



THE OBAMA APPROACH TO PUBLIC PROTECTION: RULEMAKING



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LEAD AUTHOR

Matt Madia, Regulatory Policy Analyst

CONTRIBUTORS

Gary D. Bass, Executive Director

Brian Gumm, Communications Director

Rick Melberth, Director of Regulatory Policy

Rachel Sauter, Regulatory Policy Fellow

ABOUT OMB WATCH

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INTRODUCTION

Rulemaking is an essential function of government, but it is one that is often overlooked or underappreciated. Rulemaking agencies are tasked with implementing the laws Congress passes, and the ensuing regulations can extend protection or opportunity to consumers, workers, businesses, and the environment, often in areas where it is needed most. Conversely, poor regulations, or a lack of regulations, can imperil society and sow the seeds of disaster.

Commitment to such public interest rulemaking is critical to building a successful presidential administration. Every administration engages in rulemaking, but only those committed to writing rules in the best interest of consumers, workers, and the environment can lay claim to an administrative record successful in public service.

This is the first of three OMB Watch reports evaluating the Obama administration's record on regulatory issues. This report covers health, safety, and environmental rulemaking at federal agencies during the Obama administration from January 2009 through August 2010. The second report will focus on regulatory enforcement. The third report will focus on the regulatory process, including issues of transparency, participation, regulatory analysis, and scientific integrity, and will more deeply examine the role of the White House, specifically the Office of Management and Budget (OMB), in shaping the administration's record. The other reports will be released in the coming weeks.

This report's focus is on major rulemaking agencies including the U.S. Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), the Mine Safety and Health Administration (MSHA), the Food and Drug Administration (FDA), the Consumer Product Safety Commission (CPSC), and the National Highway Traffic Safety Administration (NHTSA). The report touches upon other departments and agencies to the extent that their rulemaking activity has shaped the administration's record, including the Department of Energy, the Department of the Interior, the Wage and Hour Division of the Department of Labor, and the Food Safety and Inspection Service in the Department of Agriculture. The report begins by touching briefly on the role of the White House in rulemaking.

Each of the report's four sections – the role of the White House in rulemaking; environmental rulemaking; worker health, safety, and rights rulemaking; and consumer health and safety rulemaking – begins by identifying the level of commitment of President Barack Obama and the White House. Using the bully pulpit of the presidency to comment on rulemaking issues or call for specific protections, or failing to use that pulpit, is a significant signal of the seriousness with which an administration approaches public interest rulemaking. Comments from cabinet-level and other agency officials can supplement, but do not replace, those of the White House. As this report shows, the quality of that leadership is vitally important to an administration's regulatory success. The agency sections assess the commitment of those officials and the actions of their agencies in order to develop a thorough evaluation of the administration's rulemaking record.

AGENCY EVALUATIONS

Evaluating and drawing conclusions about the Obama administration's rulemaking record requires an assessment of both quantitative and qualitative factors in order to gauge agency performance and outcomes. Observers often look to the number of proposed or final rules agencies have published as a sign of agency performance. Though simplistic, enumeration of rules can be a telling indication of an agency's commitment to using rulemaking as a means for achieving policy goals.

More significant than quantity is quality. Rules should be evaluated based on their benefits to society, whether they comport with agency responsibilities and priorities, and their responsiveness to public need. Of equal importance is an evaluation of what an agency has not done. Evaluating the Obama administration for what it has not done has proven more difficult – the administration is less than two years old, and given the number of challenges facing the administration upon taking office, it can be difficult to distinguish between setting policy priorities and negligence or an inability to control events.

Based on the research presented here, several trends emerge. First, in stark contrast to the George W. Bush administration, the Obama administration has taken its role of protecting the public seriously and has been far more active in pursuing its rulemaking responsibilities. Obama's philosophy regarding the role of government is very different from the Bush philosophy. This contrast emerged early in Obama's tenure as agencies spent considerable time and energy addressing many of the "midnight regulations" the Bush administration enacted or finalized, most of which rolled back essential environmental, public health, and workplace safety standards. While not wholly successful, the Obama administration deserves credit for looking both forward and backward.

Second, the new administration has begun to restore agency resources, recommit leadership to agency missions, and address the toll of neglect from previous administrations. Rebuilding the regulatory agencies, their staffs, and their programs will, however, take years and consistent resources.

Third, in comparison to expectations, the Obama administration has fallen short. The administration has not changed the dysfunctional regulatory process that agencies must navigate. The rulemaking process is full of procedural hurdles that hinder how quickly and, sometimes, how effectively agencies can respond to public needs. The process is tilted heavily in favor of special interests that have the resources and access to impact the substance of rules; the public's voice is often drowned out.

This report was written in a climate in which conservatives and business leaders are criticizing the Obama administration for rapidly expanding the regulatory state, but painting the administration with such broad strokes misleads the public. The criticism is tactical, led by those who simply oppose any regulations, particularly those targeting businesses, and it obscures a more complex record. This report recognizes that there are nuances among agencies and within agencies. While some agencies or offices within agencies have plotted a rulemaking agenda clearly and with great energy, other agencies have enjoyed only mixed success.

That mixed success is partly a result of the slow confirmation process for Obama's nominees in the Senate. Nevertheless, Obama has clearly distinguished himself with the quality of his appointments to lead rulemaking agencies. President Bush placed former industry insiders atop rulemaking agencies in an effort to minimize regulation and dismantle the agencies. Obama, by contrast, has generally appointed well regarded public service and agency or policy experts to lead the agencies and the essential departments within those agencies. Albeit very slowly in some cases, this leadership has generally begun to restore the commitment by agencies to meet their responsibilities to protect the public.

Another area in which the administration has distinguished itself is in beginning to restore badly needed resources to many essential agencies, as noted above. The FDA, EPA, OSHA, and CPSC have all received substantial budget increases that they are using in their rulemaking programs. Still, resource constraints remain an issue at many agencies: decades of inattention to regulatory budgets have presented congressional appropriators and administration leaders with a steep hill to climb. Surmounting this challenge will prove even more difficult in light of Obama's call for budget caps in the coming years (discussed below).

The Obama administration's environmental agenda has thus far been driven primarily by climate and energy issues. Agencies have finalized rules and set standards in a variety of areas that together clearly signal a broad and concerted effort to fight climate change through regulation. A commitment to rulemaking at the EPA's clean air office has produced historic standards for greenhouse gas emissions and has also led to aggressive limits on other forms of air pollution. A shift in EPA's chemicals strategy, as well as the EPA's record on climate and clean air regulation, is a testimony to Administrator Lisa Jackson, who has set an active agenda and begun to restore science to the agency's decision making processes.

At the Department of Labor, efforts to jumpstart a rulemaking engine neglected during the Bush administration have been complicated by an inability to appoint agency heads in the early months of the administration and unanticipated external events, including the Upper Big Branch mine explosion in West Virginia and the BP oil spill disaster in the Gulf of Mexico. Regulatory victories have occurred amid long periods of inaction, and while the administration's agenda and goals hold promise, the pace of development is cause for concern. The Department, particularly OSHA, must also manage an injection of resources by building greater staff capacity – a development that may prove time-consuming in the short-term but should facilitate rulemaking in future months and years.

Obama has not used his bully pulpit to articulate a consumer safety agenda. Nonetheless, the administration has made some progress in the areas of consumer product safety and auto safety. The Food Safety Working Group marked an auspicious start, signaling not only a commitment to food safety but lending White House and cabinet-level support to early rules, including FDA's long-awaited egg rule to prevent salmonella contamination. However, the food safety agenda now stands in need of rejuvenation. CPSC has been largely successful in meeting new legislative deadlines. Standards for lead, phthalates, and cribs, among others, are expected to protect children and families from dangerous products.

NHTSA has revived its rulemaking apparatus under the Obama administration and is gaining resources that should help make the agency more responsive. There is real concern among vehicle safety proponents that the agency's standards are not protective enough and are not keeping up with industry standards.

At times, especially in 2010, external events have wrested the administration's regulatory agenda from its control. The BP oil spill disaster, the explosion at the Upper Big Branch mine, and the recall of millions of Toyota vehicles, among other events, have consumed agency resources and attention. These events color the administration's reputation while preventing agencies from fully crafting a record of their choosing.

A common theme among many of these problems is the failure of regulatory agencies to keep up with changing conditions and demands – a symptom of the toll of neglect and hostility towards agencies in past years. In turn, these failures have eroded the public's trust in government's ability to provide needed protections. This report discusses how Obama and select federal agencies have responded to the task of rebuilding that trust through the regulatory process.

WHITE HOUSE ROLE IN RULEMAKING

OMB Watch will present a thorough analysis of the Obama administration's efforts to address the regulatory process and the role of the Office of Information and Regulatory Affairs (OIRA) in the third report in this series. This report shows that agencies face many of the same institutional challenges they have for years: Resource constraints, difficulty shepherding presidential nominees through Senate confirmation, and a rulemaking process that can be overly cumbersome and time-consuming, among others.

The administration started to address the first of these challenges – resource constraints – in the Fiscal Year (FY) 2010 budget. As the detailed table in the appendix shows, many federal agencies received considerable budget increases in FY 2010 over FY 2009, the final year of the Bush administration. These resources do not necessarily reflect increased resources for rulemaking but provide an overall picture of the resources available to agencies to implement the president's priorities. Increased budgets for the U.S. Environmental Protection Agency and the Food and Drug Administration, for example, reflect the administration's emphasis on climate and energy issues and food safety, respectively.

In his FY 2011 budget proposal, Obama called for a freeze on the level of federal discretionary spending (except for defense and homeland security programs) through FY 2013. Obama's proposal is an overall cap, not a program-by-program freeze, allowing administration officials to shift funds to reflect priorities. Obama proposed increases for six of the nine budgets examined in this report (see appendix), though for three of those six agencies, the proposed budget would represent less than a two percent increase.

Congress has not yet passed a budget for FY 2011, which begins Oct. 1, 2010, and is unlikely to wholly adopt Obama's proposed freeze. However, Obama's pledge to continue to propose a top-line cap, combined with congressional sensitivity to deficit anxiety, will likely serve as a contracting force on agency rulemaking budgets in the coming years.

The Senate confirmation process has stalled certain appointments and led Obama to use his recess appointment powers to fill some positions. Overall, the appointees are government and policy experts with experience in past administrations, at the state and local levels, or bring extensive policy knowledge from academia. The sections that follow discuss in more detail specific appointees and their activities.

Centralized review of proposed and final rules at OIRA remains prominent in the rulemaking process. Obama promised on Jan. 30, 2009, that he would issue a new regulatory executive order, reforming the review process and improving the system; but the order was never issued and now appears dead. Meanwhile, OIRA continues to focus on the transactional review of agency draft regulations. OIRA has issued several memos to agencies that have provided greater discretionary authority over some rulemaking actions and increased transparency and consistency, especially to the regulatory information on Regulations.gov, the government's central depository for regulatory planning, proposed and final rules, and agency notices.

OIRA's review process constitutes another challenge. Statistically, under the Obama administration, OIRA appears to be operating similarly to the Bush administration. During Obama's first 18 months in office, OIRA has approved rules at an average rate of 42.9 days, compared to 43.7 days during Bush's first 18 months. The Obama administration has reviewed a greater volume of rules than the Bush administration: 906 during Obama's first 18 months compared to 816 under Bush's first 18 months. OIRA argues that it is

applying different analysis and approaching rules from new perspectives, and indeed, the office appears to be playing a less of an interventionist role.¹ However, the overall process remains the same.

Scientific integrity policy also remains the same inside the administration. In March 2009, Obama directed the White House Office of Science and Technology Policy (OSTP) to present him with recommendations by July 2009 for ensuring adequate independence for federal scientists and integrity of scientific information and its use.² Soon after, OSTP invited public participation in crafting the recommendations. But the White House has yet to release any recommendations or articulate new principles for scientific integrity, prompting criticism from the scientific community.³

CONCLUSIONS: WHITE HOUSE ROLE IN RULEMAKING

The Obama administration is moving in a positive direction on resources, but Obama's call to freeze discretionary domestic spending will no doubt slow the effort to restore resources to agencies. Resource constraints remain an issue at many agencies.

