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In This Issue

The Debt Ceiling: Why You Should Care and How It Came to Be

by Jessica Schieder

A self-inflicted economic disaster looms on the horizon. Failure to approve a routine measure allowing the U.S. to manage its finances and pay the bills it already owes would have devastating effects. Increasing the debt ceiling is the only way to avoid a destabilization of the American economy.

A Treasury Department report released Thursday clearly states, "Even the prospect of a default can be disruptive to financial markets and American businesses and families." The U.S. Treasury has been using extraordinary measures over the last several months to manage the country's bills – these measures will be exhausted on Oct. 17. That is the deadline for increasing the debt ceiling.

"The report states that a default would be unprecedented and has the potential to be catastrophic: credit markets could freeze, the value of the dollar could plummet, and U.S. interest rates could skyrocket, potentially resulting in a financial crisis and recession that could echo the events of 2008 or worse," according to the Treasury Department. "The report also notes that if the current government shutdown is protracted, it could make the U.S. economy even more susceptible to the adverse effects from a debt ceiling impasse than it was prior to the shutdown."

Understanding the seriousness of a possible default, House Speaker John Boehner's spokesman stated clearly late last week, "Speaker Boehner has always said that the United States will not default on its debt." But Boehner's aide attached a proviso: "If we're going to raise the debt limit, we need to deal with the drivers of our debt and deficits." However, in television appearances on Sunday, the Speaker seemed to back away from these assurances and said if the president failed to negotiate with the House, the president would be responsible for a default.

Business organizations like the U.S. Chamber of Commerce and the AFL-CIO have both demanded that the debt ceiling debate be removed from political posturing. President Obama and Senate Democrats have been demanding a "clean" continuing resolution (on the federal budget) and a "clean" debt ceiling bill. Yet a number of House members seem to be willing to "play chicken" with default, despite the serious economic repercussions it would have.

The Politics of the Debt Ceiling Crisis

The buildup to the debt ceiling deadline is taking place with the government shutdown as a backdrop. The government shutdown, which was triggered by the failure to approve a budget, and a potential default on federal debt are distinct crises, but both are being handled simultaneously by largely the same group of politicians. So while the crises involve different mechanisms, the politics and personalities handling the government shutdown overlap.

The national government partially shut down last week after Congress failed to approve a short-term spending bill. This failure occurred because of conservative intransigence against any bill keeping the government funded that included full support of the Affordable Care Act. Congressional Democrats and the president have rejected any spending bill that fails to fund the entire government, including the Affordable Care Act.

The president has asserted that he is willing to compromise on larger long-term budget matters but will not allow the debt ceiling to be used to extract concessions. One faction of one political party in one house of the legislature is betting on impossible concessions – essentially "hold[ing] the entire economy hostage over ideological demands," in the words of President Obama.

A default on American debt would be unprecedented. American prosperity depends in large part on low costs of borrowing and the risk-free nature of Treasury debt, both of which could be jeopardized by a default.

How the Debt Ceiling Came About

It is widely understood that Congress has the constitutional "power of the purse" – the ability to tax, spend, and authorize borrowing. Before World War I, the budgets produced by Congress contained specific financing instructions. Congress dictated the amount to be spent on projects (which it still continues to do), as well as how the Treasury would pay for such projects (i.e. interest rates, maturities, and details of when bonds could be redeemed).

Over the course of 19th century, Congress began to allow the Treasury more freedom to determine how bills would be paid. For example, by 1898, Congress gave broad guidance for funding for the Spanish-American War: it was to be paid for using "$100 million outstanding in certificates of indebtedness with maturities under a year ... [and] $400 million in longer-term notes and bonds." Within these limits, there was "substantial administrative leeway" given to the Treasury, according to the Congressional Research Service (CRS).

Detailed financing instructions were gradually eliminated before World War II. Congress began to focus more on the quality and quantity of government investment, instead of the number and type of bonds being used to finance the spending.

