THE EPA’S FUTURE UNDER PRESIDENT TRUMP

PERSPECTIVES ON THE POTENTIAL IMPACT OF THE NEW ADMINISTRATION

BY LAWRENCE B. CAHILL, CPEA

“Plans to protect air and water, wilderness and wildlife are in fact plans to protect man.” — Stewart Udall

With the inauguration of a new U.S. president and the changing of the guard in the executive branch of the government, there have been considerable concerns expressed about new directions that might be taken, especially regarding regulatory reform. This article discusses what regulatory reform might mean to one particular U.S. government agency — the Environmental Protection Agency (EPA). The history of environmental laws and regulations is first discussed briefly, followed by an analysis of the historical growth of environmental regulations and how the “one in, two out” executive order and other initiatives might impact the EPA’s activities. And, finally, a word of caution is given about gutting environmental regulations, lest we forget the agency’s legislated responsibilities and substantial accomplishments in protecting human health and the environment.¹

SUMMARY

Substantial change is coming for the U.S. Environmental Protection Agency (EPA). What is the potential impact of President Trump’s “one in, two out” executive order and other executive initiatives? Veteran EHS auditor Lawrence B. Cahill provides current facts and historical context about U.S. environmental regulations. Learn what you can do now to help your organization deal with these regulatory changes.

Historical and Current Context

The first Earth Day occurred on April 22, 1970, in the midst of a nationwide college campus strike and protests in the streets throughout the country. Sound familiar? That era became a springboard for Title 40 of the Code of Federal Regulations (CFR), which established the EPA as an independent agency of the executive branch in December 1970. A series of major federal environmental laws soon followed, as shown in Exhibit 1.


<table>
<thead>
<tr>
<th>Year</th>
<th>Title</th>
<th>Signing President</th>
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<tbody>
<tr>
<td>1</td>
<td>1969</td>
<td>National Environmental Policy Act (NEPA)</td>
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<tr>
<td>2</td>
<td>1970</td>
<td>Clean Air Act (CAA)</td>
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<td>3</td>
<td>1970</td>
<td>Occupational Safety and Health Act (OSHA)</td>
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<td>4</td>
<td>1972</td>
<td>Federal Water Pollution Control Act (FWPCA)</td>
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<td>5</td>
<td>1972</td>
<td>Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)</td>
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<td>6</td>
<td>1972</td>
<td>Noise Control Act (NCA)</td>
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<td>7</td>
<td>1973</td>
<td>Endangered Species Act (ESA)</td>
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<td>8</td>
<td>1974</td>
<td>Safe Drinking Water Act (SDWA)</td>
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<td>9</td>
<td>1976</td>
<td>Resource Conservation and Recovery Act (RCRA)</td>
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<td>10</td>
<td>1976</td>
<td>Toxic Substances Control Act (TSCA)</td>
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<tr>
<td>11</td>
<td>1980</td>
<td>Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)</td>
</tr>
<tr>
<td>12</td>
<td>1986</td>
<td>Emergency Planning and Community Right-to-Know Act (EPCRA)</td>
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¹ www.theiia.org/EHSAC
Over the next decade and a half, 12 critically important laws were passed. Interestingly enough, 11 of the 12 were authorized and signed by Republican presidents, a legacy that is sometimes forgotten or ignored. Each law, of course, required the creation of regulations to accomplish the stated goals. And indeed that has occurred.

All federal regulations, including those created by the EPA, are codified in the Code of Federal Regulations (CFR), published annually by the Government Printing Office. Each year the CFR is released to the public and it contains all current and updated regulations effective on July 1 of that year. The individual volumes for each year are usually available in January or February of the following year.

The EPA is responsible for the 37 volumes of Title 40 of that Code. By early 2017 the EPA had released the 2016 CFRs effective July 1, 2016. The total page count for EPA’s Title 40 regulations in 2016 was 27,074, the most on record (Exhibit 2).

The EPA’s page count combined with OSHA’s 3,096 pages in Title 29, created, for the first time, more than 30,000 pages in total. EPA regulations accounted for 90 percent of that total.