Obama has generally appointed well-qualified officials to lead regulatory agencies. Their energy and commitment is a welcome change from the Bush administration's strategy of placing industry insiders to run many agencies. The appointment process remains a barrier to having key officials in place; in some cases, the administration has been slow to even nominate people.

The rulemaking process continues to harry agencies, and the administration has not committed sufficient energy to reforming the rulemaking process. The decision to continue operating under the Clinton-era executive order (Executive Order 12866) on regulatory planning and review is disappointing, especially after a strong message from Obama that there was a need to change that order and a public comment process that signaled a need for change.

OIRA continues to operate in largely the same way it has for decades – focusing on the transactional review of agency draft regulations while falling short in addressing the major issues facing rulemaking agencies and in breaking down barriers to new rulemaking. OIRA appears, however, to be less interventionist in agency science and rulemaking, leaving more discretion to agencies. This is a welcome change from the political interference at all stages of the process that so characterized the Bush years.

1 The glaring exception came during the review of EPA's proposed rulemaking for coal ash, discussed on page 12.

2 Barack Obama "Memorandum for the Heads of Executive Departments and Agencies: Scientific Integrity," The White House, March 9, 2009, http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-9-09/ (accessed Sept. 17, 2010).

3 "Obama Administration a Year Behind on Scientific Integrity Plan," Union of Concerned Scientists, March 9, 2010, http://www.ucsusa.org/news/press_release/obama-administration-scientific-integrity-plan-0357.html (accessed Sept. 17, 2010).

ENVIRONMENTAL RULEMAKING

More so than on other environmental issues, President Obama and the upper echelon of his administration have been pursuing a rulemaking agenda in the area of climate change. As early as Jan. 26, 2009, just six days into his administration, Obama committed his administration to set new standards for fuel efficiency in passenger vehicles.⁴ He couched his pledge in the context of the need to stem climate change and secure America's energy independence.

Ever since, the White House has continued to publicly comment on the need to address climate change and transform America's energy future – and regulatory options are seemingly always on the table. In a major Rose Garden speech, Obama announced May 19, 2009, a compromise among the administration, the auto industry, and environmentalists on fuel efficiency and the details of new standards.⁵ In May 2010, Obama signed a memorandum directing his administration to set standards for medium- and heavy-duty trucks as a follow-up to the standards for passenger vehicles.⁶

While not as high-profile an issue as its commitment to capping greenhouse gas emissions, Obama and White House officials have included consumer product energy efficiency in their energy and climate agenda. In June 2009, Obama announced, "I've asked [Energy] Secretary [Steven] Chu to lead a new effort at the Department of Energy focusing on implementing more aggressive efficiency standards for common household appliances -- like refrigerators and ovens -- which will spark innovation, save consumers money, and reduce energy demand."⁷

Other issues have enjoyed less attention from prominent White House officials; however, the U.S. Environmental Protection Agency (EPA) has largely picked up the slack. Clean air has been a priority at EPA, which has proposed and finalized a number of high-profile rules. The agency has also seized upon growing public concern over the myriad chemicals Americans encounter on a daily basis and has indicated it may use its regulatory authority to limit human exposure to potentially toxic substances.

The agency's efforts to tackle climate change, air pollution, and chemicals management have been captained by Administrator Lisa Jackson. Jackson, a chemical engineer and former head of the New Jersey Department of Environmental Protection, was confirmed by the Senate Jan. 22, 2009. Jackson has also emphasized new values to be reflected in EPA rulemaking, including a commitment to environmental justice and the building of new partnerships with state and tribal governments.

4 Barack Obama, "Memorandum for the Secretary of Transportation [and] the Administrator of the National Highway Traffic Safety Administration: The Energy Independence and Security Act of 2007," The White House, Jan. 26, 2009, <http://www.whitehouse.gov/the-press-office/energy-independence-and-security-act-2007> (accessed Sept. 2, 2010).

5 Barack Obama, "Remarks by the President on National Fuel Efficiency Standards," The White House, May 19, 2009, http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-national-fuel-efficiency-standards/ (accessed Sept. 2, 2010).

6 Barack Obama, "Memorandum for the Secretary of Transportation, the Secretary of Energy, the Administrator of the Environmental Protection Agency, [and] the Administrator of the National Highway Traffic Safety Administration: Improving Energy Security, American Competitiveness and Job Creation, and Environmental Protection through a Transformation of our Nation's Fleet of Cars and Trucks," The White House, May 21, 2010, <http://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-fuel-efficiency-standards> (accessed Sept. 2, 2010).

7 Barack Obama, "Remarks by the President on Energy," The White House, June 29, 2009, http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Energy/ (accessed Sept. 2, 2010).

CLIMATE CHANGE

In order to begin to address climate change through regulation, Obama and the EPA faced a practical obstacle: It was not yet the position of the United States government that climate-altering greenhouse gas emissions were a problem. The U.S. Supreme Court had ruled in 2007 that greenhouse gases are eligible for regulation under the Clean Air Act if EPA finds them to be dangerous.⁸ Armed with the decision, EPA staff prepared a so-called endangerment finding for greenhouse gases, a document that would have triggered regulation of both vehicles and facilities, but President George W. Bush's White House ran out the clock, and EPA never made its finding official.

Once Obama took office, EPA, led by Jackson, moved swiftly to make the endangerment finding official. EPA proposed the finding in April 2009. Despite protests from conservatives in Congress and climate change deniers, EPA stood firm, holding up its scientific conclusions, as well as the Supreme Court decision, in defense of its action. EPA finalized the endangerment finding on Dec. 15, 2009.⁹

Meanwhile, the Obama administration moved to develop regulations on passenger vehicle and stationary source emissions. In September 2009, EPA, in partnership with the Department of Transportation's National Highway Traffic Safety Administration (NHTSA), proposed standards to limit greenhouse gas emissions from vehicles by mandating improvements in fuel economy. EPA's portion of the rule sets a limit on the amount of carbon dioxide vehicles could emit per mile, while NHTSA's part set corresponding miles-per-gallon requirements on cars built from model years 2012 through 2016. EPA then proposed limits on major industrial emitters, such as power plants and oil refineries, scheduled to take effect in 2011. The rules were finalized on May 7, 2010,¹⁰ and June 3, 2010,¹¹ respectively.

The Department of Energy has followed Obama's directions and contributed to the administration's climate change agenda by setting a series of energy standards for consumer products, including dishwashers, microwaves, ranges and ovens, and pool and water heaters. From June 2009 through April 2010, following Obama's remarks on efficiency standards, the Energy Department's Energy Efficiency and Renewable Energy Office finalized eight significant new rules, including five energy efficiency or energy conservation standards.¹²

8 "Massachusetts v. Environmental Protection Agency," 549 U.S. 497 2007, http://oyez.org/cases/2000-2009/2006/2006_05_1120 (accessed Sept. 2, 2010).

9 Lisa P. Jackson, "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule," Environmental Protection Agency, 74 FR 66496, Dec. 15, 2009, <http://edocket.access.gpo.gov/2009/pdf/E9-29537.pdf> (accessed Sept. 2, 2010).

10 Ray LaHood and Lisa P. Jackson, "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule," Environmental Protection Agency [and] Department of Transportation, National Highway Traffic Safety Administration, 75 FR 25324, May 7, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-8159.pdf> (accessed Sept. 2, 2010).

11 Lisa P. Jackson, "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule," Environmental Protection Agency, 75 FR 31513, June 3, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-11974.pdf> (accessed Sept. 2, 2010).

12 In addition to energy efficiency and conservation standards, the Energy Efficiency and Renewable Energy Office publishes other rules intended to reduce or alter energy consumption. For example, in October 2009 the office published a final rule incentivizing the production of cellulosic biofuels. See, Cathy Zoi, "Production Incentives for Cellulosic Biofuels; Reverse Auction Procedures and Standards," Department of Energy, Office of Energy Efficiency and Renewable Energy, 74 FR 52867, Oct. 15, 2009, <http://edocket.access.gpo.gov/2009/pdf/E9-24778.pdf> (accessed Sept. 8, 2010).

The uptick is remarkable. As Graph 1 shows, the energy office finalized only 12 significant new rules during Bush's entire eight-year term, only seven of which were energy efficiency or conservation standards. Under the Obama administration, on the other hand, the office finalized 10 significant rules in only 18 months.

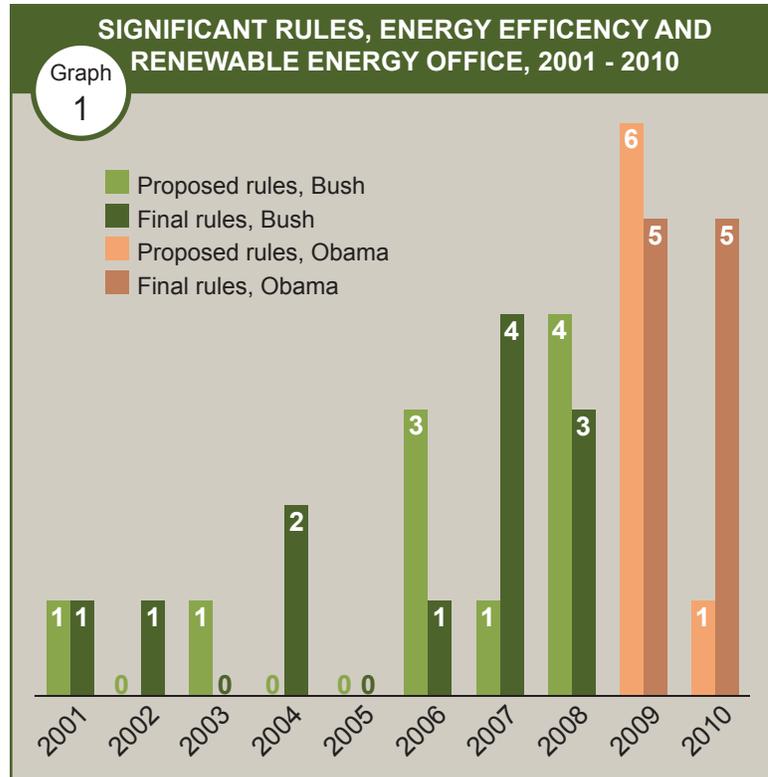
CLEAN AIR

Under the Obama administration, EPA continues to focus much of its rulemaking activity on clean air regulation. EPA's Office of Air and Radiation, the same office responsible for the greenhouse gas regulations discussed above, has significantly outpaced the Bush administration in number of rules proposed and finalized during the first 18 months of the administration. (See Graph 2.) The office has finalized or is in the process of developing several clean air rules it believes will lead to healthier communities and fewer pollution-related illnesses and deaths.

