COUNTRY REPORT: UNITED STATES

Congressional Opposition Fails to Halt Key Environmental Initiatives by the Obama Administration; Court Battles Loom as the 2016 Presidential Election Approaches

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Introduction

In 2015, his penultimate full year in office, President Obama moved aggressively to cement his environmental legacy and shift U.S. energy infrastructure away from fossil fuels. The U.S. Environmental Protection Administration (EPA) adopted significant regulations to limit greenhouse gas (GHG) emissions from power plants and to clarify the reach of federal authority to protect wetlands. Fierce opposition from Republicans in Congress failed to curtail EPA actions due to Obama's veto of resolutions disapproving the regulations. Even a Supreme Court decision requiring the EPA to consider costs before limiting emissions of mercury and air toxics (MATS) was founded on such narrow grounds that the EPA was able to leave the regulations in place.

The Republican Party, which fiercely opposes environmental regulation, now holds a majority in both houses of Congress. However, its majority is not large enough to override a presidential veto, which requires a two-thirds majority in each house of Congress. Congress does hold the 'power of the purse', but, fearing political backlash from another government shutdown, Republicans were unable to defund the EPA's environmental initiatives. The future of President Obama's environmental initiatives will thus depend on decisions by courts hearing legal challenges to them, and ultimately the results of the 2016 elections.

Air Pollution and Climate Change

EPA Regulation of GHG Emissions from Power Plants

The EPA announced its final rules for controlling GHG emissions from existing power plants on 3 August. Known as the 'Clean Power Plan', the regulations are designed to reduce GHG emissions from this sector by 32% above 2005 levels by 2030. Since the EPA proposed the regulations in June 2014, it received more comments on them that it has ever received on any proposed regulations in the agency's 45-year history. The regulations are being issued pursuant to §111(d) of the Clean Air Act. This provision allows the EPA to require states to regulate a pollutant for

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which it has established a new performance standard if it is not already regulated as a pollutant in a national ambient air quality standard (NAAQS) or in a national emissions standard for hazardous air pollutants (NESHAP). Initial state plans will be due in September 2016, but states that provide a reasonable explanation for needing more time can obtain extensions to September 2018.

On 23 October 2015, at least 17 separate lawsuits challenging the EPA's Clean Power Plan were filed in the D.C. Circuit. The state of West Virginia, joined by 23 other states, was the lead plaintiff in the first lawsuit. Industry trade associations, unions, and the states of Oklahoma and North Dakota also filed suits. Several of these states and groups prematurely filed lawsuits last year before the rule even was adopted in final form. These cases were dismissed as premature, but the new round of litigation is timely filed. On 21 January 2016, the U.S. Court of Appeals for the D.C. Circuit refused to grant a stay of the regulations, while expediting consideration of the cases, which will be argued in court on 2 June 2016.

EPA Strengthens Controls on Ground-Level Ozone

On 1 October 2015, the EPA announced that it was taking final action to lower permissible levels of ozone in the ambient air. The EPA lowered the national ambient air quality standard (NAAQS) for ozone from 75 to 70 parts per billion (ppb). Environmentalists were disappointed that the EPA did not lower the standard to 60 ppb, which was what they believe the science justifies. The EPA estimates that compliance with the 70 ppb standard will cost US$1.4 billion per year by 2025, while producing annual benefits worth US$2.9 to US$5.9 billion. Both industry groups, which had been running deceptive ads praising the existing NAAQS they once opposed, and environmental groups, who believe the new standard is too weak, filed lawsuits challenging the EPA's action.

Stronger Fuel Economy Regulations Proposed for Heavy Trucks

The EPA proposed to require that heavy trucks improve their fuel economy on average by 40% by 2027. The proposal is part of the Obama administration's plans to reduce U.S. GHG emissions. While it is estimated that compliance with the rules could increase the cost of trucks by US$12000 to US14000 per vehicle, the added expense is expected to be recouped quickly in fuel savings. Truck manufacturer Cummins actually expressed support for the new regulations, though trucking companies were more skeptical.

Supreme Court Rules Against EPA on Power Plant Emissions of Mercury and Air Toxics

On 29 June 2015, the U.S. Supreme Court announced its decision in *Michigan v. EPA* 576 U.S. (2015). By a 5-4 majority, the Court held that the words 'appropriate and necessary' in § 112(n)(1)(A) of the Clean Air Act required the EPA to consider costs when it made the initial decision to regulate emissions of mercury and toxic air pollutants from power plants. The Court held that the EPA's subsequent consideration of costs when it promulgated the mercury and air pollutant regulations was insufficient to comply with the statute. However, the Court's decision was

very narrow, and the EPA's regulations were not vacated on remand. Because the EPA had already prepared extensive analyses of costs and benefits when it issued its final regulations, it should be easy for the agency to comply with the decision without vacating the regulations. Moreover, virtually all the power plants that did not intend to shut down in response to the regulations are now in compliance with them (the regulations were not stayed pending judicial review). On 17 December 2015, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit agreed that the EPA can keep its regulations controlling mercury emissions from power plants intact while it complies with the Supreme Court's decision.