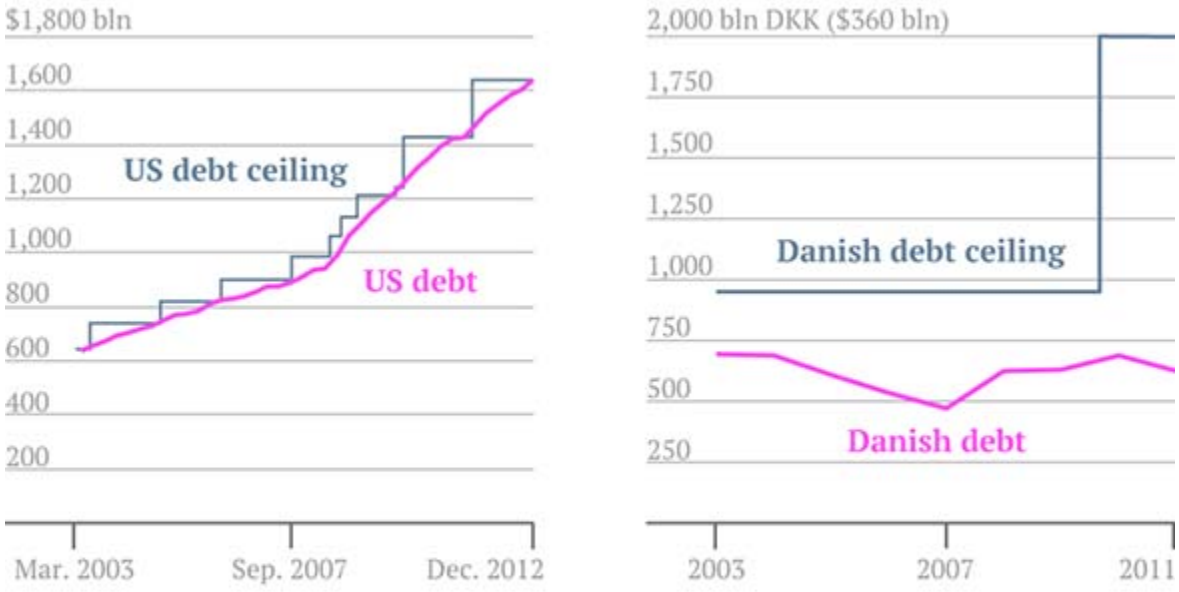
Under President Franklin Roosevelt, Treasury Secretary Henry Morgenthau formally proposed in 1935 that Congress limit the total amount of bonds (debt) instead of limiting the sale of additional bonds (debt). Congress approved the first aggregate debt limit of $45 billion in 1939, which included all forms of American debt under one standardized limit. But when the U.S. entered WWII, the debt ceiling was quickly raised to over $300 billion, and debt after WWII rose to about 110 percent of Gross Domestic Product. (It fell quickly as the economy grew in the 1950s.) It was during the period since WWII that the modern consolidated federal budget came into being.

The debt ceiling has been raised 94 times since 1940, by both Republicans and Democrats. During the Reagan Administration, Congress raised the debt ceiling 18 times, more than any other presidency. A complete list of historical debt ceiling increases can be found here.

A Uniquely American Practice

No other modern nation handles debt like the United States. Denmark is the only other democratic nation with a debt ceiling (although Japan has a similar mechanism). Since its origin in the 1990s – due to reforms – Denmark has not yet used its debt ceiling as a bargaining chip in political negotiations.

Instead, the Danish debt ceiling is generously placed above actual debt, and the nation has avoided debt ceiling crises. Denmark has raised the limit only once in its history, and, even at that point in time, national debts totaled less than three-quarters of the limit. The chart below demonstrates the apolitical nature of the Danish debt ceiling.



Note: US debt includes only the debt subject to the debt ceiling and is shown for the end of every quarter. Danish debt includes oustanding foreign and domestic debt and is shown for the end of every year.

Ritchie King | Quartz Data: US Treasury, Congressional Research Service, Danmarks Nationalbank

From an economic perspective, the continued existence of a debt ceiling that could initiate a default is a massive risk in itself. A 2011 *Financial Times* editorial commented on the harmful instability caused by the debt ceiling, saying, "Sane governments do not cast doubt on the pledge to honor their debts – which is why, if reason prevailed, the debt ceiling would simply be scrapped."

The Center on Budget and Policy Priorities (CBPP) has commented, "It makes little sense to have a limit on federal debt that is divorced from the budgetary decisions that largely determine the amount of debt incurred."

From time to time, there have been calls to abolish the debt ceiling or reform the way it is increased (by vesting it in a body aside from Congress), because it has been used to extract concessions that otherwise would have been unpalatable. The latest laundry list of Republican demands is an example of this.

What Are We Risking?

As the nation nears possible default, the full faith and credit of the United States is at risk. Besides destabilizing the American recovery from the Great Recession, instability in the American market will ripple around the globe.

Consumer confidence is expected to fall and financial markets would be chaotic in the face of an actual default. The cost of borrowing would increase dramatically, potentially catalyzing a credit freeze.

The mere threat of default in 2011 cost the country $19 billion through increased interest rates in the Treasury market, according to an estimate by the Bipartisan Policy Center.

As the largest economy in the world, the United States produces almost 22 percent of the world's annual gross domestic product (GDP), according to the World Bank. A politically induced economic crisis caused by a debt default could damage the American "brand" abroad, driving foreign investment out of the United States.

Triggering an Economic Crisis through a Default

Unless the debt ceiling is increased, the government will default on obligations on Oct. 17.

To prevent such a crisis, a wide range of diverse American constituencies, from the Chamber of Commerce to the AFL-CIO, have called for a debt ceiling increase.

But the frustration produced by this latest debt ceiling debacle has left many experts looking for an escape hatch in the event Congress does not act in time.

Legal experts have drawn attention to proposals which might at the last minute avoid a default. Some have proposed that the president could invoke the 14th amendment and continue borrowing to pay debts. The 14th amendment includes a provision that states that the U.S. must pay its debts – and thus cannot default. The specific phrase in question is worded as follows:

The validity of the public debt of the United States, authorized by law, including debts incurred for payments of pensions and bounties for services in suppressing insurrection or rebellion," the critical sentence says, "shall not be questioned.