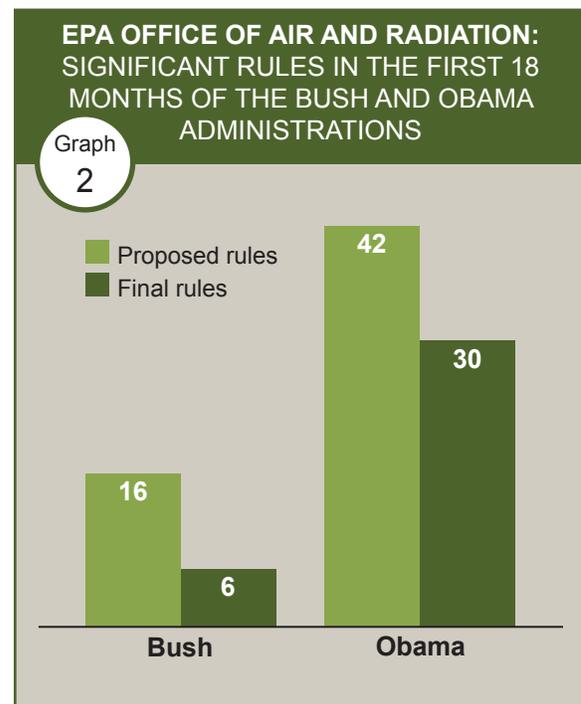
EPA pledged to revise public health standards for each of the six major air pollutants identified in the Clean Air Act. Gina McCarthy, head of the air office, said in October 2009 that the agency would review the pollutants under the act's National Ambient Air Quality Standards (NAAQS) program and determine whether changes to the standards are necessary, all by the end of 2011.¹³

The Clean Air Act requires EPA to review each standard every five years, but, as McCarthy noted at the time, EPA has historically been derelict in doing so. For example, when EPA revised the standard for ozone, also known as smog, in 2008, it marked the first update since 1997.

13 Steven D. Cook, "EPA to Complete Review of Standards For Six Major Air Pollutants by 2011," Daily Report for Executives, The Bureau of National Affairs, 205 DER A-7, Oct. 27, 2009, http://news.bna.com/drln/DRLNWB/split_display.adp?fedfid=15665017&vname=dernotallissues (accessed Sept. 2, 2010).



Graph 1 and 2: All data for both graphs are taken from RegInfo.gov and the Federal Register. In Graph 1, years run from Jan. 21 through Jan. 20, to account for presidential inauguration, and data for 2010 are through July 20, 2010.



EPA is already in the process of revising the ozone standard, likely putting the agency well ahead of the five-year schedule. In January 2010, EPA proposed strengthening the Bush-era standard of 0.075 parts per million to a lower limit somewhere between 0.060 and 0.070 parts per million.¹⁴ Clean air advocates praised the proposal, noting that the proposed range aligns with the range EPA's independent scientific advisers had first recommended in 2006. Lowering the primary standard to the highest end of the range, 0.070 ppm, could prevent hundreds of additional premature deaths and heart attacks annually and prevent tens of thousands of missed school days for children who suffer from asthma and other respiratory problems, based on EPA estimates.

EPA has already published final rules strengthening the public health standards for nitrogen dioxide and sulfur dioxide. In January 2010, EPA revised the standard for nitrogen dioxide and, for the first time, included provisions targeting short-term exposure to the pollutant.¹⁵ Clean air advocates said the short-term standard was critical to preventing asthma attacks and other acute effects, though they also criticized the level of the standard as too high. Advocates were more sanguine about the revision to the public health standard for sulfur dioxide, announced in June 2010, which also addressed short-term exposure.¹⁶ EPA says the rule will prevent 54,000 asthma attacks annually and between 2,300 and 5,900 deaths.¹⁷ Neither the sulfur dioxide standard nor the nitrogen dioxide standard had been updated since first being set in 1971.

EPA is also in the process of reviewing two other pollutant standards: carbon monoxide and particulate matter. EPA expects to propose action for the pollutants in November 2010 and December 2010, respectively.^{18,19}

Separate from the NAAQS program, EPA's air office is also tackling mercury emissions. The agency announced on Aug. 9, 2010, a final rule that will reduce mercury emissions from cement kilns by 92 percent.²⁰ EPA has also agreed under court order to replace a Bush-era rule that would have created a trading system for mercury emissions from power plants. Instead, EPA will require pollution control

14 Lisa P. Jackson, "National Ambient Air Quality Standards for Ozone; Proposed Rule," Environmental Protection Agency, 75 FR 2938, Jan. 19, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-340.pdf> (accessed Sept. 2, 2010).

15 Lisa P. Jackson, "Primary National Ambient Air Quality Standards for Nitrogen Dioxide; Final Rule," Environmental Protection Agency, 75 FR 6473, Feb. 9, 2010, <http://edocket.access.gpo.gov/2010/2010-1990.htm> (accessed Sept. 2, 2010).

16 Lisa P. Jackson, "Primary National Ambient Air Quality Standards for Sulfur Dioxide; Final Rule," Environmental Protection Agency, 75 FR 35520, June 22, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-13947.pdf> (accessed Sept. 2, 2010).

17 "EPA Sets Stronger National Air Quality Standard for Sulfur Dioxide First new SO2 standard in 40 years will improve air quality for millions," United States Environmental Protection Agency, June 3, 2010, <http://yosemite.epa.gov/opa/admpress.nsf/6424ac1caa800aab85257359003f5337/f137260029b9b4f385257737004e521b!OpenDocument> (accessed Sept. 2, 2010).

18 McCarthy included the standard for lead, the sixth NAAQS pollutant, which was actually revised in November 2008 during the Bush administration, in her promise saying, "I will tell you that from '08 to 2011, our agency will complete the review of all six standards." EPA did modify the Bush standard by increasing the number of air pollution monitors that will be required to be placed around the country.

19 Throughout this report, references to agency schedules or expectations for publishing rules are based on the most recent edition of the Unified Agenda of Federal Regulatory and Deregulatory Actions, published April 26, 2010. Agencies publish the Unified Agenda semi-annually to catalogue rules the agency is developing and project milestone dates. The agenda is available exclusively online at <http://www.reginfo.gov/public/do/eAgendaMain>.

20 "EPA Sets First National Limits to Reduce Mercury and Other Toxic Emissions from Cement Plants," United States Environmental Protection Agency, Aug. 9, 2010, <http://yosemite.epa.gov/opa/admpress.nsf/e77fdd4f5afd88a3852576b3005a604f/ef62ba1cb3c8079b8525777a005af9a5!OpenDocument> (accessed Sept. 2, 2010).

technologies that will lead to more significant emissions reductions. Mercury emissions can impair brain development, especially in fetuses, among other health problems, including premature mortality. Humans are primarily exposed to mercury when emissions settle in waters, are consumed by fish, and subsequently move up the food chain. EPA estimates that the cement kiln rule alone will prevent between 960 and 2,500 deaths annually.

CLEAN WATER

EPA's Office of Water has been far quieter than the air office on the rulemaking front. Through July 2010, the water office under Obama proposed only three significant rules and finalized two others.

EPA's most significant clean water rulemaking thus far set standards for runoff from construction sites. Operators at construction sites 10 acres or larger will be required to monitor runoff and ensure it meets certain water quality standards.²¹ The rule, proposed near the end of the Bush administration and finalized under a court deadline, will "reduce the amount of sediment discharged from construction sites by about 4 billion pounds each year," EPA said.²² The rule took effect Feb. 1, 2010, and will be phased in over four years.

The rule drew praise from environmentalists but roiled the construction industry. Builders' groups opposed the rule and sued EPA, saying the agency had used flawed data in setting the limits in the rule. EPA has since said that the builders' groups may be correct in some of their objections. EPA asked a federal court on Aug. 13 to send portions of the rule back to the agency where it would either revise limits or add new evidentiary support.²³

The water office is in the process of revising one of its major health standards for drinking water contamination. On July 14, 2010, EPA proposed revisions to its Total Coliform Rule for the first time since 1989.²⁴ The standard is meant to protect drinking water from microbial contamination, particularly fecal coliforms. EPA's proposal targets an especially dangerous contaminant, *E. coli*, and would set a limit of zero for *E. coli*, requiring public water systems to eliminate it. EPA does not plan to finalize the new standard until 2012.

EPA announced in August 2009 that it will reevaluate its position on the safety of perchlorate, a component of rocket fuel that has been linked to thyroid disease and other health problems. Environmentalists have lobbied the agency for years to make a regulatory determination on the chemical. In October 2008, EPA determined that standards for perchlorate were unnecessary.²⁵ However, Jackson

21 Lisa P. Jackson, "Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category; Final Rule," Environmental Protection Agency, 74 FR 62995, Dec. 1, 2009, <http://edocket.access.gpo.gov/2009/pdf/E9-28446.pdf> (accessed Sept. 2, 2010).

22 "Fact Sheet: Final Rule: Effluent Guidelines for Discharges from the Construction and Development Industry," United States Environmental Protection Agency, Nov. 1, 2009, http://www.epa.gov/waterscience/guide/construction/files/c_and_d_final_rule_factsheet.pdf (accessed Sept. 2, 2010).

23 "EPA's Unopposed Motion for Partial Vacature of the Final Rule, Remand of the Record, to Vacate Briefing Schedule, and to Hold Case in Abeyance," Aug. 12, 2010, filed Aug. 13, 2010, in the case *Wisconsin Builders Association v. EPA*, case No. 09-4113 (7th Cir.), [http://op.bna.com/env.nsf/id/jsun-88dmc9/\\$File/EPA%27s%20ELG%20Motion.pdf](http://op.bna.com/env.nsf/id/jsun-88dmc9/$File/EPA%27s%20ELG%20Motion.pdf) (accessed Sept. 3, 2010).

24 Lisa P. Jackson, "National Primary Drinking Water Regulations: Revisions to the Total Coliform Rule; Proposed Rule," Environmental Protection Agency, 75 FR 40926, July 14, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-15205.pdf> (accessed Sept. 2, 2010).

25 Stephen L. Johnson, "Drinking Water: Preliminary Regulatory Determination on Perchlorate," Environmental Protection Agency, 73 FR 60262, Oct. 10, 2008, <http://edocket.access.gpo.gov/2008/pdf/E8-24042.pdf> (accessed Sept. 2, 2010).

thought the chemical warranted additional scrutiny, citing the need to consider perchlorate's effects on children, and published a notice seeking additional comment on perchlorate and on the 2008 determination.²⁶ EPA has not taken action since or indicated the status of its process for reevaluating the chemical.

Addressing pollution from factory farms has been an underserved part of the EPA's clean water agenda. Large feedlots, or concentrated animal feeding operations (CAFOs), are significant sources of water pollution, and regulation of CAFOs has long been a priority for environmental and public health advocates. EPA has not revised a rule set in November 2008, under the Bush administration, that essentially allows factory farms to self-regulate under the Clean Water Act.²⁷ Instead, the agency says it will more strictly enforce existing rules. EPA did agree in May 2010, in response to a lawsuit from environmentalists, to propose by May 2011 a rule requiring CAFOs to report more information about the way they handle livestock manure.²⁸

A proposed rule to regulate coal ash, a byproduct of coal combustion that can contain lead, arsenic, and other toxics, holds the potential to improve water quality and protect the health of communities situated near coal ash landfills and impoundments. EPA's Office of Solid Waste proposed a rule on June 21, 2010, that would regulate coal ash as a hazardous waste, thereby requiring special handling, transportation, disposal, and any potential reuse.²⁹

But the agency proposed another regulatory option alongside the hazardous waste designation – to regulate coal ash as a solid waste, imposing requirements typically only used to control less toxic wastes such as household garbage. The solid waste option was added as a co-proposal during the review conducted by the White House Office of Information and Regulatory Affairs (OIRA). OIRA's review lasted 200 days, in excess of its own 120-day limit, and featured dozens of meetings with outside stakeholders, most of whom represented industries opposed to coal ash regulation. Environmentalists and public health advocates faulted the administration for adding the second option and pilloried the White House for its apparent interference.³⁰ The proposals are open for public comment until Nov. 19, 2010.

TOXIC CHEMICALS

Jackson announced on Sept. 29, 2009, that the EPA was overhauling its chemicals management program with the goal of protecting the public.³¹ Jackson cited the need for additional data, some provided by industry, and the need to prioritize risk management.

26 Peter S. Silva, "Drinking Water: Perchlorate Supplemental Request for Comments," Environmental Protection Agency, 74 FR 41883, Aug. 19, 2009, <http://edocket.access.gpo.gov/2009/pdf/E9-19507.pdf> (accessed Sept. 2, 2010).