Protection of Water Quality

EPA Clarifies the Reach of Federal Jurisdiction under the Clean Water Act

At the end of May 2015, the EPA issued a final rule clarifying its interpretation of the meaning of 'waters of the United States,' the jurisdictional trigger for federal regulation under the Clean Water Act. The rule is a response to the Supreme Court's sharply divided (4-1-4) ruling in *Rapanos v. U.S.* 47 U.S. 715 (2006). In that decision, Chief Justice Roberts expressly invited the EPA to issue new rules clarifying the reach of its jurisdiction. He indicated that such rules would be entitled to deference under the Court's *Chevron* doctrine that requires reviewing courts to defer to reasonable agency interpretations of ambiguous statutory provisions. On 9 October 2015, the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay of the EPA's 'waters of the U.S.' rule by a 2-1 ruling. Curiously, the Court did so without even finding that it had jurisdiction over challenges to the rule. The two judges that issued the stay conceded as follows:

The clarification that the new Rule strives to achieve is long overdue. We also accept that respondent agencies have conscientiously endeavored, within their technical expertise and experience, and based on reliable peer-reviewed science, to promulgate new standards to protect water quality that conform to the Supreme Court's guidance. Yet, the sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being.[1]

Energy Law

On 25 January 2016, the U.S. Supreme Court decided an important case involving efforts to encourage more efficient use of energy. The case, *Federal Energy Regulatory Commission (FERC) v. Electric Power Supply Association* No. 14–840, involved review of a FERC order encouraging utilities to implement demand-response programs to reduce consumption of electricity at peak hours. Industry groups argued that the rule exceeded the FERC's jurisdiction because it

[1] *State of Ohio, Et al. v US Army Corps of Engr'rs, et al* Nost 15-3799/3822/3853/3887 (2015) US Court of Appeals, 6th Circuit.

effectively regulates retail, rather than wholesale, markets for electricity. By a 6-2 vote the Court rejected these arguments and held that the Federal Power Act did give FERC the authority to regulate demand-response programs and that FERC's rule was not arbitrary and capricious. Justice Kagan wrote the majority opinion joined by Chief Justice Roberts, Justice Kennedy, Justice Ginsburg, Justice Breyer, and Justice Sotomayor. Justice Scalia wrote a dissent joined by Justice Thomas (Justice Alito did not participate in the decision). Surprisingly, the Court held that judicial deference to the agency was not necessary to uphold FERC's rule because the Federal Power Act unambiguously gave FERC power to regulate activities that directly affect the wholesale market for electricity. The decision is an encouraging sign that six of the Justices understand the importance of encouraging more efficient use of energy in evolving electricity markets.

Environmental Enforcement

Federal Government and Coastal States Settle Civil Claims over 2010 BP Oil Spill

On 5 October 2015, the U.S. government and five states reached a settlement with British Petroleum (BP) to resolve civil claims arising from the massive oil spill in the Gulf of Mexico in April 2010. BP agreed to pay a total of US$20.8 billion for violations of the Clean Water Act and Oil Pollution Act and for economic and natural resources damages. The settlement includes a US$5.5 billion federal Clean Water Act penalty, the largest civil penalty in the history of environmental law, 80% of which will be devoted to restoration efforts. It also includes US$8.1 billion in natural resource damages that will be paid to federal and state trustees for Gulf restoration projects and an additional US$700 million to address any later-discovered natural resource conditions. BP also agreed to pay US$4.9 billion to the five Gulf states and up to a total of US$1 billion to several hundred local governmental bodies to settle claims for economic damages suffered as a result of the spill.

Volkswagen Diesel Emissions Scandal Stuns Authorities

In September 2015, the EPA announced that Volkswagen had installed software on its diesel vehicles that disabled their pollution control devices, except when they were being tested. After initially acknowledging that this software was installed on 482000 vehicles Volkswagen sold in the U.S., the company later admitted that it was installed on 11 million vehicles worldwide. Volkswagen's intentional deception resulted in much higher levels of pollution from vehicles Volkswagen was touting as 'green diesels'. This revelation led to the resignation of the company's Chief Executive Officer and universal condemnation of the company. Because the Clean Air Act provides for civil penalties of US$37500 per vehicle, the fine in the U.S. alone could be as high as US$18 billion. On 4 January 2016, the U.S. Department of Justice filed a civil suit against Volkswagen seeking both an injunction to stop the cheating and civil penalties that will range into the billions of dollars. More than 450 private lawsuits have been filed against

Volkswagen. These have been consolidated in the U.S. District Court for the Northern District of California.*Securities Law Enforcement for Climate Change Disclosures*

On 9 November 2015, New York Attorney General Eric T. Schneiderman announced that he had settled charges against Peabody Energy for failing to disclose to investors and securities regulators what the company knew about the risks of climate change. Peabody will not pay any financial penalty, but it agreed to make more detailed disclosures about the impact of climate change risks on the coal company's future financial prospects. The action was brought pursuant to New York's Martin Act that forbids companies from making false representations to investors or securities regulators.

