



BUSH

The Last 100 Days

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Past is Prologue: For Energy and the Environment, the Bush Administration's Last 100 Days Could Rival the First 100

Deregulatory Risks Abound for Environment and Energy Policy in Final Months of Bush Administration

A Majority Staff Report by



THE SELECT COMMITTEE ON
ENERGY INDEPENDENCE AND GLOBAL WARMING

The Honorable Edward J. Markey

A Report by the Select Committee on Energy Independence and Global Warming Majority Staff

In 2001, the Bush administration began its radical, anti-environmental agenda by rescinding, changing, or issuing rules that degraded America's environment. From refusing to reduce the arsenic levels in drinking water, to opening wilderness areas to new roads, to rejecting the Kyoto Protocol after promising to cut emissions, early actions merely presaged later damaging activities on global warming, clean air laws, and myriad other environmental and energy issues.

And while the first 100 days of the Bush administration initiated perhaps the worst period of environmental deregulation in American history, the last 100 days of a Bush presidency could be even worse. With the recent reports showing that the Interior Department is rushing the review of changes to rules implementing the Endangered Species Act, with far-reaching consequences for threatened species and global warming, past is prologue for the anti-regulatory ideologues in the White House.

The Select Committee on Energy Independence and Global Warming has prepared the following report on what administrative actions the Bush administration could take in the final days of its second term.

The report will cover the following major rulemaking topics:

- New Source Review and other air pollution rules under Clean Air Act
- Fuel economy
- Biofuels
- Endangered Species Act
- Mountaintop mining, oil shale, tar sands and other resource extraction rules
- Clean water rules
- Global warming
- Nuclear energy and safety
- Rules already issued

Clean Air Act

Power plant New Source Review (NSR):

New Source Review, a program that forces power plants to improve their pollution performance when making updates to facilities, could be completely gutted in the next few weeks. The Environmental Protection Agency (EPA) plans to finalize an NSR rule before the end of the administration that would essentially exempt all existing power plants from having to install new pollution control

technology when these plants are updated. Currently, EPA looks at whether a modification to a facility increases the *annual* emissions of the facility to determine whether NSR is triggered. The Bush EPA plans to change this to focus whether a modification increases the *hourly* emission rate. The upshot is that changes that keep the hourly rate the same, but greatly increase overall annual emissions, will no longer trigger NSR. NSR will essentially become worthless, as polluters will be able to expand operations without changing the hourly emissions rate. Duke Power had advocated this faulty methodology in its challenge to current NSR rules, which it ultimately lost in the Supreme Court in *Duke v. EPA* – decided the same day as the global warming case *Massachusetts v. EPA*. If put in place, the effect of the rule will be to allow old, dirty power plants to continue to increase emissions without having to install emissions control technologies.

Fugitive emissions exemption: In a separate NSR rule, EPA plans to exempt so-called “fugitive” emissions – meaning emissions that don’t come out of the end of a stack such as volatile organic compounds emitted from leaking pipes and fittings at petroleum refineries – from consideration in determining whether NSR is triggered. This represents another significant weakening of the NSR program.

NSR aggregation Rule: EPA is also set to finalize a third rule weakening the NSR program, by allowing so-called “batch process facilities” – like oil refineries and chemical plants – to artificially ignore certain emissions when determining when NSR is triggered. For example, if such a facility installs a new boiler that simultaneously increases pollution from production lines, the rule would allow EPA to ignore the production-related pollution in determining whether the boiler upgrade triggers NSR.

The three NSR rules are expected to be issued within the next month.

Air quality impacts on parks: EPA is also working towards weakening air pollution regulations on power plants and other emissions sources adjacent to national parks and other pristine, so-called “Class I” areas. By changing the modeling of new power plants’ impact on air quality in national parks – using annual emissions averages as opposed to shorter daily or monthly periods – the EPA rule will make it easier for such plants to be built close to parks. The EPA rule is set to be finalized in late November.



Fuel Economy

In December of 2007, the President signed the Energy Independence and Security Act of 2007 (EISA), which requires fuel economy standards for the fleet of cars and light trucks to be increased by the maximum feasible amount each year, such that it reaches at least 35 miles per gallon by 2020. This change is the first Congressionally mandated increase in fuel economy standards in 32 years. The National Highway Traffic Safety Administration (NHTSA) issued proposed regulations to implement the EISA standards in April 2008, and final regulations are expected soon. In determining whether fuel economy



standards should be increased so as to reach 35 miles per gallon before 2020, NHTSA looks at the cost-effectiveness of higher standards—based in large part on predicted gasoline prices. The Bush administration has proposed to use unrealistically low predictions of future gasoline prices for these calculations—contradicting the recommendations of both the Department of Energy’s Energy Information Administration (EIA) and EPA.