The provision was originally intended to "ensure the payment of Union debts after the Civil War and to disavow Confederate ones," according to *The New York Times*' Adam Liptak. Former President Clinton endorsed using the 14th amendment during the 2011 debt ceiling crisis as a means to avert an economic disaster. However, the Obama administration remains unconvinced that using the obscure provision would be a valid option. President Obama has clearly stated his legal advisors "are not persuaded that that is a winning argument." Many others have cast doubt on this option as well.

If invoking the 14th amendment is not an option, other experts have suggested the Treasury could "prioritize" certain payments to avoid defaulting on an interest payment. Under such a scenario, the United States would likely prioritize paying interest payments over obligations to the American people. Promised Social Security checks, Medicare reimbursements, and other entitlement programs would then be paid with what money is left, but it is unlikely guaranteed benefits could be dispersed in full or at expected intervals.

These suggestions would be last-ditch efforts to prevent a crisis that no one wants and the American economy does not need as it recovers from the Great Recession. Raising the debt ceiling is in the interest of every American, so Congress should do it as soon as possible to promote the interests of the American people. In addition, long-term reforms should be made to avoid these types of crises from taking place in the future.

Chlorine Gas Is a Major Risk across the Country, but Needn't Be

by Leeann Sinpatanasakul

Currently, over 2,700 facilities nationwide store large amounts of toxic chlorine gas, putting millions of Americans at risk of serious harm in the event of an explosion or leak. In the past 15 years, over 600 accidents injuring almost 800 people have occurred at these facilities. However, safer alternatives are available, and many facilities have already turned to them, showing that these alternatives can be commercially successful. Check our new interactive map to see if there are facilities with chlorine gas in your community.

The Health Risks of Chlorine Gas

Chlorine gas is so toxic that it was used as a chemical weapon during World War I. Today, the chemical is most often used as a disinfectant in drinking water treatment, sewage plants, and some food processing facilities. It is also used to manufacture plastics, insecticides, solvents, and household cleaning products, such as bleach.

Exposure to concentrated amounts of chlorine gas causes eye irritation, vomiting, coughing, a choking sensation, and lung irritation. Higher chlorine exposure may also lead to acute respiratory distress syndrome, an inflammation of the lungs from breathing in chemical fumes, and even death. Although chlorine itself is not flammable, it can react explosively or form explosive compounds when mixed with other chemicals like turpentine and ammonia.

The Clean Air Act requires facilities handling large quantities of toxic or flammable chemicals to submit risk management plans (RMPs). For chlorine, facilities storing 2,500 pounds or more on-site must submit an RMP detailing worse-case scenarios and what response measures are in place in the event of a chemical release.

Currently, over 2,700 facilities file risk management plans. About 2,000 of these are either water treatment or wastewater treatment plants that use chlorine in their operations, with the remaining facilities comprised of industrial sites or chemical plants.

Impacts of Chlorine Gas Exposure

Workers were the main victims of facility accidents. For example, in 2010, a tank filled with chlorine gas at a metal recycling facility in Tulare, CA, was pierced, which resulted in 23 people being rushed to the hospital and six kept for treatment. One inspector at the facility had to be on life support for several days with lung damage. The facility was fined $15,000 for the incident (which the company is appealing). The medical and human costs of such accidents were likely much higher.

Emergency personnel, who respond to these accidents, are also at serious risk of hazardous exposure. In 2007, a leaking chlorine gas container at the Pioneer Americas Tacoma bleach plant in Tacoma, WA forced the Port of Tacoma to close. After the leaking cylinder was plugged, a shift in the wind exposed more than 25 individuals to the gas, many of them first responders. They were taken to the hospital

where one of the firefighters began coughing up blood. Days later, several first responders continued to report feeling sick and required medical treatment.

The Tacoma plant accident, which occurred at night, could have been much worse. An estimated 10,000 people who work in the plant's surrounding industrial neighborhood had mostly gone home for the evening. An internal report on the incident noted the importance of better air monitoring, the need to use respirators (many firefighters didn't use them), and the need to limit access to the danger zone. The company agreed to pay a $15,804 penalty for failing to properly notify authorities and donated nearly $60,000 worth of emergency response equipment to the Tacoma Fire Department. But the company paid a fine of only $1,650 to the state Department of Labor and Industries for this incident.

The Safety Record of Facilities with Chlorine Gas

Over the past 15 years, over 600 major accidents were reported at facilities storing chlorine. These incidents resulted in 779 injuries and two deaths, almost 22,000 people evacuated, and over $127 million in property damage. Texas has the most facilities storing chlorine gas, followed by California and Louisiana. Texas also had the most accidents (80).

But safety records are not just a concern in the larger states. Delaware has nine facilities storing chlorine gas over the past 15 years, and three of those facilities have had 14 accidents. Arkansas has had 41 accidents, and they happened in only eight of the 91 facilities in the state. A single Georgia-Pacific paper plant (a subsidiary of Koch Industries) in Crossett, AR accounted for 18 accidents where chlorine gas and chlorine dioxide (another chlorine-based toxic gas) were stored on-site. The majority of the accidents were due to equipment failure.

Accidents in the Transportation Sector

Some of the most severe incidents involving chlorine have occurred in transport. A 2011 report from the U.S. Department of Transportation ranked chlorine as one of the top chemicals with high-impact causalities, with nine fatalities and 83 major injuries resulting from 48 chlorine transportation accidents.