27 Stephen L. Johnson, "Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision; Final Rule," Environmental Protection Agency, 73 FR 70417, Nov. 20, 2008, <http://edocket.access.gpo.gov/2008/pdf/E8-26620.pdf> (accessed Sept. 2, 2010).

28 "EPA, Environmental Groups Reach Settlement on Factory Farm Pollution Lawsuit," Natural Resources Defense Council, May 26, 2010, <http://www.nrdc.org/media/2010/100526.asp> (accessed Sept. 2, 2010).

29 Lisa P. Jackson, "Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals From Electric Utilities; Proposed Rule," Environmental Protection Agency, 75 FR 35128, June 21, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-12286.pdf> (accessed Sept. 2, 2010).

30 For more information, see "Commentary: White House Misadventures in Coal Ash Rule," OMB Watch, May 18, 2010, <http://ombwatch.org/node/11001> (accessed Sept. 2, 2010).

31 Lisa P. Jackson, "Administrator Lisa P. Jackson, Remarks to the Commonwealth Club of San Francisco, As Prepared," United States Environmental Protection Agency, Sept. 29, 2009, <http://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/fc4e2a8c05343b3285257640007081c5!OpenDocument> (accessed Sept. 2, 2010).

The shift in strategy runs concurrent with the agency's push for legislative reform to the Toxic Substances Control Act (TSCA), the long-standing but flawed statute that spells out EPA's authorities and responsibilities over chemicals. Jackson also laid out the agency's principals for TSCA reform and asked for greater regulatory authority and a dedicated funding stream for TSCA-related activities.

On Dec. 30, 2009, EPA posted its first round of chemical action plans covering four classes of chemicals, including phthalates and certain flame retardants called polybrominated diphenyl ethers, or PBDEs. Studies have associated the chemicals with health risks and/or environmental problems. The plans review scientific information on chemical exposure and potential hazards and outline steps the agency may take to control chemicals or limit risks. Steps may include imposing labeling requirements, restricting chemical use, or banning the chemical entirely, EPA says.³²

EPA has said it will post additional plans at four-month intervals. Accordingly, EPA posted an action plan for bisphenol-A (BPA), a chemical found in hard plastics and the lining of food containers that has been linked to health problems, including heart disease and developmental disorders, on March 29, 2010. The agency posted three more plans on Aug. 18, 2010, for benzidine dyes, another type of flame retardant, and a class of surfactants used in a variety of consumer products, including detergents.³³

EPA also announced Sept. 29, 2009, that it would strengthen oversight of nanomaterials – matter engineered to be thousands of times smaller than the width of a human hair and used in an increasing number of consumer products and processes.³⁴ Studies have linked nanomaterials to environmental and health problems, but much remains unknown about their effects. EPA is developing rules that would require greater reporting and testing of nanomaterials and their effects.

EPA's most significant venture into chemicals management regulation came Aug. 3, 2010, when it proposed changes to the way manufacturers report information about the chemicals they produce.³⁵ EPA's Inventory Update Reporting rule would require manufacturers to provide more information, including production and use data, and to provide the information more frequently (every four years, from every five years). The rule is also expected to increase the number of chemicals listed in EPA's TSCA inventory. The agency is also attempting to limit confidential business information claims filed by manufacturers attempting to skirt reporting requirements. The changes, if finalized, are expected to provide regulators and the public with richer information about thousands of chemicals in commerce.

EPA has indicated that it may soon propose regulations for BPA. In its March 2010 action plan, EPA says it will look to add BPA to its "chemicals of concern" list, look more closely at BPA's presence in the environment, and require manufacturers to submit information on health impacts. EPA said it plans to

32 For information about and links to EPA's chemical action plans, see "Existing Chemicals Action Plans," United States Environmental Protection Agency, Aug. 18, 2010, <http://www.epa.gov/oppt/existingchemicals/pubs/ecactionpln.html> (accessed Sept. 2, 2010).

33 Ibid.

34 "EPA Announces Research Strategy to Study Nanomaterials," United States Environmental Protection Agency, Sept. 29, 2009, <http://yosemite.epa.gov/opa/admpress.nsf/d985312f6895893b852574ac005f1e40/3058183a44280171852576400076bc35> (accessed Sept. 2, 2010).

35 Stephen A. Owens, "TSCA Inventory Update Reporting Modifications; Proposed Rule," Environmental Protection Agency, 75 FR 49656, Aug. 13, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-19830.pdf> (accessed Sept. 2, 2010).

propose adding BPA to the list in the fall of 2010. The agency also plans to add phthalates and PBDEs. EPA has never used its authority under TSCA to add a substance to the chemicals of concern list.³⁶

EPA has also taken steps to improve public access to information on toxics. In April 2010, the agency proposed adding 16 chemicals to its Toxics Release Inventory (TRI), including four considered persistent and bioaccumulative toxins – a category of chemicals that pose a high risk to human health and the environment.³⁷ EPA used the National Toxicology Program's Report on Carcinogens to inform the selection of the chemicals. Under TRI, facilities must report to the EPA information on the type and volume of chemicals they release or transport. EPA has not added new chemicals to the TRI list since 1999.

ENDANGERED SPECIES

Shortly after taking office, Obama signed a memo lauded by species-protection advocates. The March 3, 2009, memo rendered moot a controversial Bush administration rule that had allowed federal land-use managers to approve projects like infrastructure creation, minerals extraction, or logging without consulting federal habitat managers and biological health experts responsible for species protection.³⁸ Obama directed employees in his administration to exercise their discretion to continue to seek consultation. The Bush-era rule was later officially removed from the books by the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service, the original rulemaking agencies.³⁹

But just days after Obama's memo, Interior announced its intention to proceed with the Bush administration's plan to remove the gray wolf from the endangered species list.⁴⁰ Environmentalists criticized the rule and sued the agency, saying the species had yet to recover. A federal court sided with environmentalists and reinstated protections for the wolves on Aug. 5, 2010.⁴¹

Since then, FWS's record on species protection has been thin, listing few species as threatened or endangered under the Endangered Species Act. After being confirmed by the Senate in July 2009, FWS's Director, Sam Hamilton, passed away in February 2010. President Obama has yet to nominate a replacement. The turmoil likely impacted the agency's agenda.

36 Other regulatory agencies have been reluctant to address rising concern over BPA. In January 2010, the Food and Drug Administration (FDA) revised its position on the safety of BPA, acknowledging that it has "some concern" about the chemical. However, FDA appears unwilling to take regulatory steps to limit consumer exposure.

37 Lisa P. Jackson, "Addition of National Toxicology Program Carcinogens; Community Right-to-Know Toxic Chemical Release Reporting; Proposed Rule," Environmental Protection Agency, 75 FR 17333, April 6, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-7756.pdf> (accessed Sept. 17, 2010).

38 Barack Obama, "Memorandum for the Heads of Executive Departments and Agencies: The Endangered Species Act," The White House, March 3, 2009, <http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies> (accessed Sept. 2, 2010).

39 Ken Salazar and Gary Locke, "Interagency Cooperation Under the Endangered Species Act; Final rule," Department of the Interior, Fish and Wildlife Service [and] Department of Commerce, National Oceanic and Atmospheric Administration, 74 FR 20421, May 4, 2009, <http://edocket.access.gpo.gov/2009/pdf/E9-10203.pdf> (accessed Sept. 2, 2010).

40 "Secretary Salazar Affirms Decision to Delist Gray Wolves in Western Great Lakes, Portion of Northern Rockies," U.S. Fish & Wildlife Service, March 6, 2009, <http://www.fws.gov/news/NewsReleases/showNews.cfm?newsId=AB852132-9A86-32C3-145193B113FC89F6> (accessed Sept. 2, 2010).

41 "Federal Court Reinstates Federal Wolf Protections," Earthjustice, Aug. 6, 2010, <http://www.earthjustice.org/news/press/2010/federal-court-reinstates-federal-wolf-protections> (accessed Sept. 2, 2010).

LAND MANAGEMENT

The Obama administration has addressed two long-running land management issues of concern to environmentalists: mountaintop mining and forest conservation.

The Obama administration has approached the issue of mountaintop mining tentatively. Early in the administration, EPA began more thoroughly reviewing mountaintop mining permits, but the agency then allowed many of those permits to go through, angering environmentalists.⁴² Ending mountaintop mining, a practice by which mining operations blast the tops off of mountains and often deposit the debris in nearby valleys and streams, has long been a priority for environmental advocates.

On April 1, 2010, EPA announced new guidance that should limit mountaintop mining.⁴³ The new guidance requires greater scrutiny in evaluating Clean Water Act permits for operations seeking to dump mining debris in valleys. Although EPA does not claim to be issuing a ban on all valley fills, Jackson says the standard is strict enough that few, if any, valley fill permits will be issued.

The Obama administration has sent mixed signals on overturning a controversial Bush administration rule that lifted the ban on dumping mountaintop mining debris in rivers and streams. The rule was finalized late in the Bush administration and was flagged by many as a priority for reversal early in the Obama administration. But the administration did not announce its intentions until March 2010. The Interior Department, which wrote the rule under the Bush administration, agreed in a settlement to propose a new rule by February 2011 and finalize the rule by June 2012.⁴⁴ EPA's April 2010 guidance should limit the impact of the existing rule while the Interior Department reconsiders.

The Obama administration has taken steps to secure the viability of the Roadless Area Conservation Rule, which protects approximately 58 million acres of pristine forest land from new roads, logging, and development. In May 2009, amid conflicting court rulings, Agriculture Secretary Tom Vilsack announced that he would review any logging proposals to "ensure that USDA can carefully consider activities in ... roadless areas while long term roadless policy is developed."⁴⁵ Vilsack reserved, and has exercised, the right to approve projects in protected areas.

The roadless rule, which dates back to the Clinton administration, has been the subject of constant court battles since it went into effect. In August 2009, the Obama administration appealed a federal district court ruling that struck down the rule.⁴⁶ The appeal is still pending.

42 Tom Hamburger and Peter Wilson, "Obama walks a fine line over mining," *Los Angeles Times*, May 31, 2009, <http://articles.latimes.com/2009/may/31/nation/na-mountaintop-mining31>, (accessed Sept. 2, 2010).

43 Peter S. Silva and Cynthia Giles, "Memorandum: Guidance Summary: Improving EPA Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order," United States Environmental Protection Agency, April 1, 2010, http://www.epa.gov/owow/wetlands/guidance/pdf/appalachian_mtntop_mining_summary.pdf (accessed Sept. 2, 2010).

44 "Earthjustice Will Put Stream Buffer Zone Litigation on Hold," *Earthjustice*, March 22, 2010, <http://www.earthjustice.org/news/press/2010/earthjustice-will-put-stream-buffer-zone-litigation-on-hold> (accessed Sept. 2, 2010).

45 "Agriculture Secretary Vilsack Announces Interim Directive Covering Roadless Areas in National Forests," United States Department of Agriculture, May 28, 2009, available at <http://usda.gov/wps/portal/usda/usdahome>.

46 "Obama Administration Joins Roadless Rule Battle," *OMB Watch*, Aug. 18, 2009, <http://ombwatch.org/node/10314> (accessed Sept. 2, 2010).

CONCLUSIONS: ENVIRONMENTAL RULEMAKING

The Obama administration's environmental agenda has thus far been driven primarily by climate and energy issues. Rulemaking has been an essential element of the administration's strategy to reduce climate-altering emissions, to transform the energy efficiency and green technology sectors, and to begin to limit consumer demand for energy-intensive products and fossil fuel consumption. Agencies have finalized rules and set standards in a variety of areas that together clearly signal a broad and concerted effort to fight climate change through regulation.

A commitment to rulemaking at the EPA's clean air office has produced historic standards for greenhouse gas emissions and has also led to aggressive limits on other forms of air pollution. EPA expects that its clean air agenda will slash emissions of dangerous pollutants and generate significant public health benefits in the coming years.