Using EIA’s “reference scenario” projections, NHTSA’s proposed regulations are based on the following predicted gasoline prices: \$2.42/gallon in 2016 to \$2.51/gallon in 2030. Even with the recent dip in gas prices to just under \$3.00/gallon, these figures are unrealistically low, and using them has the effect of biasing modeling of the “maximum feasible” fuel economy standards towards lower levels. If NHTSA used EIA’s higher gasoline price scenario—a range of \$3.14/gallon in 2016 to \$3.74/gallon in 2030—the technology is available to cost-effectively achieve a much higher fleet wide fuel economy of nearly 35 mpg in 2015 – instead of the 31.6 mpg in 2015 under the lower gas prices used in NHTSA’s proposed rule. In June, Chairman Markey sent a letter to NHTSA suggesting that the agency use the higher gas price estimates in setting the standards.

NHTSA’s proposed fuel economy regulations also include an estimate of the economic benefits of reducing carbon dioxide emissions that many consider to be unjustifiably low (\$7 per metric ton of carbon dioxide) – perhaps setting an adverse precedent for future accounting of such benefits by NHTSA or other federal agencies

NHTSA’s proposed fuel economy regulations also include NHTSA’s view that State vehicle greenhouse gas regulations such as California’s clean car standards (which more than a dozen other States wish to adopt), are preempted by the Energy Policy and Conservation Act. That view has been rejected by several courts that have addressed it, but there is concern that including this view as an appendix in federal regulations may give it additional legal weight in future litigation challenging the state standards.

Finally, NHTSA has also come under pressure by the auto industry to alter its assessments of how quickly fuel efficient technologies could be incorporated into the fleet, and if it bows to industry's demands, the final fuel economy standards could also be lower than the "maximum feasible" standards required by law.

Renewable Fuel Standard (EPA)

EPA is expected to issue proposed regulations soon on the renewable fuels provisions passed in EISA that required America's fuel supply to include 36 billion gallons of renewable fuels by 2022 – together with more specific volumetric requirements and lifecycle greenhouse gas benchmarks for "advanced" renewable fuels, cellulosic ethanol, and biodiesel.

The major issue of the rulemaking is how EPA will count "lifecycle" greenhouse gas emissions associated with the production of different types of biofuels, especially how they will address significant indirect land use impacts as required by the law. Reports indicate that the agency's calculations of lifecycle emissions for some biofuel feedstocks may prevent them from being used to satisfy the advanced biofuels targets. This may delay the timing of release for the proposed lifecycle calculation methodology and how much information on EPA's calculations on specific feedstocks will be released. The EPA's intention is to release the proposal before the end of the year, but a final rulemaking seems unlikely before the end of the Bush administration.

Department of Interior – Natural Resources, Endangered Species

Endangered Species Act: The Department of the Interior (DOI) has already telegraphed its intention to gut the Endangered Species Act by rushing through 300,000 comments on proposed rules in 32 hours, then providing a mere 10-day public comment period on the Environmental Assessment of the proposed rules change. The proposed rules would take expert scientific review out of many Endangered Species Act (ESA) processes, and could exempt the effects of global warming pollution on threatened or endangered species.



A letter sent by Chairman Markey to the U.S. Fish and Wildlife Service (FWS) on October 28, 2008 notes: "The proposed rule changes would weaken the ESA by undermining the Section 7 consultation requirements in the Act and excluding global warming emissions as a consideration under the ESA."

The letter continues, “The FWS notes on page 4 of the draft Environmental Assessment that, in the absence of the proposed rule change, “[t]here will likely continue to be an increase in the number of section 7 consultations given the emerging challenge of global climate change.” In other words, the FWS is proposing to deal with an increase in Section 7 consultation requests due to activities that increase global warming emissions by eliminating the requirement.”

DOI may also issue pending decisions on whether to list candidate species as threatened or endangered, or on designation of “critical habitat” for threatened or endangered species.

For example, the Bush administration is already taking steps to de-list the gray wolf. FWS reopened the comment period this week on the 2007 proposal to de-list the animal, a controversial proposal that was struck down in court after lawsuits from environmentalists.

Oil shale development: It has been reported that DOI intends to finalize new regulations governing commercial development of oil shale on more than 2 million acres of public lands in the West. In light of the recent lifting of the Congressional moratorium on oil shale development, these rules will now have a direct impact on these lands. Oil shale development presents serious risks of adverse environmental effects – both at the extraction stage, and because refining oil shale into usable product generates substantially higher lifecycle greenhouse gas emissions than conventional petroleum sources and requires large amounts of water.

Mountaintop removal coal mining: DOI’s Office of Surface Mining is expected before the end of the administration to issue a final rule that would extend the current rule (which requires a 100-foot buffer zone around streams to protect them from mining practices) so that it also applies to all other bodies of water, such as lakes, ponds and wetlands. But the rule would also exempt many harmful practices – such as permanent coal waste disposal facilities – and could even allow for changing a waterway’s flow. The public comment period on the Environmental Impact Statement accompanying the rule lasts until November 23, 2008. Under the Surface Mining Control and Reclamation Act, EPA is also required to “concur” that the rule satisfies applicable environmental requirements. Reports indicate that EPA plans to do so, notwithstanding its serious negative impacts on water quality in mining areas.