For example, in 2005, two trains collided in Graniteville, SC in one of the worst chlorine-related catastrophes in recent years. A derailed freight car was punctured, releasing a large amount of chlorine gas that killed nine people and caused respiratory difficulties among 554 others. More than 5,000 people in the area were evacuated, and the damages from the incident totaled over $6.9 million.

Improving Chemical Security and Decreasing Risk

Over the last 15 years, almost 5,000 facilities stored or produced large amounts of chlorine, but 40 percent of these facilities have "deregistered" and no longer submit risk management plans to the EPA. EPA data does not report why a facility was "deregistered" – it could be that the quantity of chlorine stored at a facility fell below 2,500 pounds, the facility might have switched to a safer chemical, or it may have simply closed.

The extensive use of toxic chlorine gas across the country is increasingly unnecessary as a variety of safer and affordable alternatives and processes are available. Indeed, the potential for safety improvements has already led some companies to replace chlorine gas altogether. In 2009, the Clorox Company transitioned away from using chlorine to produce bleach at its 600 facilities and instead began purchasing bleach produced by others without using chlorine in its toxic gas form.

The Dow Chemical Company and K2 Pure Solutions also opened bleach manufacturing plants that don't use chlorine gas. Although the Dow Chemical Company has instituted these safer manufacturing procedures at its Pittsburg, CA plant, it has not undergone a company-wide transition similar to Clorox.

In addition, nearly 125 water treatment plants have switched from chlorine gas to liquid bleach or ultraviolet treatments, according to a 2008 Center for American Progress report. The report also cites strategies that paper mills, chemical manufacturers, and bleach facilities can use to eliminate or reduce the safety and security risk associated with chlorine gas, often while also decreasing operating costs.

Bolder Oversight Is Needed

In August, after the explosions in West, TX and Geismar, LA, President Obama signed Executive Order 13650, which created a federal working group to make recommendations on improving safety and security for hazardous chemicals such as chlorine gas. A standard on requiring facilities to adopt safer chemicals and processes should be part of these recommendations. The working group is tasked with reaching out to stakeholders during its work, and there should be opportunities for all those concerned about such dangerous chemicals to participate.

You can participate in one of the working group's sessions or urge the president to use his authority to begin requiring companies to use safer technologies and chemicals.

Sofia Plagakis contributed to this article.

New California Regulations Lead the Way in Protecting Consumers from Toxic Chemicals

by Ronald White

The nation's federal toxic chemicals law, the Toxic Substances Control Act (TSCA), has a number of significant shortcomings. Among other things, it does not generally require companies to test chemicals for possible health effects before using them in consumer products. And though the federal Consumer Product Safety Improvement Act limits the amount of lead and bans certain chemicals known as phthalates in children's products, it doesn't restrict the use of other toxic substances in consumer goods. To respond to this gap in addressing the use of toxic substances in consumer products, California adopted new regulations on Oct. 1 designed to create safer substitutes for hazardous ingredients in products sold in the state.

In addition to reducing consumer exposures to toxic chemicals and thus improving health, the goal of the regulations is to also "create new business opportunities in the emerging safer consumer products economy and reduce the burden on consumers and businesses struggling to identify what's in the products they buy for their families and customers." The regulations are an outgrowth of California's Green Chemistry Law, specifically Assembly Bill 1879, which mandated the Safer Consumer Products Regulations and authorized the implementation of the Safer Consumer Products Program.

Four-step Process

The regulations require a four-step process for regulating toxic chemicals in consumer products (Figure 1):

1. Development of a list of potentially harmful chemicals by California's Department of Toxic Substances Control (DTSC) based on the work already done by other authoritative organizations.

2. Evaluation and prioritization of combinations of toxic chemicals and the products they are used in to develop a list of "Priority Products" for which analyses must be conducted to see if safer alternatives are available. A chemical that is the basis for a product being listed as a Priority Product will be designated a Chemical of Concern (COC) for that product and any alternative considered or selected to replace that product.

3. Responsible entities (i.e., manufacturers, importers, assemblers, and retailers) notify the Department of Toxic Substances Control when their product is listed as a Priority Product. Manufacturers (or other responsible entities) of a product listed as a Priority Product must then perform an alternatives analysis for the product and the Chemicals of Concern in the product to determine how best to limit exposures to, or the level of adverse public health and environmental impacts posed by, the chemicals in the product.

4. The Department identifies and implements regulatory responses designed to protect public health and/or the environment, which maximize the use of acceptable and feasible alternatives of least concern. DTSC may require regulatory responses for a Priority Product (if the manufacturer decides to retain the Priority Product), or for an alternative product selected to replace the Priority Product.

