

Environmental Policymaking To Watch In Fall 2015

By **Juan Carlos Rodriguez**

Law360, New York (September 8, 2015, 2:59 PM ET) -- Environmental issues will likely be a major focus in Congress and the executive branch this fall, as long-awaited reform on toxic substances, a controversial species listing and more power plant rules are ready to take center stage.

While some members of Congress are continuing to take aim at key environmental initiatives of the Obama administration, such as the Clean Power Plan and Waters of the U.S. rule, it seems unlikely those efforts will have much success, according to Gary Guzy, senior of counsel at Covington & Burling LLP.

But that doesn't rule out the prospect for policymaking on other fronts, he said.

"I think people generally underestimate the possibility of some real bipartisan legislative accomplishments, and there are a number of areas that seem incredibly well-primed for that to happen," Guzy said.

Here, Law360 examines some of the key environmental legislative and regulatory matters to look for in coming months.

Toxic Substances Control Act

In June, the U.S. House of Representatives approved its version of TSCA reform, following the lead of the Senate Committee on Environment and Public Works, which in April passed its own bill. This fall, it's possible the full U.S. Senate may get a chance to debate the act.

Both measures are intended to strengthen TSCA, which has been criticized for being so weak as to not even allow the U.S. Environmental Protection Agency to ban dangerous chemicals like asbestos.

But there are major sticking points, particularly on the issue of exactly how much a new TSCA will preempt state laws. Senate EPW Ranking Member Barbara Boxer, D-Calif., whose own state may have even stricter standards than federal law, has been particularly vocal in her belief that state regulations be given deference.

But Guzy said there's a good chance the House and Senate can hammer out a deal and get something passed.

"On the Toxic Substances Control Act reform effort, there's a real alignment of interests among a range

of parties on improving the current situation and the tremendous amount of work that's been done already, legislatively, in committee and in both houses to develop some responsible, bipartisan approaches," he said.

Sage Grouse ESA Listing

The U.S. Fish and Wildlife Service is currently conducting a status review for the greater sage grouse across its 11-state range. In 2010, the agency determined the greater sage grouse warranted protection but that action was precluded by higher priorities. A determination on whether the species still requires protection is due Sept. 30.

Republicans have attempted to preemptively block a threatened or endangered listing, inserting prohibitive language into U.S. Department of Defense and EPA spending bills. But neither of those efforts is likely to succeed.

The U.S. Department of the Interior says that its proposed plans to conserve greater sage grouse habitat — outside of a listing decision — mostly cover land with few to no energy prospects and that the plans will honor all existing valid development rights, but opponents still said they see the plans as an overreach.

The Bureau of Land Management and the U.S. Forest Service have released a proposal and 14 final environmental reviews that aim to support sustainable economic development on parts of public land in states across the West, calling the plans an essential part of a strategy to maintain both the chicken-size bird and the western economy.

"The decision on whether to list the sage grouse is going to be pretty big," Melinda Pierce, the Sierra Club's legislative director, said.

EPA's Ozone Standard

Salo Zelermyer, senior counsel at Bracewell & Giuliani LLP, said the EPA's ozone standard, due Oct. 1, is likely to get a lot of attention. The plan was just sent to the White House for review at the end of last month.

The EPA is planning to update the National Ambient Air Quality Standard for ozone, which currently stands at 75 parts per billion. In November, the agency proposed a range between 65 and 70 parts per billion but will also consider comments on setting ozone levels as low as 60 parts per billion.

Critics have seized on the annual EPA-estimated compliance costs of \$3.9 billion for a 70-parts-per-billion standard and \$15 billion for a 65-parts-per-billion standard, pointing out that some states and regions would never be able to achieve the tighter standard because of levels of naturally occurring ozone.

However, EPA Administrator Gina McCarthy has insisted that states would only be held responsible for reducing ozone emissions they can control.

Zelermyer said interested parties are looking to see whether the White House and the EPA are willing to "give a little bit" on the ozone standard to preserve some of their more climate-focused rules.

“If you think about it in terms of the potential issues that could come up in the congressional budget discussions, there will be riders on ozone, and there will be riders on other issues as well. How those negotiations play out is an open question right now,” he said.

EPA’s Effluent Limitation Guidelines

Pierce also said another final rule due Sept. 30 from the EPA will draw considerable attention for its impact on power plants. The rule, dubbed the Effluent Limitation Guidelines, would strengthen the existing controls on discharges from plants. The proposal sets the first federal limits on the levels of toxic metals in wastewater that can be discharged from power plants, based on technology improvements in the industry over the last three decades.

The EPA says steam electric power plants contribute over half of all toxic pollutants discharged to surface waters by all industrial categories currently regulated in the U.S. under the Clean Water Act.

“Power plants are ... allowed to discharge arsenic, selenium and other pollutants into waterways,” Pierce said. “This rule is rolled up with coal ash regulations that came out not too long ago.”

Coal combustion residuals, or coal ash, can either be collected dry and stored in ponds, or discharged directly into waterways, Pierce said.

“This is another regulation that power plants need to take into account when they're making their investment decisions,” she said.

--Additional reporting by Daniel Wilson, Kery Murakami and Keith Goldberg. Editing by Mark Lebetkin.