More Facts about EPA Regulatory Growth

When looking at additional data about EPA regulatory growth, some interesting facts emerge. For example:

- **Incremental Growth.** There was approximately a 3 percent increase in the number of pages in Title 40 between 2015 and 2016 (about 800 pages).
- **Predominance of the Clean Air Act.** Approximately 66 percent of the pages in Title 40 in 2016 were devoted to Clean Air Act regulations.
- **Regulations in the Pipeline.** As reported in the EPA’s November 2016 Semi-Annual Regulatory Agenda, there were 203 separate and additional environmental regulations that were under development or review. (These are regulations, not pages!)
- **Comparison with the U.S. Tax Code.** EPA and OSHA regulations combined are about 40 percent as long as the federal tax code (30,000 pages compared to 75,000 pages).
- **Correlation with the Dow.** From 1972 to 2016, there is a 95 percent statistical correlation between the growth of environmental regulations and the growth of the Dow Jones Industrial Average. Could this mean that regulatory growth is actually a sign of a strong economy?

Without a doubt, the complexity of environmental protection has led to a large number of regulations. The question is: If we start eliminating regulations in haste, will we sacrifice our safety and health at the same time?
What Might Change Under Trump

During the 2016 presidential campaign, much criticism was expressed over the regulatory burden placed on U.S. industry and the regulated community in general. President Trump said numerous times that his goal is to eliminate as many as 75 percent of all existing federal regulations.

“One In, Two Out”

The first step in that effort was Trump’s January 30, 2017, issuance of the executive order titled, “Reducing Regulation and Controlling Regulatory Costs.” This order states that for every “one new regulation issued, at least two prior regulations be identified for elimination with the goal of zero incremental costs.” As with most executive orders, further guidance will be required, and the Director of the Office of Management and Budget must develop that guidance. In fact, on February 2, 2017, the White House issued guidance stating that the order would only apply to “significant regulations,” as defined in the executive order titled, “Regulatory Planning and Review,” issued by the Clinton administration in 1993. Clinton’s executive order defined “significant regulations” as those imposing an annual economic cost of US$100 million or more. The director must also identify the total amount of incremental costs that will be allowed for each agency for each fiscal year.

This “one in, two out” approach, if enacted as stated, obviously would have significant impacts on federal rulemaking within all agencies including the EPA. As stated previously, the EPA in its November 2016 Semi-Annual Regulatory Agenda listed 203 new regulations under development or review. If all of these regulations are put forward, does this mean that more than 400 other existing regulations must be eliminated? As arbitrary as this sounds, the answer at this time is yes.

Chemical Safety Act

Another potential impact caused by the executive order would be related to the Frank R. Launtenberg Chemical Safety for the 21st Century Act signed into law on June 22, 2016. The act requires that the EPA evaluate and communicate the risks of existing chemicals from the current inventory of 83,000 chemicals in use in the United States. The first 10 chemicals for review were identified on November 29, 2016, and include asbestos, carbon tetrachloride, methylene chloride, and trichloroethylene. If an assessment determines that a chemical poses an unreasonable risk, the agency must mitigate that risk within two years. Further, for each risk evaluation completed, another must be initiated. At least 20 ongoing evaluations are to be initiated by the end of 2019.

Does this mean that any resultant rule addressing mitigations for a particular high-risk chemical cannot be promulgated unless two other unrelated rules are eliminated? This seems rather arbitrary as well. Perhaps in this and other cases the “significant regulation” threshold will have a moderating impact, and the effects will not be as severe as expected.
Congressional Review Act
Another regulatory reform initiative taking place but receiving considerably less attention is the use of the Congressional Review Act enacted in 1996, which allows lawmakers to take certain actions regarding laws enacted during the waning days of an administration. Historically, the Congressional Review Act has been used sparingly but this has not been the case in early 2017. Congress has already used this power to rescind the EPA’s Stream Protection Rule promulgated in December 2016, which sought to protect the nation’s waterways from debris generated by coal surface mining activities. Congress is also attempting to rescind the EPA’s revised Accidental Release Prevention Requirements contained in its Risk Management Program final rule issued on January 13, 2017. A bill to rescind the rule was introduced in the House in early February.

In sum, there is strong evidence that significant regulatory reform is ahead driven by a Republican Congress and presidency. One can only hope that logic will prevail and that protection of human health and the environment will continue as a fundamental priority for the nation.

Why the EPA’s Mission Remains Essential
With good reason President Nixon created the EPA in 1970. The agency’s basic mission is to protect human health and the environment. This is accomplished with an US$8 billion budget and 15,000 full-time equivalent staff. Although it is often overlooked in our daily lives, we have all benefited from the protections that are a result of the agency’s efforts and programs. Consider the scope of the agency’s oversight and responsibilities:

- **Nationwide Facility Coverage.** More than 800,000 facilities in the United States generate air emissions, wastewater, and hazardous waste at a level sufficient to require regulatory oversight through mechanisms such as Title V air permits, NPDES wastewater discharge permits, and/or hazardous waste generation and disposal requirements. That’s an average of 16,000 facilities per state where there is regulatory oversight and controls over the release of pollutants.

