage, TCEQ is still evaluating the new requirements of this complex rule and has not fully determined yet how to implement the rule as revised," said Gary Rasp, a spokesperson for the TCEQ. "TCEQ is not aware of any guidance provided by EPA to the states."

ADVERTISEMENT
To comply with the testing requirement, the TCEQ requested $8 million from the Legislature this session to create a program to test water in tens of thousands of schools and child care facilities and oversee corrective actions by water systems. The current Senate and House budgets proposed for the state include $7.1 million for the program.

The EPA rule requires community water systems to sample 20% of elementary schools and 20% of child care facilities per year — full implementation of the rule in Texas will be required by January 2024.

Baker said that if the Legislature cannot help finance the initiative, the agency will be forced to divert other resources to the effort since testing is required by the EPA.

"We feel this is an unfunded federal mandate," Baker said. "We don't disagree with the rule; we have needed this for a while. But, it's quite an expensive undertaking for the state."

ADVERTISEMENT
Baker said in addition to requesting money from the Legislature, the agency will continue to ask the federal government to make funding available for testing. He said the TCEQ will need to create a new database, design a system for monitoring and hire new positions at the agency to carry out the mandate.

Testing water and correcting lead levels can be an expensive and time-intensive task, experts said, because the problem is so widespread and can occur from many different sources, particularly in complex facilities like schools. Lead usually enters drinking water through lead-based pipes or plumbing — which were used for decades before being banned in the 1980s.

"It is a legacy problem because there used to be a time when lead was not controlled as tightly as it is now," said Gregory Korshin, a professor of civil and environmental engineering at the University of Washington. "Everything that was installed years ago is still there, and it's very difficult to correct it."

The EPA estimates that drinking water can make up 20% or more of a person's total lead exposure. And identifying which component of a water system is the source of contamination can be difficult — and expensive.

ADVERTISEMENT
"Every single case is different," Korshin said. "The source of the lead might be quite unpredictable. It's a very complicated issue to address."

After the Flint water crisis gained national attention, at least 17 Texas school districts proactively tested drinking water for lead, according to data compiled by Environment Texas, an Austin-based nonprofit. Of the more than 1,000 schools in those districts, 13% found concentrations of lead above the federal threshold for corrective action.

Fort Worth Independent School District, for example, identified 60 schools with levels of lead above that threshold during its testing initiative in 2016. After testing, the school district was able to remove or replace sources of lead contamination, such as old-style water fountains, according to a press release at the time.

The EPA rule sets a threshold of 15 parts per billion of lead in water to take corrective action, including replacement of water service lines over a number of years, and a lower "trigger" threshold of 10 parts per billion of lead to require water systems to take steps to reduce lead in the water.

ADVERTISEMENT
While scientists agree that no level of lead in the body is safe for children, EPA regulators countered that the systems with the highest concentrations should be prioritized.

"Setting a lower trigger level would substantially increase the number of water systems required to obtain review," the EPA wrote in a response to public comments. "It is not practicable for this significant number of water systems to obtain state review and approval."

Environmental groups maintain that the threshold for intervention is still too high. They also said Texas will need significant resources, money and stricter standards in order to prevent children from being exposed to lead.

Even among schools that voluntarily tested and corrected significant sources of lead exposure, many still have some level of lead in the water, said Luke Metzger, executive director of Environment Texas. He said the Legislature should set a lower standard for intervention.

"There are thousands of schools in the state that we don't even have information on," Metzger said. "The $7 million is a good start, but that probably won't go as far as needed."

Court Order Widens EPA Options to Drop 'Secret Science' Rule (2)

https://news.bloomberglaw.com/environment-and-energy/court-order-gives-epa-more-options-to-drop-secret-science-rule

By **Stephen Lee**

Jan. 29, 2021

- 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 remains committed to ensuring that its actions rest on a strong scientific foundation, said Jennifer Orme-Zavaleta, acting assistant administrator for the EPA's Office of Research and Development who also serves as acting science adviser.

"It is essential that the environmental policies, decisions, guidance, and regulations that impact the lives of Americans are informed by the best available science," she said in an email.

The EPA "will follow the science and law in accordance with the Biden-Harris administration's executive orders and other directives in reviewing all of the agency's actions issued under the previous administration," an agency spokeswoman added.

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 paragraphs 17 through 19.)

Atlantic Richfield Agrees to $24 Million Montana Smelter Cleanup
https://news.bloomberglaw.com/environment-and-energy/atlantic-richfield-agrees-to-24-million-montana-smelter-cleanup?context=search&index=2

BY SYLVIA CARIGNAN

Jan. 29, 2021

Atlantic Richfield Co., the EPA, and a federal district court in Montana have signed off on an agreement to continue remediating a Montana Superfund site the company has worked to clean up for nearly four decades.

The U.S. District Court for the District of Montana finalized a consent decree Thursday between the company and the Environmental Protection Agency, binding the company to additional cleanup at the Anaconda Smelter Superfund site in Anaconda, Mont.

The 300 square mile site was the focus of a 2020 U.S. Supreme Court decision prompted by residents' concerns that the EPA's cleanup plan and Atlantic Richfield's execution of it were insufficient, leaving them with properties contaminated by lead and arsenic.

The estimated cost of the cleanup under the consent decree is $23.7 million. Atlantic Richfield will address pollution of the site's water, waste, and soil, but the plan doesn't affect the concerned residents' properties, according to the consent decree.

The Supreme Court remanded the residents' case to Montana state courts to review their claims in light of their status as "potentially responsible parties" under Superfund law, a classification that would prevent them from conducting cleanup work outside of EPA's plan without the agency's authorization. The residents asked for up to $58 million from Atlantic Richfield to pay for their land to be restored to its pre-smelter state.

The EPA has issued more than a dozen administrative orders to Atlantic Richfield since 2000 to address contamination at the Anaconda site. Some of the mandates aimed to reduce arsenic in soil, cover smelting waste piles, and control stormwater runoff at the site, according to the consent decree.

The EPA and Montana Department of Environmental Quality started investigating the site in 1983, when it was placed on the National Priorities List. The smelter shut down in 1980.

The agency expects most of the Anaconda Smelter site's remediation to be completed by 2025.

Cause of Action: Comprehensive Environmental Response, Compensation, and Liability Act.

Attorneys: Davis Graham & Stubbs LLP represented Atlantic Richfield.

The case is U.S. v. Atlantic Richfield Co., D. Mont., No. 2:89-cv-39, 1/28/21.

Neshawne Gibson
Office of the Administrator
US Environmental Protection Agency
Phone: (202) 566-1957
Mobile: (202) 603-7617