EPA's new strategy for managing hazardous chemicals and other substances of concern represents a shift towards a deliberative, science-based approach to evaluating chemical safety. In most cases, though there have been indications that the agency will exercise seldom-used regulatory authority, EPA is not expected to decide on regulatory controls in the near future.

Unfortunately, the agency has done little to set new clean water standards aimed at protecting public health from chemicals like perchlorate, taking relatively minor steps, nor has it aggressively pursued regulation of factory farms. EPA's pending regulation for coal ash could evolve into a major public health accomplishment, but the political controversy surrounding the rulemaking thus far remains a cause for concern.

Nonetheless, the shift in chemicals strategy, as well as the EPA's record on climate and clean air regulation, is a testimony to Administrator Lisa Jackson. The rulemaking record crafted by Jackson and her deputies reveals a commitment to following the law and using regulation as a means to preserve the environment and protect public health. Though it is too soon to determine how far the agency has gone, EPA has begun to reflect environmental justice principles in its rules and other actions. Under Jackson, EPA appears to be recommitted to its mission.

The Obama administration actively sought to overturn many Bush administration environmental policies, particularly in the areas of climate change and clean air. EPA initiated action, sought more stringent standards, and restored science as a key component in its decision making. On other issues like coal ash, clean water, and species protection, the administration has been more tentative and seems to have made less progress in changing the ways agencies approach their rulemaking responsibilities. The administration may face an even tougher road if a new Congress seeks to slow rulemaking in important public health and environmental areas like climate change and air quality.

WORKER HEALTH, SAFETY, AND RIGHTS RULEMAKING

At the White House, worker protection issues have been placed in the portfolio of the Middle Class Task Force, led by Vice President Joe Biden. “Restoring labor standards, including workplace safety,” is one of the task force’s five goals.⁴⁷ When the Middle Class Task Force was formed on Jan. 30, 2009, Biden pledged to hold a town hall-style meeting to discuss workplace safety. However, that promise has yet to come to fruition.⁴⁸

President Obama’s most significant accomplishment in the worker health and safety arena may prove to be the selection of qualified candidates for top positions at the Department of Labor. Obama selected former U.S. Representative Hilda Solis to lead the agency. Solis had a solid record of supporting workers’ rights and even garnered support from environmental organizations for her leadership on green jobs legislation.

Obama tapped David Michaels, an epidemiologist at George Washington University, to head the Occupational Safety and Health Administration (OSHA). After a prior stint in government at the Department of Energy, Michaels had become a vocal occupational safety and health advocate and authored a book titled *Doubt Is Their Product*, which catalogued instances in which industry cited scientific uncertainty, often speciously, to stave off regulation.

Obama nominated Joe Main, a mine safety and health expert who had worked for the United Mine Workers of America, to lead the Mine Safety and Health Administration (MSHA). Both Michaels and Main have indicated a willingness to move aggressively to set standards protective of worker health and safety, though progress thus far has been limited.

However, securing that leadership proved to be a major challenge. While Solis was nominated and confirmed early, Obama did not announce nominees for other critical posts for months. Main and Michaels were nominated on July 6, 2009, and Aug. 3, 2009, respectively. The Senate confirmed Main in October 2009, but did not confirm Michaels until Dec. 3, 2009. At the Wage and Hour Division, the regulatory agency responsible for ensuring worker rights like overtime pay and for preventing child labor and other abuses, Obama’s original nominee, Lorelei Boylan, withdrew in October 2009, and the president has yet to announce a second nominee. The difficulties have likely contributed to a stunting of rulemaking activity at those agencies.

When Department of Labor leaders did assume office, their attention was quickly diverted by external events. OSHA has been a part of the administration’s all-hands-on-deck response to the oil spill in the Gulf of Mexico. At MSHA, the April 2010 explosion at the Upper Big Branch mine in West Virginia has thrust the agency back in the national spotlight, compelling MSHA to once again answer the question, How can this be prevented from ever happening again? Meanwhile, at the White House, the Middle Class Task Force has shifted nearly all of its focus towards reviving the sluggish job market.

47 “About the Middle Class Task Force,” The White House, <http://www.whitehouse.gov/strongmiddleclass/about> (accessed Sept. 2, 2010).

48 Joe Biden, “Remarks by the President and the Vice President in Announcement of Labor Executive Orders and Middle Class Working Families Task Force,” The White House, Jan. 30, 2009, <http://www.whitehouse.gov/blog/2009/01/30/a-strong-middle-class-equals-a-strong-america> (accessed Sept. 2, 2010).

OCCUPATIONAL SAFETY AND HEALTH

OSHA transitioned from the Bush administration to the Obama administration burdened with a rulemaking agenda that had grown long and cumbersome. Health standards for crystalline silica and beryllium have been in the queue since the late 1990s. Standards meant to prevent slips, trips, and falls and to protect construction workers operating in confined spaces have languished as well. Meanwhile, new hazards continue to warrant attention, including diacetyl – a chemical used to give popcorn and other food items a buttery flavor – which has been linked to the lung disease *bronchiolitis obliterans* in workers exposed to it.

For the most part, OSHA's rulemaking agenda has remained untouched. Of the rules just mentioned, OSHA has made progress only on the slips, trips, and falls rule, proposing new safety standards in May 2010.⁴⁹

OSHA did score a major victory in July 2010 when it announced a new safety standard for crane and derrick workers.⁵⁰ Among other things, the rule provides for additional safety measures designed to prevent falls and electrocution, two leading causes of death and injury, and set up more advanced training and certification requirements. The final rule is the culmination of almost a decade of work: OSHA first announced its intention to write new crane and derrick standards in 2002. OSHA estimates the new standards will save 22 lives and prevent 175 injuries every year.

One of Michaels' first tasks as assistant secretary was to create a new reporting column for musculoskeletal disorders on the injury forms employers are required to file with OSHA – a seemingly minor but important step in the process of establishing ergonomic protections for workers. On Jan. 29, 2010, OSHA proposed the reporting column, which would require employers to place a check mark next to a musculoskeletal injury, such as carpal tunnel syndrome.⁵¹ OSHA says the addition of the column would improve statistics and understanding of musculoskeletal risks in the workplace. However, OSHA has not indicated whether it will pursue actual standards to protect workers from ergonomic hazards.

OSHA is driving the Labor Department's Plan, Prevent, Protect initiative, detailed by the department in April 2010.⁵² As part of the initiative, OSHA has pledged to start an injury and illness prevention program, which would require employers to maintain and follow safety plans that incorporate best practices and aim to protect workers from any hazard they may face on the job. The program, which will be established by regulation, has yet to be proposed.

Michaels reiterated his agency's commitment to the Plan, Prevent, Protect initiative and pledged other rules and reforms in a July 19, 2010, letter to OSHA staff.⁵³ Acknowledging that, "[OSHA's] standard-

49 David Michaels, "Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems); Proposed Rule," Department of Labor, Occupational Safety and Health Administration, 75 FR 28861, Ma 24, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-10418.pdf> (accessed Sept. 2, 2010).

50 David Michaels, "Cranes and Derricks in Construction; Final Rule," Department of Labor, Occupational Safety and Health Administration, 75 FR 47905, Aug. 9, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-17818.pdf> (accessed Sept. 2, 2010).

51 David Michaels, "Occupational Injury and Illness Recording and Reporting Requirements," Department of Labor, Occupational Safety and Health Administration, 75 FR 4728, Jan. 29, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-2010.pdf> (accessed Sept. 2, 2010).

52 "Labor Rules: The U.S. Department of Labor Spring 2010 Regulatory Agenda," Center for American Progress, April 29, 2010, <http://www.americanprogress.org/events/2010/04/UnifiedAgenda.html> (accessed Sept. 2, 2010).

53 David Michaels, "OSHA at Forty: New Challenges and New Directions," U.S. Department of Labor, July 19, 2010, http://scienceblogs.com/thepumphandle/OSHA_at_Forty.pdf (accessed Sept. 2, 2010).

setting process is slow and resource-intensive,” Michaels has dispatched an internal task force to explore alternatives to OSHA’s current process, the letter says. Michaels also vowed to expand the role of science in agency standard-setting. He wrote, “OSHA will identify ways to address new and emerging hazards quickly, serving as a conduit of information from the scientific community to workers and employers.”

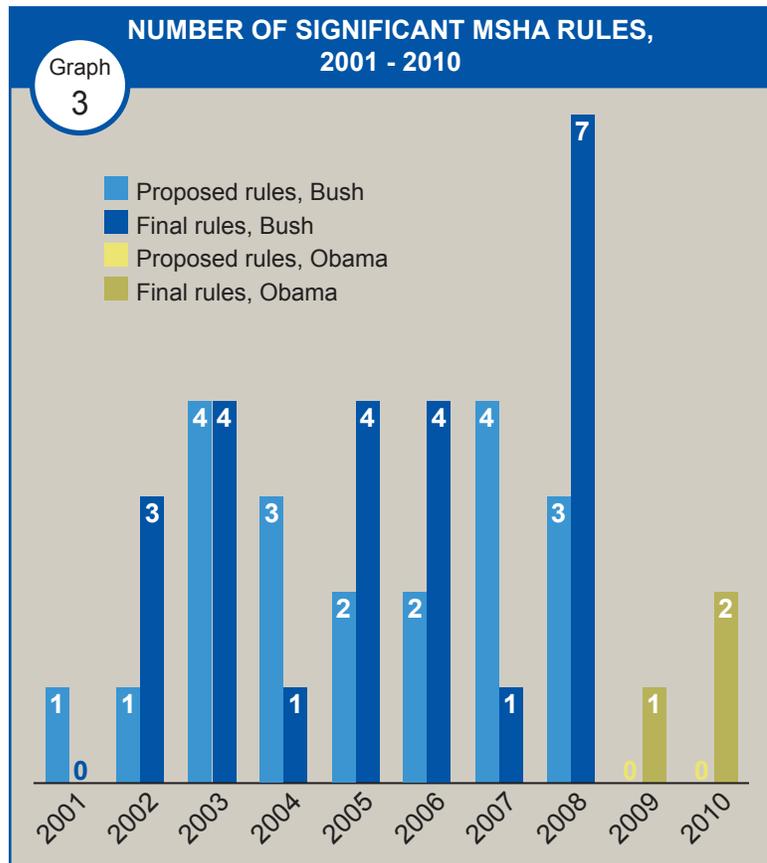
Finding resources for OSHA’s rulemaking division has long been a challenge, but the Obama administration appears to be moving in a positive direction. Funding for rulemaking remained steady for most of the 2000s, at \$16-\$17 million, and staffing levels followed suit at around 83 employees. But the Department of Labor’s FY 2010 budget requested, and Congress granted, an increase of more than \$2 million for rulemaking activities.⁵⁴ OSHA estimates the increase will help hire 20 additional staff members. The FY 2011 budget request included another suggested increase for rulemaking, this time calling for an additional \$4 million.⁵⁵ The FY 2011 budget does not project additional staff, but absorbing and training staff from the FY 2010 increase will take time, and could limit OSHA’s rulemaking ability in the short-term.

MINE SAFETY AND HEALTH

MSHA was still in the process of implementing new rules written under the MINER Act, a mine safety reform law passed in the wake of 2007’s spate of mining tragedies, when an explosion at the Upper Big Branch mine in West Virginia killed 29 miners.

Under Obama, MSHA has proposed no new significant regulations. It has finalized three significant regulations, all started during the Bush administration. (See Graph 3.)

The first rule, regarding mine rescue teams, revised older parts of a 2008 rule found by a federal court to violate the MINER Act.⁵⁶ The June 2009 rule requires members of mine rescue teams to attend trainings



Graph 3: Years run from Jan. 21 through Jan. 20, to account for presidential inauguration. Data for 2010 is through July 20, 2010. All data taken from RegInfo.gov and the Federal Register.