- **Hazardous Waste Generation.** There are more than 26,000 large quantity hazardous waste generators in the U.S., generating more than 33 million tons of hazardous waste annually. These generators are required to manage their wastes properly and report to the EPA every other year on their activities.

- **Toxic Releases.** There are more than 22,000 facilities in the United States that release listed toxic chemicals at a sufficient level to require reporting under the Toxics Release Inventory (TRI) requirements of the Emergency Planning and Community Right-to-Know Act. More than 3.3 billion pounds of toxics were released nationally in 2015. TRI reporting has resulted in a better understanding of pollutants in our environment and has driven a reduction of releases over time.

- **Superfund Sites.** As a result of the 1980 passage of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) some 1,188 “superfund” sites have been cleaned up as of November 30, 2016. However, there remain 1,337 superfund sites on the National Priorities List (NPL) that have yet to be cleaned up.

- **Toxic Chemicals.** There are 85,000 chemicals inventoried and regulated under the Toxic Substances Control Act. These include materials containing asbestos and PCBs, which were considered miracle products when first produced. Very few of the inventoried chemicals have undergone meaningful risk assessments to determine hazards posed to human health or the environment. The Frank R. Lautenberg Chemical Safety for the 21st Century Act
signed into law on June 22, 2016, contains provisions to assure that these assessments are conducted.

It is important to note that, save for the superfund sites, all of the chemicals, wastes, releases, and discharges discussed above are being managed in compliance with existing environmental regulations. Do we really want to eliminate 75 percent of these regulations resulting in the loss of essential controls over discharges and releases?

What Internal Auditors Can Do Now

IIA CEO and President Richard Chambers advises that in the face of a lower regulatory environment, it will be important to remind stakeholders that the risks any rescinded regulations were designed to mitigate still remain. Now is the time to promote internal auditing as being both necessary to assessing risk mitigation where regulations once did, and to making sure resources are allocated based solely on risk.

So, what can internal auditors do now?

- Understand the full breadth of the potential impact of EHS risks. As with other technical or specialty areas, CAEs should ensure that internal audit has adequate competencies in this area.

- Keep abreast of deregulation activities and determine their impact on:
  - Associated risk management, control, and governance processes.
  - The internal audit plan.
  - Internal audit resources.

- Open lines of communication with other parties that provide assurance over the management of EHS risks to explore the best options to leverage knowledge and coordinate activities. Stakeholders expect internal auditors to work with other assurance providers and coordinate assurance activities where appropriate.

- Consider who provides assurance over EHS risk management and control processes. Ensure the level of assurance — and especially the independence of the assurance provider — is appropriate for the level of the risk to the organization.

- Provide management and the board with timely advice and insights related to deregulation.

Conclusion

The future of environmental regulation in the United States is cloudy indeed. It is really too soon to tell exactly what might be the impact of President Trump’s executive order and other pending regulatory reform initiatives. It would be prudent to not only keep a close watch, but to take steps now to help your organization safeguard against risks that EPA regulations were intended to mitigate.

Sources

2. All statistical data concerning the U.S. Environmental Protection Agency were obtained from the agency’s website at www.epa.gov.
6. Ibid.
7. Ibid
About the Author

Lawrence B. Cahill, CPEA (Master Certification) is a technical director with Environmental Resources Management and has more than 35 years of professional EHS experience with industry and consulting. He is the editor and principal author of the widely used text, *Environmental, Health and Safety Audits*, 9th Edition and its 2015 follow-up text *EHS Audits: A Compendium of Thoughts and Trends*, both published by Bernan Press. He has published more than 70 articles and has been quoted in numerous publications including *The New York Times* and *The Wall Street Journal*. Cahill has worked in more than 25 countries during his career. He holds a bachelor’s degree in mechanical engineering from Northeastern University where he was elected to Pi Tau Sigma, the International Mechanical Engineering Honor Society. He also holds a master’s degree in environmental health engineering from the McCormick School of Engineering and Applied Science of Northwestern University, and a master’s in business administration from the Wharton School of the University of Pennsylvania.

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