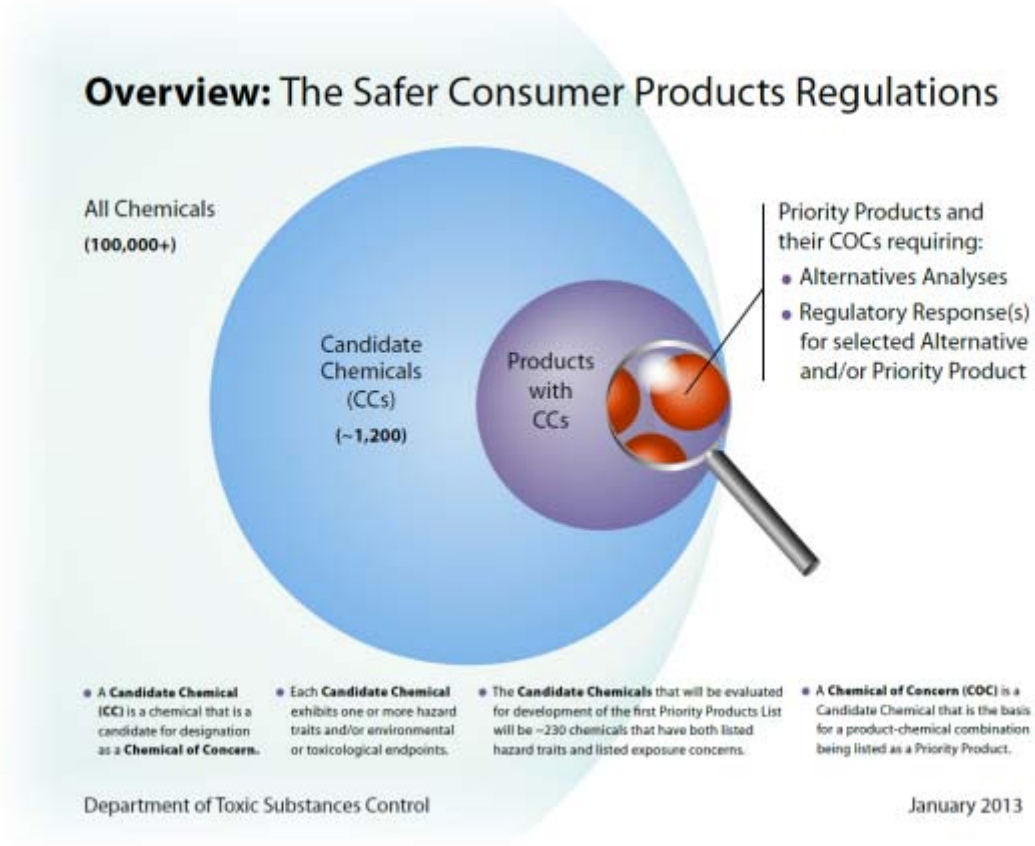


Figure 1 (*click image to enlarge*)

Candidate Chemicals/Priority Product Selection

The regulations require the entities that produce consumer products to inform the DTSC that their products contain a chemical that is listed on a forthcoming list of "priority products." On Sept. 26, the DTSC published an informational list of approximately 1,200 individual and groups of "candidate chemicals" derived by the DTSC from lists developed by other "authoritative organizations." Manufacturers can voluntarily review whether their products contain any of the chemicals on the list to evaluate whether safer chemicals are available and to avoid substitutions in which one toxic chemical is substituted for another.

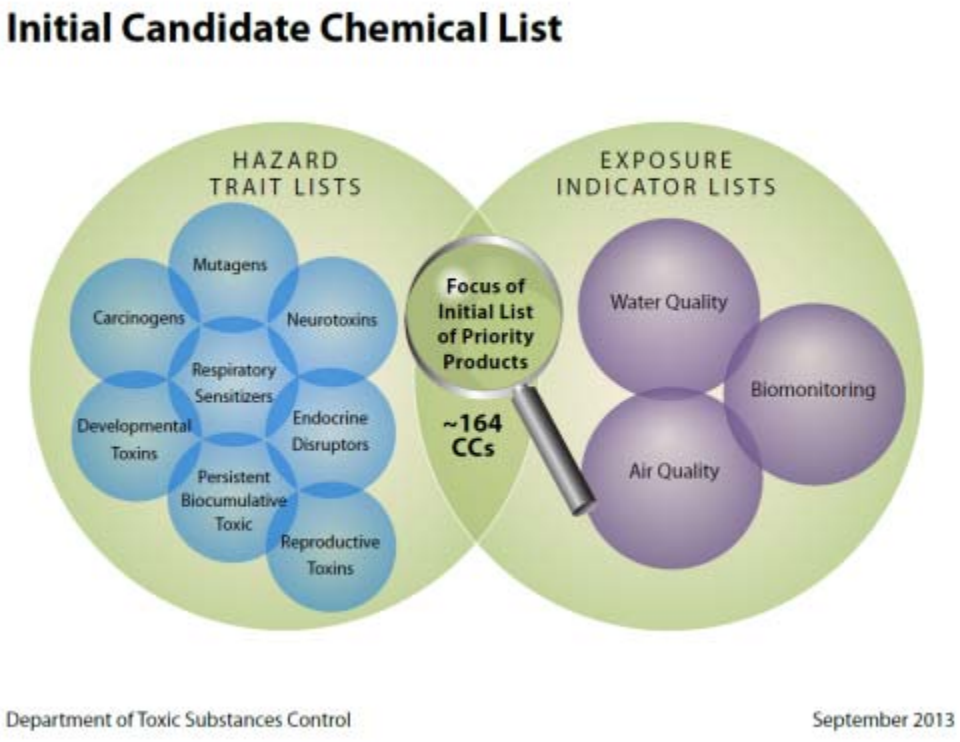


Figure 2 (*click image to enlarge*)

A list of 164 initial Candidate Chemicals that meet the criteria for the Initial Priority Products List was developed from this larger list of chemicals based on both the toxicity profile of the chemical and information on the potential for human exposure (Figure 2).