54 “FY 2010, Congressional Budget Justification, Occupational Safety and Health Administration,” U.S. Department of Labor, 2009, <http://www.dol.gov/dol/budget/2010/PDF/CBJ-2010-V2-08.pdf> (accessed Sept. 3, 2010).

55 “FY 2011, Congressional Budget Justification, Occupational Safety and Health Administration,” U.S. Department of Labor, 2010, <http://www.dol.gov/dol/budget/2011/PDF/CBJ-2011-V2-11.pdf> (accessed Sept. 3, 2010).

56 Michael A. Davis, “Mine Rescue Teams,” Department of Labor, Mine Safety and Health Administration, 74 FR 28606, June 17, 2009, <http://edocket.access.gpo.gov/2009/pdf/E9-14128.pdf> (accessed Sept. 2, 2010).

more frequently. The second rule, finalized on April 6, 2010, sets new standards for coal dust monitors used by miners.⁵⁷ The third rule, also completed April 6, 2010, sets new standards for high-voltage mining machines to better safeguard against fires, explosions, and shocks.⁵⁸

MSHA is planning a rule to address a major procedural flaw that drew attention in the wake of the Upper Big Branch explosion. MSHA's Pattern-of-Violations (POV) program flags scofflaw mining operations and allows MSHA to increase its regulatory scrutiny. However, companies, including Massey Energy, the owner of the Upper Big Branch mine, have kept themselves off the POV list by appealing health and safety violations, keeping their POV status in regulatory limbo while tying up the system.⁵⁹ MSHA says that a new proposed rule that is planned for January 2011, will "[improve] consistency in the application of the pattern of violations notice, and requiring implementation of safety and health management program."⁶⁰ It is unclear whether the rule will grant MSHA more authority to place mines on the list because the proposal has yet to be published.

While mine explosions and collapses make headlines as the most spectacular threat to coal miners, chronic health hazards deep below the earth's surface continue to jeopardize the nation's coal mining workforce. Chief among these hazards is black lung disease. Although long recognized as a serious but preventable risk, incidents of black lung are on the rise, according to the National Institute for Occupational Safety and Health.⁶¹

To address black lung, Main announced Dec. 3, 2009, the End Black Lung – Act Now! initiative. The goals of the initiative include "regulatory improvements to reduce miners' exposure to respirable coal mine dust." MSHA says it will develop rules to allow for more accurate measurement of coal dust concentrations and may lower the permissible exposure limit for coal dust – the critical standard for reducing incidences of black lung.⁶² However, those rules are in the earliest stages of development.

WORKER RIGHTS

The Wage and Hour Division, the federal agency that writes and enforces fair labor standards, is still without a Senate-confirmed leader and has not figured prominently into the Department of Labor's worker protection activities. The agency has finalized only one significant rule, an update of federal child labor

57 Joseph A. Main, "Coal Mine Dust Sampling Devices; High-Voltage Continuous Mining Machine Standard for Underground Coal Mines; Final Rules," Department of Labor, Mine Safety and Health Administration, 75 FR 17511, April 6, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-7308.pdf> (accessed Sept. 2, 2010).

58 Joseph A. Main, "High-Voltage Continuous Mining Machine Standard for Underground Coal Mines," Department of Labor, Mine Safety and Health Administration, 75 FR 17529, April 6, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-7309.pdf> (accessed Sept. 2, 2010).

59 "What's Next for Coal Mine Safety?," OMB Watch, April 20, 2010, <http://ombwatch.org/node/10936> (accessed Sept. 2, 2010).

60 See the Department of Labor's entry, "Pattern of Violations," RIN: 1219-AB73, in, "Spring 2010 Unified Agenda of Federal Regulatory and Deregulatory Actions," General Services Administration, Regulatory Information Service Center and Executive Office of the President, Office of Management and Budget, Office of Information and Regulatory Affairs, April 26, 2010, available exclusively online at <http://www.reginfo.gov/public/do/eAgendaMain>, hereinafter "Spring 2010 Unified Agenda" (accessed Sept. 9, 2010).

61 "MSHA launches comprehensive action plan to tackle black lung," U.S. Department of Labor, Mine Safety and Health Administration, Dec. 3, 2009, <http://www.msha.gov/MEDIA/PRESS/2009/NR091203.asp> (accessed Sept. 2, 2010).

62 See the Department of Labor's entry, "Lowering Miners' Exposure to Coal Mine Dust Including Continuous Personal Dust Monitors," RIN: 1219-AB64, in, "Spring 2010 Unified Agenda" (accessed Sept. 9, 2010).

standards.⁶³ The rule prohibits children from working in certain high-risk workplaces and from operating certain dangerous machinery.

CONCLUSIONS: WORKER HEALTH, SAFETY, AND RIGHTS RULEMAKING

At the Department of Labor, efforts to jumpstart a rulemaking engine neglected during the Bush administration have been complicated by an inability to appoint agency heads in the early months of the administration, resource constraints, and unanticipated external events, including the West Virginia mine explosion and the BP oil spill.

Although early signs indicated that it would oversee a rulemaking revival carried out in the best interest of workers, the White House has grown quieter. Partly as a result, the administration's progress toward restoring protections for workers has been muted. Regulatory victories have occurred amid long periods of inaction, and while the administration's agenda and goals hold promise, the pace of development is cause for concern.

As discussed above, OSHA operated without a Senate-confirmed leader until December 2009, possibly slowing its agenda. With limited rulemaking activity thus far, much of the activity on which OSHA will be judged lies ahead. While the future may bring much success for OSHA and the workers it is charged with protecting, the agency's rulemaking record thus far has been underwhelming. During the Obama administration, OSHA has yet to surmount the challenges posed by the rulemaking process.

At MSHA, 18 months into the Obama administration, the agency has accomplished little in the way of new, proactive regulation. While the three regulations the agency has finalized will create safer working conditions for miners, the Obama administration has yet to place a stamp on mine safety rulemaking.

Any actions MSHA may have planned have now likely been set aside while the agency focuses on the Upper Big Branch mine explosion. MSHA's response to the Upper Big Branch tragedy has been dominated by its investigation of the explosion, still ongoing. The agency has yet to detail a regulatory plan designed to prevent future tragedies. Congress is considering legislation that would strengthen MSHA's hand in dealing with repeat violators like Massey. With the next round of reforms looming, MSHA finds that its resource commitments and agenda are being driven by tragedy and circumstance.

During the Bush years, the Department of Labor had limited resources and operated with an anti-regulatory philosophy. As a result, it is difficult to determine whether the department's tepid progress on worker protection issues is only a result of past neglect. Is the department renewing itself and setting the table for an aggressive agenda, or are the deficiencies of old so ingrained that even energetic new leadership cannot quickly overcome them? The infusion of resources can serve as a stimulant, but agencies like OSHA must absorb and train new staff, which could take years.

63 Nancy J. Leepink, "Child Labor Regulations, Orders and Statements of Interpretation; Final Rule," Department of Labor, Wage and Hour Division, 75 FR 28403, May 20, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-11434.pdf> (accessed Sept. 2, 2010).

CONSUMER HEALTH AND SAFETY RULEMAKING

President Obama's most visible foray into consumer health and safety came March 14, 2009, when he announced the formation of a Food Safety Working Group, an inter-governmental task force assigned with crafting recommendations to improve food safety.⁶⁴ Obama said, "Protecting the safety of our food and drugs is one of the most fundamental responsibilities of government," and pledged to update food safety regulation.

When announcing the working group, Obama also unveiled his picks for the two top positions at the Food and Drug Administration (FDA). Obama nominated Margaret Hamburg as commissioner. Hamburg had built a successful public health record in her professional career, including prior government service as the Commissioner of Health for the City of New York. Obama tapped Joshua Sharfstein to serve as the agency's principal deputy. Sharfstein had been the Commissioner of Health for Baltimore and before that had worked on the Democratic staff of the House Oversight and Government Reform Committee. The Senate confirmed Hamburg on May 18, 2009. Sharfstein's position did not require confirmation.

The working group, chaired by the secretaries of Agriculture and Health and Human Services, made its recommendations in July 2009.⁶⁵ The recommendations reflected a change in direction on food safety – one toward prevention, not reaction. Some of the working group's recommendations have already been implemented, as discussed below.

A key member of the administration's food safety team, the head of the Food Safety and Inspection Service (FSIS), was absent during the development of those recommendations. Obama did not announce his nominee for USDA undersecretary for food safety, Elisabeth Hagen, until January 2010. The Senate Agriculture Committee did not approve the nomination until June 30. The full Senate did not take up the nomination before leaving for its 2010 summer recess. Finally, Obama installed Hagen through recess appointment on Aug. 19. Throughout the delay, the failure to install a leader at FSIS left the agency struggling to advance its rulemaking agenda.

The White House has had little to say on other consumer health and safety issues, leaving federal agencies responsible for shaping the administration's record on issues like consumer product safety and auto safety.

The White House's most important contribution to consumer product safety thus far has been the quick appointment of three commissioners to the Consumer Product Safety Commission (CPSC). Before Inez Tenenbaum took office on June 23, 2009, CPSC had not had a permanent chair for nearly three years, running on life support with only two commissioners. When legislative changes expanding the commission from three to five members took effect in August 2009, Obama's choices, Robert Adler and Anne Northrup, were waiting in the wings. The agency finally had a full complement of commissioners and a quorum to conduct new rulemakings.⁶⁶

64 Barack Obama, "Weekly Address: President Barack Obama Announces Key FDA Appointments and Tougher Food Safety Measures," The White House, March 14, 2009, http://www.whitehouse.gov/the_press_office/Weekly-Address-President-Barack-Obama-Announces-Key-FDA-Appointments-and-Tougher-F/ (accessed Sept. 2, 2010).

65 "Obama Administration Delivers on Commitment to Upgrade U.S. Food Safety System," The White House, July 7, 2009, http://www.whitehouse.gov/the_press_office/Obama-Administration-Delivers-on-Commitment-to-Upgrade-US-Food-Safety-System/ (accessed Sept. 2, 2010).

66 When CPSC was a commission of three, by law, it only maintained a quorum for six months in the event of a commissioner vacancy. Without a quorum, the commission could not set new rules. 2008's Consumer Product Safety Improvement Act expanded the commission to five members.

Auto safety news has been dominated by the recall of millions of Toyota cars and trucks after the vehicles were linked to crashes caused by sudden, unintended acceleration. The controversy highlighted deficiencies at the National Highway Traffic Safety Administration (NHTSA), the chief regulator of auto safety. The White House has clearly indicated that NHTSA is in charge of the response and subsequent investigation.⁶⁷ It is unclear whether NHTSA will pursue through rulemaking any of the fixes necessary to prevent future incidents like the one involving Toyota.

The portfolio of regulatory responsibilities at FDA expanded in 2009 when Congress passed the Family Smoking Prevention and Tobacco Control Act,⁶⁸ commencing regulatory oversight of cigarettes and other tobacco products. The act, strongly supported by Obama, requires FDA to issue a series of new regulations covering the marketing and packaging of cigarettes, cigars, and other tobacco products.⁶⁹ Several of the rules are due in 2011.

FOOD SAFETY

The Food Safety Working Group's first accomplishment came when the FDA finalized a standard to reduce *salmonella* contamination in eggs.⁷⁰ The rule requires farms to maintain *salmonella* prevention plans and to expand microbial testing.⁷¹ The *salmonella* rule had been under development since the 1990s; it was proposed under the Bush administration in 2004 but never completed. The Obama administration made completion of the rule an early priority and successfully finalized it on July 9, 2009. The agency estimates the new regulation will prevent 79,000 illnesses and 30 deaths every year while adding less than one cent to the cost of a dozen eggs.