Federal Legislation

Reform of Toxic Substance Control Act Passes Both Houses of Congress

For years, sharp divisions in Congress have blocked the enactment of new environmental legislation. However, bills to comprehensively update the Toxic Substances Control Act passed both houses of Congress in 2015. On 24 June 2015, the U.S. House of Representatives passed the TSCA Modernization Act (H.R. 2576) by a vote of 398-1. The bill would require more testing of chemicals and replace the existing requirement that regulation employ the 'least burdensome' regulatory option, instead requiring the EPA to 'determine whether technically and economically feasible alternatives that [are more beneficial to] health or the environment . . . will be available as a substitute.' On 17 December 2015, the U.S. Senate approved similar legislation (S. 697) by a voice vote. The substantial differences in the House and Senate bills must be reconciled, but given the huge margins of passage, it is widely expected that compromise legislation will be enacted and signed into law. Congressional action was spurred in part by the realization that U.S. chemical control law had fallen far behind that of the EU and even China.

Microbeads in Cosmetics Prohibited

The U.S. Congress adopted, and President Obama signed into law, the Microbead Free Waters Act of 2015. The Act amended the Federal Food, Drug and Cosmetic Act to ban the use of cosmetics that contain synthetic plastic microbeads because of their adverse environmental impact.

EPA Budget

The omnibus budget bill adopted by Congress funded the EPA at a level of US$8.1 billion, US$451 million less than President Obama had requested. As a result of budget reductions, the EPA now has only 15000 employees, down from 17000 at the start of the Obama administration and the lowest level since 1989. However, the EPA's Republican opponents were unable to block EPA action, save for one barring the EPA from regulating livestock emissions of GHGs.

Efforts by Congress to Overturn Regulations Vetoed by President Obama

EPA opponents in Congress tried to use the Congressional Review Act (CRA) to veto EPA regulations to limit GHG emissions from power plants. The CRA creates a special fast-track procedure permitting an up-or-down vote in each house of Congress. On 17 November 2015, the U.S. Senate passed a joint resolution of disapproval of the EPA's new performance standard by a vote of 52-46, with only three Democrats supporting the resolution and three Republicans voting against it. The disapproval resolution was adopted by the House by a vote of 235-188 on 1 December 2015, even as the Paris climate negotiations were taking place. A resolution disapproving the EPA's Clean Power Plan regulations for existing power plants passed the Senate on 17 November 2015 by a vote of 52-46. The resolution passed the House by a vote of 242-180 on 1 December 2015. This all turned out to be political theater because, as promised, President Obama vetoed both joint resolutions of disapproval on 18 December 2015. As a result, the regulations remain in effect.

On 4 November 2015, the U.S. Senate voted 53-44 to use the CRA in an attempt to veto the EPA's rule clarifying the reach of federal jurisdiction under the Clean Water Act. On 13 January 2016, the U.S. House, voting largely on party lines, joined the Senate in passing the disapproval resolution. However, President Obama vetoed the disapproval resolution on 20 January 2016, preserving the regulations.

International Environmental Law

U.S/China Climate Agreement Helps Spawn Landmark Global Agreement in Paris

In September 2015, Chinese President Xi Jinping made a state visit to the U.S. The Chinese and U.S. Presidents released a Joint Statement on Climate following up on their historic November 2014 agreement to work together to reduce GHG emissions. The Chinese President announced that China would establish a nationwide cap-and-trade program for carbon emissions, based on the seven pilot emissions trading programs that the country has already established in major Chinese cities. On 12 December 2015, the nations of the world unanimously endorsed a new global climate agreement in Paris at the conclusion of the 21st Conference of the Parties to the UN Framework Convention on Climate Change (COP21). It is an historic achievement because for the first time it commits virtually every country in the world to take action to control their GHG emissions. While it is well recognized that the 'intended nationally determined contributions' (INDCs) each country made will not, taken together, be sufficient to meet the global target of keeping the rise in global temperatures well below 2 degrees celsius, countries committed to strengthening their commitments every five years and a robust system of transparency and monitoring is to be established to measure progress.