The DTSC will then evaluate and prioritize product/Candidate Chemical combinations to develop a list of Priority Products for which analyses of potential alternatives must be conducted. By April 1, 2014, the DTSC will make available for public review and comment up to five products proposed on an Initial Priority Products List. In evaluating a product for inclusion on this list, the DTSC will assess the potential adverse impacts of its candidate chemical(s) and adverse impacts due to potential exposures during the life cycle (i.e., from manufacture through to use and disposal) of the product by considering various factors listed in the regulations for which information is reasonably available.

The DTSC will also identify the chemical(s) from the initial candidate chemicals list included in the product for each initial priority product. A chemical that is the basis for a product being listed as a priority product will be designated a Chemical of Concern for that product and any alternative considered or selected to replace the product. By Oct. 1, 2014, the DTSC will develop a Priority Product Work Plan to identify and describe the product categories they will evaluate in the future.

Alternatives Analysis

For products categorized as Priority Products, the responsible entity must perform an alternatives analysis for the product and the chemicals of concern in the product to determine how best to limit exposures to, or the level of adverse public health and environmental impacts posed by them.

A two-phase alternative analysis process is described in the rule. Safer Consumer Products Regulations requires the manufacturers to compare the existing product-chemical combination that contains a chemical of concern with a potential alternative (e.g. chemical substitution or product redesign) using 13 factors evaluated at each stage of the product's life cycle. Based on this analysis, the manufacturer (or another responsible entity) will select an alternative chemical ingredient or alternative product design, or decide to retain the existing product-chemical combination. A DTSC guidance document on conducting an alternatives analysis is currently being developed.

Conclusion

As has been the case for a variety of environmental health concerns (e.g., air pollution, chemical hazard assessment), California is taking a national leadership role in developing a regulatory system to reduce public exposure to toxic chemicals in consumer products, a major source of public exposure to toxic hazards. As California gains experience with this new program, other states will be looking at this model to develop similar programs. However, industry is expected to challenge California's program and concerns remain that preemption of state chemical regulations could be included in efforts to reform the Toxic Substances Control Act, the nation's outdated and generally ineffective legislation for chemical regulation.

A Three-Month Review of the President's Climate Action Plan: Strides Made in Implementing Rules, Threats Emerge in Congress

by Katie Weatherford

In June, President Obama revealed his climate action plan, delivering on a promise he made during his State of the Union Address in February that he would take action to address climate change if Congress failed to do so. The plan outlines near- and long-term policies that the Obama administration will implement to address climate change: cutting carbon pollution, preparing the U.S. for climate change impacts, and leading international efforts to take action.

Three months after issuing the plan, the Obama administration has made steady progress toward achieving some of these key goals, demonstrating that the president is serious about confronting the climate change challenge head on.

Reducing Carbon Pollution

In an earlier article, the Center for Effective Government explained that a key initiative included in the president's climate action plan is to establish limits on carbon dioxide (CO2) emissions from new and

existing U.S. coal-fired power plants, a major source of CO2 emissions, as well as other harmful air pollutants.

On Sept. 20, the U.S. Environmental Protection Agency (EPA) met the deadline President Obama set for proposing the CO2 emissions limits for new coal-fired power plants. The president has directed EPA to finalize the proposed rule "in a timely fashion," but no formal deadline has been set. The president also directed EPA to issue a rule limiting CO2 emissions from existing power plants by June 2014 and to finalize those rules by June 2015.

Just days before EPA released the new power plant emission limits, Sen. Minority Leader Mitch McConnell (R-KY) introduced legislation in the Senate that would block EPA from finalizing the rule. McConnell has also announced that he intends to file a disapproval resolution under the Congressional Review Act (a process that has only resulted in one rule being overturned in its history). And Rep. Ed Whitfield (R-KY) has threatened to introduce legislation that would impose guidelines on how EPA sets limits on new power plants, although he has yet to do so. In the weeks ahead, congressional climate change skeptics and opponents of regulations are likely to attach "riders" to the debt ceiling extension that would block or limit EPA's authority to regulate power plant emissions.

The administration has also taken measures to reduce carbon pollution by promoting renewable energy investments and developments. The president's climate plan establishes a goal of reducing carbon pollution by 3 billion metric tons cumulatively by 2030 and directs the Department of Energy (DOE) to issue energy efficiency standards for appliances and federal buildings. Three draft energy efficiency rules that had languished at the Office of Management and Budget's Office of Information and Regulatory Affairs for over a year were released by the DOE this past August. Two of the rules set new efficiency standards for commercial refrigeration equipment, and the third rule sets standards for metal halide lamp fixtures. These rules combined are estimated to save up to $31 billion in energy costs and reduce CO2 emissions by up to 393 million metric tons over the next 30 years.