However, because the rule was not scheduled to take effect until July 2010, one year after FDA finalized it, the rule was useless in preventing a major *salmonella* outbreak that has sickened more than 1,400 people⁷² and led to the recall of more than 500 million eggs⁷³ laid before the rule took effect. Regulators at the FDA have acknowledged that, had the rule been in effect, the chances of preventing the outbreak would have been greater.⁷⁴

67 Bill Burton, "Briefing by White House Deputy Press Secretary Bill Burton, 2/3/10," The White House, Feb. 3, 2010, <http://www.whitehouse.gov/the-press-office/briefing-white-house-deputy-press-secretary-bill-burton-2310> (accessed Sept. 2, 2010).

68 P.L. 111-31.

69 Barack Obama, "Remarks by the President at the Signing of the Family Smoking Prevention and Tobacco Control Act," The White House, June 22, 2009, <http://www.whitehouse.gov/the-press-office/remarks-president-signing-family-smoking-prevention-and-tobacco-control-act> (accessed Sept. 2, 2010).

70 Jeffrey Shuren, "Prevention of Salmonella Enteritidis in Shell Eggs During Production, Storage, and Transportation; Final Rule," Department of Health and Human Services, Food and Drug Administration, 74 FR 33029, July 9, 2009, <http://edocket.access.gpo.gov/2009/pdf/E9-16119.pdf> (accessed Sept. 2, 2010).

71 "Obama Administration Takes Welcome Actions on Food Safety," Center for Science in the Public Interest, July 7, 2009, <http://www.cspinet.org/new/200907071.html> (accessed Sept. 8, 2010).

72 "Investigation Update: Multistate Outbreak of Human Salmonella Enteritidis Infections Associated with Shell Eggs," Department of Health and Human Services, Centers for Disease Control and Prevention, Aug. 27, 2010, <http://www.cdc.gov/salmonella/enteritidis/> (accessed Sept. 2, 2010).

73 "Frequently Asked Questions and Answers: FDA's Investigation into the Salmonella Enteritidis Outbreak Involving the Recall of Shell Eggs," U.S. Food and Drug Administration, Aug. 27, 2010, <http://www.fda.gov/Food/NewsEvents/WhatsNewinFood/ucm223723.htm> (accessed Sept. 2, 2010).

74 Timothy W. Martin, "New Food-Safety Rules Come Amid Egg Probe," The Wall Street Journal, Aug. 23, 2010, <http://online.wsj.com/article/SB10001424052748704504204575445981962961848.html>, (accessed Sept. 2, 2010).

Since the egg rule, FDA has not finalized a single significant food safety standard, preferring to continue its policy of using non-mandatory guidance in lieu of regulation. On July 31, 2009, FDA released three guidance documents aimed at lowering the risks of microbial contamination in leafy greens, melons, and tomatoes, another recommendation of the Food Safety Working Group.⁷⁵ In April 2010, the agency issued guidance intended to reduce contamination and safety risks during the transport of food.⁷⁶ FDA is careful to note in each of its guidances that the documents are not legally binding or enforceable.

FSIS, the regulator of meat, poultry, and some egg products, scored an early victory in March 2009 when it tightened regulations preventing downer cows from being slaughtered and entering the food supply.⁷⁷ Following up on a 2008 proposed rule, the agency required that all nonambulatory, or downer, cows be banned, even if those cows had already passed a health inspection.

Since then, the agency has struggled, proposing three significant rules and finalizing none. Among the challenges FSIS has faced is advancing rules through the regulatory review stage conducted by the White House Office of Information and Regulatory Affairs (OIRA). For example, OIRA has been reviewing since November 2009 an FSIS proposal to set up a catfish inspection program, far exceeding OIRA's own time limit of 120 days. FSIS has missed not only its own target date but a statutory deadline imposed by Congress in 2008.

CONSUMER PRODUCT SAFETY

The product safety agenda continues to be driven by the Consumer Product Safety Improvement Act (CPSIA),⁷⁸ the landmark 2008 law that overhauled product safety, particularly children's product safety, in response to a rash of recalls in 2007 and 2008.

Rulemaking at CPSC, the agency tasked with implementing the CPSIA, has been dominated by the law's requirements and deadlines. Congress made protecting children from lead exposure one of the law's keystones. The law sets a new limit for lead paint in children's products, which took effect in August 2009, one year after the law's enactment.⁷⁹ The law also limits the content of lead in children's products by requiring CPSC to set standards that tighten over time. The most recent standard, 300 ppm (parts per million), took effect in August 2009 as well.⁸⁰

Partly in response to complaints about the lead limits, CPSC has taken steps to exempt certain products from the third-party testing the law requires to show compliance. CPSC developed a list of products which, "by their nature, will never exceed the lead content limits" and are therefore exempt. CPSC mentions cotton and wool as examples. CPSC also announced that firms would not have to test for the

75 "FDA Issues Draft Guidances for Tomatoes, Leafy Greens and Melons," U.S. Food and Drug Administration, July 31, 2009, <http://www.fda.gov/Food/FoodSafety/Product-SpecificInformation/FruitsVegetablesJuices/FDAProduceSafetyActivities/ucm174086.htm> (accessed Sept. 2, 2010).

76 "Guidance for Industry: Sanitary Transportation of Food," U.S. Department of Health and Human Services, Food and Drug Administration, April 1, 2010, <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodSafety/ucm208199.htm> (accessed Sept. 2, 2010).

77 Alfred Almanza, "Requirements for the Disposition of Cattle that Become Non-Ambulatory Disabled Following Ante-Mortem Inspection," Department of Agriculture, Food Safety and Inspection Service, 74 FR 11463, March 18, 2009, <http://edocket.access.gpo.gov/2009/pdf/E9-5987.pdf> (accessed Sept. 2, 2010).

78 P.L. 110-314. Hereinafter, CPSIA.

79 CPSIA § 101(f).

80 CPSIA § 101(a).

general lead content standard for children's products, except jewelry, until Feb. 10, 2011. Testing for lead paint and testing of children's jewelry is still required.⁸¹

CPSC has said that it believes the scope of the lead limits is too broad and asked in a January 2010 report to Congress for more flexibility to exempt certain products from the ban.⁸² CPSC already has the authority to exempt products but has not yet exercised it: "[N]o exemption has been granted by the Commission to date because in each instance the manufacturer admitted that an amount of lead was present in the product that could be handled by the child, however infrequently, leading to hand to mouth ingestion of lead," the report says.

The next tightening of the lead content standard is due in August 2011. CPSC is accepting comments on the feasibility of the scheduled limit, 100 ppm, in accordance with the CPSIA.⁸³

CPSC is also enforcing limits on phthalates in children's products, which took effect under the act in February 2009.⁸⁴ Phthalates are a class of chemicals found in a variety of plastic products that have been linked to reproductive and developmental abnormalities.

Under the CPSIA, CPSC has also proposed new safety standards for cribs.⁸⁵ The rule would add new requirements for durability testing of cribs. The rule would also essentially ban drop-side cribs, those in which an entire side of the crib can be moved up and down. Reports show that drop-side cribs pose a greater risk to babies who can become trapped in the movable side of the crib. CPSC commissioners approved the proposal July 14, 2010, in a 5-0 vote.

CPSC's ability to adhere to the CPSIA's rulemaking deadlines has likely been abetted by three years of steady budget increases. From FY 2007 to FY 2010, CPSC's budget increased from \$66 million to \$122 million, and its staffing level increased from 393 to 530, according to the White House Office of Management and Budget (OMB).⁸⁶ The CPSIA authorized the budget increases.

81 Todd A. Stevenson, "Interim Enforcement Policy on Component Testing and Certification of Children's Products and Other Consumer Products to the August 14, 2009 Lead Limits," Consumer Product Safety Commission, 74 FR 68593, Dec. 28, 2009, <http://edocket.access.gpo.gov/2009/pdf/E9-30669.pdf> (accessed Sept. 2, 2010).

82 "Report to Congress Pursuant to the Statement of Managers Accompanying P.L. 111-117," Consumer Product Safety Commission, Jan. 15, 2010, <http://www.cpsc.gov/ABOUT/Cpsia/cpsiareport01152010.pdf> (accessed Sept. 2, 2010).

83 Todd A. Stevenson, "Children's Products Containing Lead; Technological Feasibility of 100 ppm for Lead Content; Request for Comments and Information," Consumer Product Safety Commission, 75 FR 43942, July 27, 2010, <http://www.cpsc.gov/businfo/frnotices/fr10/leadTech.pdf> (accessed Sept. 2, 2010).

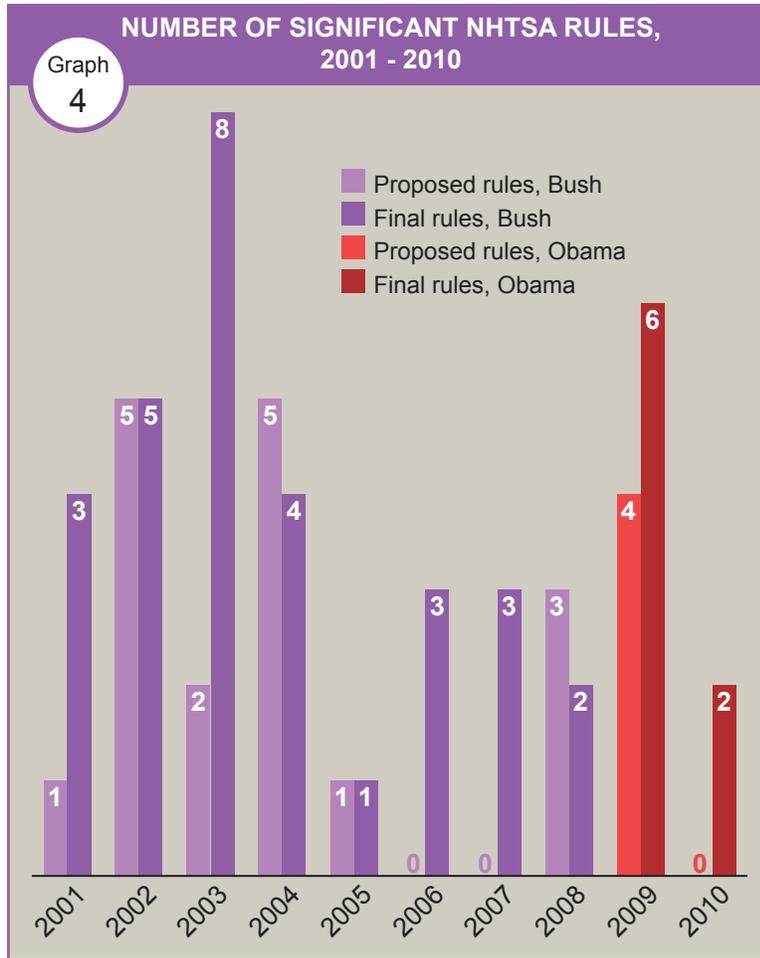
84 CPSIA § 108.

85 Todd A. Stevenson, "Safety Standards for Full-Size Baby Cribs and Non-Full-Size Baby Cribs; Notice of Proposed Rulemaking; Proposed Rule," Consumer Product Safety Commission, 75 FR 43307, July 23, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-17594.pdf> (accessed Sept. 2, 2010).

86 For budget and staffing information, see the Consumer Product Safety Commission section in "Appendix: Budget of the United States Government" for fiscal years 2009 through 2011. Final budget and staffing figures are published in volumes two years after the fiscal year. For example, final figures for FY 2009 are found in the FY 2011 budget. FY 2010 figures are estimates contained in the FY 2011 budget. Past volumes are available online at <http://www.gpoaccess.gov/usbudget/browse.html>.