President Obama Denies Approval for Canada's Keystone XL Pipeline Project

On 6 November 2015, President Obama announced that he had accepted Secretary of State John Kerry's recommendation to reject TransCanada's application to build the Keystone XL pipeline. The decision ends a seven-year process during which the pipeline became a top political controversy with strong support from Republicans and opposition from every Democratic presidential candidate. Announcing his decision, President Obama stated that 'America is now a global leader when it comes to taking serious action to fight climate change, and frankly, approving this project would have undercut that leadership.' TransCanada subsequently announced that it will challenge President Obama's decision as a violation of the North American Free Trade Agreement.

U.S./Cuba Environmental Agreement

On 18 November 2015, the U.S and Cuba signed an agreement pledging cooperation on marine research and protection issues. Under the agreement, scientists with the U.S. National Oceanic and Atmospheric Administration (NOAA) who are responsible for marine sanctuaries in the Florida Keys and the Texas Flower Garden Banks national sanctuary will work with scientists from Cuba's Guanahacabibes National Park and Banco de San Antonio in the westernmost part of Cuba. This agreement has been hailed as opening the door to more extensive environmental cooperation between the two countries in the future.

U.S. Permits Oil Drilling in Arctic Waters, but Shell Abandons Drilling

On 23 July 2015, Royal Dutch Shell received two permits from the federal government to begin exploratory oil drilling in the waters of the Chukchi Sea off the northwestern coast of Alaska. While other major oil companies have stopped plans for drilling in the Arctic because they deem it too risky, Shell spent more than US$7 billion over a decade to drill in the Arctic. After drilling one well, Shell announced in late September 2015 that it would end its oil exploration off the north coast of Alaska because of 'disappointing results.' Many observers believe that Shell abandoned drilling because it made little economic sense in light of the plunge in global oil prices. On 16 October 2015, the U.S. Department of Interior announced that it was cancelling auctions that had been scheduled for the next two years for oil drilling rights in the Chukchi and Beaufort Seas off the northern coast of Alaska. Interior Secretary Sally Jewell cited market conditions and Shell's abandonment of its Arctic drilling program. The government also denied requests for lease suspensions from Shell and Statoil, which means that their existing 10-year leases will expire in 2017 and 2020.

Chevron/Ecuador RICO Judgment Appealed

The decades-long saga of efforts by villagers in Ecuador to seek redress for oil pollution allegedly caused in the 1970s by an American oil company continued in 2015. In 2011, the villagers

obtained a US$9 billion judgment against Chevron from a court in Ecuador. Chevron responded by suing the plaintiffs and their lawyers in the U.S., alleging that the lawsuit was a fraud. In 2014, U.S. federal district Judge Lewis A. Kaplan ruled that the judgment had been obtained by fraud perpetrated by U.S. lawyers for the plaintiffs. The judge barred any enforcement of the judgment in the U.S. and barred the U.S. lawyers from receiving any of the proceeds from collection of the judgment in other countries. On 20 April 2015, the U.S. Court of Appeals for the Second Circuit heard an appeal of Judge Kaplan's order. While no decision has been issued by the court, one of the judges at oral argument responded with anger when Chevron's counsel argued that the corporation should not be bound by a prior commitment to accept the judgment of the Ecuadoran courts in return for the case being dismissed from U.S. courts where the plaintiffs initially filed it in 1993.

Lawsuit against ExxonMobil Allowed to Proceed under Alien Tort Statute

In *Doe v. Exxon Mobil Corp*. No. 01-1357 (July, 2015), federal judge Royce Lamberth refused to dismiss a lawsuit against ExxonMobil charging human rights abuses in connection with the development of natural gas facilities in Aceh Province Indonesia in 2000 and 2001. The plaintiffs allege that Exxon was complicit in the murder of villagers opposed to the project by Indonesian security forces. Judge Lamberth distinguished the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum* 133 S.Ct. 1659 (2013), which dismissed a lawsuit alleging similar abuses by Shell Oil in Nigeria, because Shell is a foreign company while ExxonMobil is headquartered in the United States. The lawsuit was initially filed in 2001, alleging claims arising under the Alien Tort Statute (ATS). The plaintiffs allege that Exxon violated five norms of international law: norms against torture; extrajudicial killing; cruel inhuman and degrading treatment; arbitrary detention; and disappearance. The court concluded that jurisdiction is available under the ATS for 'claims that sufficiently touch and concern the United States to displace the presumption against extraterritoriality.' The court noted that the plaintiffs allege that Exxon executives in the U.S. received regular reports about human rights abuses by their security forces and planned and authorized their actions.

Conclusion: Court Battles Loom as 2016 Presidential Election Approaches

In 2016 legal challenges to key EPA regulations, including the Clean Power Plan and the 'Waters of the U.S.' rule will be heard in court. Even if the rules are upheld, a new Republican administration may seek to repeal them. Because virtually every Republican presidential candidate has pledged to repeal EPA regulations, their future will depend largely on the results of the 2016 presidential election, which will be held on November 8, 2016.