Additionally, the president's plan seeks to double renewable energy generation to power more than five million homes by 2020. As a first step, the Department of the Interior (DOI) has accelerated permitting for a 500-megawatt wind project in Arizona and a 40-megawatt geothermal energy project in California. These two projects alone will generate enough electricity to power approximately 211,000 homes. Additionally, DOI recently held its first-ever offshore wind lease sales, opening up millions of acres off the coasts of Rhode Island, Massachusetts, and Virginia for renewable energy development. Other carbon-cutting measures in the president's action plan are also underway.

Preparing for Climate Change Impacts

In addition to reducing carbon dioxide emissions, the president's climate action plan highlights the importance of preparing for the impacts of climate change by building stronger and safer communities and infrastructure, protecting our environment and economy, and using sound science to manage climate impacts.

On Sept. 26, the United Nation's Intergovernmental Panel on Climate Change (IPCC) released its five-year assessment on the impacts of climate change, which highlights just how serious preparing for

climate change will be for the U.S. The report indicates that "[t]he atmosphere and ocean have warmed, the amounts of snow and ice have diminished, sea level has risen, and the concentrations of greenhouse gases have increased." The report goes on to say: "Most aspects of climate change will persist for many centuries even if emissions of CO2 are stopped."

Since the president unveiled his plan, the Interior Department has established a grant program for environmental research projects in the region affected by Hurricane Sandy. Research to manage risks of wildfires and drought and identify and prepare for risks to the electric power grid is also underway. The administration has also initiated several partnerships between federal agencies and state and local leaders to identify and mitigate risks to their communities. Nonetheless, much more work remains to be done to prepare for the impacts of climate change.

International Efforts a Mixed Bag

On the international front, the president has taken some steps to promote climate friendly policies, yet he continues to also promote energy policies that present considerable risks to public health and the environment.

On the one hand, working with world leaders has resulted in the recent agreement with China to phase-down use of hydrofluorocarbons (HFCs), a potent greenhouse gas. However, the president is also promoting the development of a global market in natural gas and approving applications to export liquefied natural gas overseas without conducting adequate environmental reviews. Public interest organizations, including the Center for Effective Government, have warned that exporting liquefied natural gas overseas will lead to more hydraulic fracturing operations in the United States to satisfy increased foreign demand. Furthermore, a recent Center for Effective Government blog post explains that promoting natural gas use as a component of the president's climate action plan will risk increasing the release of methane (a potent greenhouse gas) during hydraulic fracturing operations unless adequate controls are required.

Meanwhile, some groups are concerned that the administration's trade policies and efforts to negotiate two new free trade agreements conflict with the international action he has laid out for his climate plan. For example, *The Huffington Post* recently reported that environmental groups are concerned that U.S. Trade Representative Michael Froman is working to undermine the European Union's efforts to reduce greenhouse gas emissions. Testifying before the House Ways and Means Committee in July, Froman reportedly said, speaking about the EU's Fuel Quality Directive, that the U.S. is seeking "improvements in the EU's overall regulatory practices" through the Trans-Atlantic Free Trade Agreement negotiations.

Conclusion

The president's climate action plan presents a comprehensive approach to addressing climate change, and the administration's progress over the past three months has been encouraging. Moving forward, the administration must continue to implement smart, sustainable policies that address greenhouse gas emissions domestically, prepare the U.S. for climate change impacts, and avoid trade policies that

would undermine progress in addressing climate change.

Clarity on Clean Water Protection is Coming, But How Long Will it Take?

by Katie Greenhaw

Last month, the U.S. Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) announced they were moving forward with a much-needed rulemaking to clarify which waters are protected under the Clean Water Act (CWA). Enforcement of the law has been hindered by years of uncertainty about agencies' regulatory jurisdiction over certain wetlands and waterways. On Sept. 17, agencies submitted a draft joint rulemaking for interagency review that would provide greater clarity and help ensure vital waters are covered by the CWA. However, protracted review processes and industry pushback could further extend the uncertainty and leave some waters unprotected.

Jurisdictional Uncertainty Leaves Water Quality at Risk

The Clean Water Act provides for the restoration and protection of water bodies, but it applies only to "navigable waters" of the United States. Determining which waterways meet this definition has been challenging and contentious. The CWA's broad language has historically been interpreted expansively, covering many surface waters and wetlands. But two U.S. Supreme Court decisions issued in 2001 and 2006 created uncertainty about the CWA's scope and the jurisdiction of the regulatory agencies charged with enforcing it. As EPA's recent blog explains, "the confusion centers on questions surrounding small streams and wetlands—some of which only flow after precipitation or dry up during parts of the year—and what role they play in the health of larger water bodies nearby or downstream."

The rulings left many streams, creeks, and isolated wetlands vulnerable to contamination by polluters who asserted that those waters were not covered by the CWA. In the wake of the 2006 decision, Bush administration agencies issued an ineffective guidance document that attempted to clarify federal enforcement obligations. In 2008, an investigation by the House Oversight and Transportation Committees concluded that there had been a drastic deterioration in EPA's enforcement program that was directly attributable to the 2006 Supreme Court decision and the Bush agencies' subsequent guidance. Documents obtained from the agencies indicated that hundreds of violations had been abandoned or delayed. EPA regulators later estimated that more than 1,500 major pollution investigations were discontinued or shelved between 2006 and 2010, according to *The New York Times*.