Bureau of Land Management: The sub-agency that oversees land-based extraction practices like mining and oil shale is expected to issue a host of resource management plans and rules in the final days of the Bush administration. The plans will reportedly ignore the advice of the EPA on environmental protection measures and bypass the public comment process, in conflict with requirements under the National Environmental Policy Act (NEPA) and other regulations.

Plans for oil shale and tar sands development have been sent up the chain in DOI, forgoing the normal public comment period. In the case of oil shale, many say BLM is ignoring comments from an EPA regional office that say these extraction processes may cause harm to water and air quality, and could potentially fail to win approval under NEPA.

Water Quality

Factory farms: EPA has already missed several deadlines to finalize a rule addressing whether concentrated animal feeding operations (CAFOs) are required to obtain permits under the Clean Water Act. Concerns abound from states, environmentalists, and the farming industry over the details of the rule. Will the rule allow farms to “self-certify” they have not discharged pollution, perhaps making it too easy for CAFOs to avoid regulation and fines for infractions? Will states with progressive CAFO rules be pre-empted by the new federal standard? Will fines be retroactively applied? Will farms have to treat manure to eliminate dangerous pathogens?



The final rule could come as early as this week, or at the very end of the Bush administration. Either way, challenges to the final rule – from one or both sides of the issue – appear inevitable.

Definition of “Waters of the United States”: There is concern that EPA and the Army Corps of Engineers may issue a revised guidance memo on how to interpret the phrase “waters of the United States” in the Clean Water Act, which determines what water bodies are subject to regulation under the Act. The current guidance was issued last June in the wake of the Supreme Court’s decision in *Rapanos v. United States*. Many in the environmental community and the States see the current guidance as unjustifiably excluding too many waters from coverage under the Act, and that potential forthcoming revisions could further limit such coverage.



Climate Change

Clean Air Act greenhouse gas regulations: The die has already been cast on agency regulations relating to greenhouse gas emissions. On July 11, 2008, EPA issued a non-regulatory Advance Notice of Proposed Rulemaking (ANPR) regarding potential regulation of greenhouse gas emissions under the Clean Air Act. The ANPR has made clear that the Agency does not intend to propose any regulations under the Clean Air Act, but rather will leave this issue to the next administration.

Greenhouse gas reporting: Under the Omnibus appropriations bill for FY 2008, EPA was directed to establish a mandatory reporting rule for greenhouse gas emissions, using its existing authority under the Clean Air Act, by September 2008. EPA has been working on a proposed rule, which may or may not be issued before the end of the Bush administration. EPA will not issue a final rule before the end of the administration. The emissions reporting rule is considered to be an important foundation for future regulation of greenhouse gas emissions, either under the Clean Air Act or under new federal legislation.

There is some concern that the Bush administration may try to preemptively undermine the rule. However, because the rule will not be made final until after the end of the administration, the next administration could correct any problems with a proposed rule by “re-proposing” the rule

within a relatively short time period. The main adverse effect would be delay in finalizing the rule.

Nuclear Regulatory Commission:

Waste confidence: The Nuclear Regulatory Commission (NRC) has a proposed rule changing its environmental regulations to update the NRC's so-called "waste confidence" finding, which determines the safety of spent nuclear fuel. The proposed rule updates the NRC finding that spent fuel generated at any reactor can be stored safely and without significant environmental impacts for at least 30 years after the reactor shuts down.

The NRC, in the proposed rule, maintains that it still has this confidence, but is updating the findings that support this confidence since the current findings were based upon the premise that a geologic repository, like the controversial Yucca Mountain facility, would be available by 2025. The industry has long touted this rule as necessary for any future of the nuclear industry, but opponents of the rule have argued that the current rule ties the agency's confidence too closely to timing of a Yucca Mountain facility and thus places the NRC in an awkward position as it reviews the Yucca Mountain application. The agency could amend the rule by basing its findings solely on science, leaving the politics out of the equation, or not.

Comments to the rule are due by December, so a final rule may or may not come before the end of the Bush administration.

Aircraft impact rule: The NRC is currently deliberating a final rule to require new nuclear reactor applicants to provide an assessment of how the reactor would respond in the event of a large commercial aircraft impact. The original proposal was for each new reactor to be required to withstand a large commercial aircraft impact, not simply to require that they issue a report on the potential harm from an impact. The NRC is reportedly split on the issue and the decision timeline is currently unknown. Congressman Markey has a proposal that would require new reactors to withstand impacts of a large commercial aircraft in his nuclear security bill, H.R. 6816.

Rules already issued:

National Ambient Air Quality Standards (NAAQS) for lead: The final rule was issued this month, setting a standard of 0.15 micrograms per cubic meter of airborne lead. Environmentalists have expressed concern that the rule allows averaging of lead levels over three months in determining compliance with the standard, which may allow for short-term spikes that adversely affect health. In addition, it appears that the White House intervened at the last minute to increase the rule's threshold for monitoring – without any policy justification – with the effect of dramatically reducing monitoring required under the rule.