AUTO SAFETY

2009 witnessed a minor surge of rulemaking at NHTSA, an agency that had grown sleepy in the final years of the Bush administration. (See Graph 4.) In May 2009, the agency finalized a long-delayed standard to increase two-fold the required roof strength in passenger vehicles.⁸⁷ NHTSA estimates the new standard “will prevent 135 fatalities and 1,065 nonfatal injuries annually.” However, the standard is



Graph 3: Years run from Jan. 21 through Jan. 20, to account for presidential inauguration. Data for 2010 is through July 20, 2010. All data taken from RegInfo.gov and the Federal Register.

not as strong as auto safety advocates had hoped. They point out that many cars already exceed the strength required by the new standard and that the rule needs to make more progress in reducing the estimated 10,000 fatalities resulting from rollover crashes annually. Of note, the final rule dropped a provision proposed by the Bush administration that would have, by preempting state law, robbed consumers of their right to sue manufacturers if injured in a rollover crash.

In December 2009, NHTSA proposed another overdue regulation, this one to reduce the chances that drivers and passengers are ejected from vehicles during a crash.⁸⁸ A 2005 law had required NHTSA to finalize the ejection mitigation standard by October 2009. Despite the generous lead time, the agency has badly missed the statutory deadline.

To make matters worse, NHTSA’s proposal is too lenient, according to advocates. For example, the proposal would not require manufacturers to adopt more protective glass glazing processes, meant to reduce the risk of ejection, to sun and moon roofs. The

agency has said in the past that 15 percent of ejections occur through sun or moon roofs. That number is likely to increase if the main provision in NHTSA’s proposal, better side-curtain airbags, is adopted.⁸⁹

87 Ronald L. Medford, “Federal Motor Vehicle Safety Standards; Roof Crush Resistance; Phase-In Reporting Requirements; Final Rule,” Department of Transportation, National Highway Traffic Safety Administration, 74 FR 22347, Ma 12, 2009, <http://edocket.access.gpo.gov/2009/pdf/E9-10431.pdf> (accessed Sept. 2, 2010).

88 Stephen R. Kratzke, “Federal Motor Vehicle Safety Standards, Ejection Mitigation; Phase-In Reporting Requirements; Proposed Rule,” Department of Transportation, National Highway Traffic Safety Administration, 74 FR 63179, Dec. 2, 2009, <http://edocket.access.gpo.gov/2009/pdf/E9-28177.pdf> (accessed Sept. 2, 2010).

89 David Arkush and Lena Pons, “Comments on Federal Motor Vehicle Safety Standards, Ejection Mitigation, Notice of Proposed Rulemaking, 74 FR 63180, Dec. 2, 2009, Docket No. NHTSA-2009-0183,” Public Citizen, Feb. 19, 2010, <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480aa888c> (accessed Sept. 2, 2010).

NHTSA has made gains in improving vehicle fuel economy. The agency worked with the U.S. Environmental Protection Agency to tighten fuel economy standards in passenger vehicles. The standards, finalized in April 2010, will both save consumers money in fuel expenses and curb climate-altering greenhouse gas emissions. (The rule is discussed in more detail on page 8.) NHTSA also finalized a rule in March 2010 that will require tire manufacturers to better inform consumers about how new tires affect vehicle fuel efficiency.⁹⁰

In 2010, NHTSA's regulatory agenda has been dominated by its response to the Toyota unintended acceleration recalls. The agency is investigating consumer complaints of unintended acceleration but has thus far been unable to draw conclusions.

Solutions to preventing similar problems seem unlikely in the near future. Congress is considering requiring NHTSA to set standards for accelerator pedals and data event recorders, also known as black boxes, but prospects for legislative reform are dim. According to NHTSA's Unified Agenda, the agency plans to propose in December an update to its standard for accelerator control systems. However, the rulemaking has been on the agency's agenda since 2008 and is not in direct response to the Toyota recalls.

Like other agencies, NHTSA faces challenges in securing adequate resources for its rulemaking activity. From FY 2006 to FY 2008, the agency's rulemaking budget shrank by more than a third, from \$23 million to \$15 million. After rebounding slightly, to \$17 million, in FY 2009, the Obama administration was able to secure a significant gain in FY 2010, up to \$22 million. Obama's FY 2011 budget proposal would raise the rulemaking division's budget to \$23 million.⁹¹

MEDICAL PRODUCT SAFETY

Aside from food safety and tobacco products, discussed above, FDA's regulatory portfolio includes pharmaceuticals and medical devices. Several rules proposed during the Obama administration change the way businesses report information to the FDA, with an increasing emphasis on electronic reporting. For example, on Aug. 21, 2009, FDA proposed two rules requiring electronic reporting of postmarketing safety data collected by manufacturers, which is information about the product reported once it is introduced into the market after approval based on clinical trials. One rule applies to pharmaceuticals,⁹² the other to devices.⁹³ FDA believes the rules will help the agency more quickly flag safety risks.

90 David L. Strickland, "Tire Fuel Efficiency Consumer Information Program; Final Rule," Department of Transportation, National Highway Traffic Safety Administration, 75 FR 15893, March 30, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-6907.pdf> (accessed Sept. 2, 2010).

91 For budget information, see the "Rulemaking" line in the National Highway Traffic Safety Administration section in "Appendix: Budget of the United States Government" for fiscal years 2008 through 2011. Final budget figures are published in volumes two years after the fiscal year. For example, final figures for FY 2009 are found in the FY 2011 budget. The FY 2010 budget is an estimate contained in the FY 2011 budget. The FY 2011 request is found in the FY 2011 budget. Past volumes are available online at <http://www.gpoaccess.gov/usbudget/browse.html>.

92 Jeffrey Shuren, "Postmarketing Safety Reports for Human Drug and Biological Products; Electronic Submission Requirements," Department of Health and Human Services, Food and Drug Administration, 74 FR 42184, Aug. 21, 2009, <http://edocket.access.gpo.gov/2009/pdf/E9-19682.pdf> (accessed Sept. 2, 2010).

93 Jeffrey Shuren, "Medical Device Reporting; Electronic Submission Requirements," Department of Health and Human Services, Food and Drug Administration, 74 FR 42203, Aug. 21, 2009, <http://edocket.access.gpo.gov/2009/pdf/E9-19683.pdf> (accessed Sept. 2, 2010).

FDA proposed a rule on March 29, 2010, that would tighten standards for prescription drug advertisements.⁹⁴ The rule would require drug companies to present information about a drug's side effects in a "clear, conspicuous, and neutral manner." Currently, companies need only present the information in a way "comparable" to the presentation of the drug's benefits or effectiveness – a standard meant to obviate the use of fine print. Direct-to-consumer advertising can mislead consumers about the trade-off between risks and benefits, FDA says, necessitating a new regulatory approach. The rule would apply to TV and radio ads.

CONCLUSIONS: CONSUMER SAFETY AND HEALTH RULEMAKING

Aside from a push to improve food safety, Obama has done little in the way of prioritizing or articulating a consumer safety agenda. Nonetheless, the administration has made some progress in the areas of consumer product safety and auto safety.

Obama's announcement of the Food Safety Working Group marked an auspicious start, signaling not only a commitment to food safety but lending White House and cabinet-level support to early rules, including FDA's *salmonella* prevention rule. However, since then, the White House has grown silent on the issue, and FDA has been slow to develop food safety regulations.

CPSC has been largely successful in meeting the CPSIA's deadlines while conceding to complaints about its workability. Standards for lead, phthalates, and cribs, among others, are expected to protect children and families from dangerous products.

Still, resource constraints remain an issue of concern for CPSC and will require additional attention. Resource levels at the agency stand below levels seen in the 1970s, shortly after the agency's creation, when adjusted for inflation. Employment is drastically lower than during the 1970s, when it topped 1,000 employees.⁹⁵

NHTSA has revived its rulemaking apparatus under the Obama administration and is gaining resources that should help make the agency more responsive. However, rules that NHTSA has proposed and finalized often do not go far enough, advocates say. Though fatalities have declined in recent years, vehicle crashes continue to injure and kill thousands each year. In 2009, 33,808 people died in crashes, according to NHTSA.⁹⁶

94 Leslie Kux, "Direct-to-Consumer Prescription Drug Advertisements; Presentation of the Major Statement in Television and Radio Advertisements in a Clear, Conspicuous, and Neutral Manner," Department of Health and Human Services, Food and Drug Administration, 75 FR 15376, March 29, 2010, <http://edocket.access.gpo.gov/2010/pdf/2010-6996.pdf> (accessed Sept. 2, 2010).

95 For more information, see "Product Safety Regulator Hobbled by Decades of Negligence," OMB Watch, Feb. 5, 2008, <http://www.ombwatch.org/node/3599> (accessed Sept. 2, 2010).

96 "Highlights of 2009 Motor Vehicle crashes," U.S. Department of Transportation, National Highway Traffic Safety Administration, August 2010, <http://www-nrd.nhtsa.dot.gov/Pubs/811363.pdf> (accessed Sept. 10, 2010).

APPENDIX

This table presents budget information for several major federal rulemaking agencies. These figures represent budgets for the entire agency, with the exception of the U.S. Environmental Protection Agency, for which only the Programs Management budget line is presented. The funds are obligated for activities, including but not limited to rulemaking. This table is included to present the reader with a general sense of how regulatory agency budgets have fared during the Obama administration. All dollar figures are in millions. More information on the budget figures is explained on the following page.

	President Bush	President Obama		President Obama		
Agency	FY 2009, enacted	FY 2010, enacted	Change, FY '09 - '10	FY 2011, requested	Change, FY '10 - '11	Change, FY '09 - '11
U.S. Environmental Protection Agency (programs) ¹	\$2,575	\$3,078	19.53%	\$2,969	-3.54%	15.30%
U.S. Fish and Wildlife Service ²	\$1,474	\$1,445	-1.97%	\$1,418	-1.87%	-3.80%
Occupational Safety and Health Administration ³	\$521	\$561	7.68%	\$575	2.50%	10.36%
Mine Safety and Health Administration ⁴	\$348	\$359	3.16%	\$363	1.11%	4.31%
Employment Standards Administration ⁵	\$455	\$542	19.12%	\$613	13.10%	34.73%
Food and Drug Administration ⁶	\$2,761	\$3,233	17.10%	\$3,743	15.77%	35.57%
Food Safety and Inspection Service ⁷	\$1,107	\$1,140	2.98%	\$1,158	1.58%	4.61%
Consumer Product Safety Commission ⁸	\$108	\$122	12.96%	\$123	0.82%	13.89%
National Highway Traffic Safety Administration ⁹	\$127	\$140	10.24%	\$133	-5.00%	4.72%

APPENDIX NOTES

¹ Budget authority (gross) for Environmental Programs Management account, Environmental Protection Agency.

² Budget authority (gross) for Resource Management account, Fish and Wildlife and Parks, Department of the Interior.

³ Budget authority (gross) for Salaries and Expenses account, Occupational Safety and Health Administration, Department of Labor.

⁴ Budget authority (gross) for Salaries and Expenses account, Mine Safety and Health Administration, Department of Labor.

⁵ Budget authority (gross) for Salaries and Expenses account, Employment Standards Administration, Department of Labor. In FY 2010, the Employment Standards Administration was dissolved into its four major sub-components: Office of Worker's Compensation Programs; Wage and Hour Division; Office of Federal Contract Compliance Programs; and Office of Labor Management Standards. The figure for FY 2011 is the aggregate of those four agencies.

⁶ Budget authority (gross) for Salaries and Expenses account, Food and Drug Administration, Department of Health and Human Services.

⁷ Budget authority (gross) for Food Safety and Inspection Service account, Food Safety and Inspection Service, Department of Agriculture.

⁸ Budget authority (gross) for Salaries and Expenses account, Consumer Product Safety Commission, Other Independent Agencies.

⁹ Budget authority (gross) for Operations and Research account, National Highway Traffic Safety Administration, Department of Transportation.

All data is taken from "Appendix: Budget of the United States Government: Fiscal Year 2011," available online at <http://www.whitehouse.gov/omb/budget/Appendix> (accessed Sept. 3, 2010).



OMB Watch
1742 Connecticut Ave., NW
Washington, D.C. 20009
202-234-8498
www.ombwatch.org