In 2011, the agencies finally issued new draft guidance intended to clarify the scope of the CWA, but the final version of the guidance document was never published. The 2011 draft was broader in scope than the Bush-era guidance, which the agencies concluded did not make full use of CWA authority as interpreted by the Supreme Court. EPA submitted the final guidance to the White House Office of Information and Regulatory Affairs (OIRA) for review in February 2012, where it languished for over 18 months. On Sept. 17, 2013, EPA withdrew the action.

New Regulatory Proposal Reflects Latest Science

On the same day the guidance was withdrawn, EPA replaced it with the proposed rule. EPA also released a draft science report on the latest peer-reviewed literature concerning how streams and wetlands connect to larger water bodies and affect downstream waters. The report finds that streams are connected to, and have important effects on, downstream waters regardless of size or how frequently they flow. The report also finds that wetlands are integrated with streams and rivers and strongly influence downstream waters.

The draft report will be subject to peer review and public comment before being finalized. According to EPA, any final regulation on CWA jurisdiction will be based on the final scientific assessment. Issue expert William Buzbee wrote that the report could provide a powerful response to CWA opponents' criticisms of the clarifying regulation.

Industry Attacks on Rule Start Early

Soon after EPA and the Corps sent the draft joint rulemaking to OIRA, the National Federation of Independent Business (NFIB) alleged that EPA failed to comply with statutory obligations. In a Sept. 24 letter to OIRA, NFIB claimed that the rule will have a significant economic impact on small businesses and EPA was therefore required to follow certain procedural requirements under the Regulatory Flexibility Act (RFA). The letter demanded that OIRA send the draft rule back to the agency for a small business impact analysis and review panel.

The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), requires EPA to conduct an initial regulatory flexibility analysis (IRFA) and small business review panel at the proposed rule stage if the proposed rule will have a significant economic impact on a substantial number of small entities. When an agency publishes a proposed rule, it must either certify that the rule will not have a significant impact or publish an IRFA. According to EPA's latest regulatory agenda, it has not yet determined whether a regulatory flexibility analysis is required. Further, since EPA has not yet published the proposed rule, NFIB's claims are at best premature.

NFIB is adamant that the rule will have a significant economic impact on "virtually all small businesses," even though the contents of the draft rule are not yet public. The industry group assumes it is similar to the guidance document that languished at OIRA (thanks in part to industry opposition). In fact, that guidance was expected to produce more benefits than costs by protecting streams and wetlands that support fishing and hunting, filter sediment and contaminants, reduce flooding, and contribute to drinking water supplies. A preliminary analysis of the potential indirect economic impacts associated with the guidance indicated that while more wetlands would be covered by permitting requirements, adding some costs, the benefits to the public would substantially outweigh those costs. According to one estimate, the indirect costs of potential wetlands mitigation would be in the range of $63 to $185 million, while the value of the benefits provided range from $162 to $368 million.

Although NFIB's letter assures that it "is not asking EPA to abandon this rulemaking," the additional procedures it requests would certainly lengthen the timeline of the rulemaking process. Small business

review panels are supposed to be completed within 60 days, but the actual lengths can vary. Some panels have been completed within two months, while others have taken over a year.

The Long Road Ahead

Even if EPA certifies that the rule does not trigger a regulatory flexibility analysis, a number of other processes have the potential to complicate and delay the rulemaking. The draft must survive OIRA review, an often opaque process that historically has resulted in lengthy regulatory delays. The prospect for a lengthy regulatory review process is likely, given that OIRA held 19 meetings on the agencies' non-binding guidance, some even before the draft guidance document was released. The specific content of stakeholders and OIRA discussions at those meetings is not publicly available, but participants included industry trade associations, environmental groups, and other agencies.

The proposed rule is likely to receive even more attention. Once published, it will be open to public comment. Collecting and considering public comments could take a significant amount of time, especially considering that the draft guidance received 230,000 comments.

In addition, the agencies cannot complete a final rule until EPA completes a final scientific assessment. EPA will publish a final report after considering public comments and the results of an external review of the draft document by the EPA's Science Advisory Board. The Science Advisory Board will hold its first meeting in mid-December. Unfortunately, EPA has not issued an expected timeline for the scientific assessment or the proposed rule, but time is of the essence.

According to previous reports, about 117 million Americans get their drinking water from sources fed by waters that could be excluded from the CWA because of jurisdictional uncertainty. When waters that impact the health of drinking water sources and waterways critical to recreation and commercial activities are not protected, the consequences are severe. In just one example provided by EPA,

> "Crude oil was discharged into Edwards Creek, an intermittent stream near Talco, Texas (Titus County). Under existing guidance, EPA did not attempt to pursue enforcement of this violation because it was too complex to prove the water was protected under the Clean Water Act. No clean up was required under the Clean Water Act. More than 50 percent of residents in Titus County get their drinking water from sources dependent on these kinds of creeks."

The body of recent scientific evidence linking the importance of streams and wetlands to the health of larger water bodies underscores the need for the rule to have a broad scope in order to fully protect the health of our nation's waters under the CWA. To accomplish this objective, it is imperative that EPA and the Corps proceed without delay and industry interference in developing this much needed clarifying rule.

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