2009

Seven Things the New EPA Administrator Should Do

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SOAPBOX

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BY MICHAEL B. GERRARD

In view of the dramatic shift in the nation's environmental policy that is presaged by the ascension of Barack Obama, I have been asked to suggest several actions that should be undertaken by the new administrator of the Environmental Protection Agency (EPA).

This article was written on Jan. 26, 2009, six days after the inauguration. It is to appear in March. Thus every reader will know something that, today, I don't—what long-pent-up actions were taken by President Obama shortly after he moved into the Oval Office. But I am guessing that by the time this article appears, Lisa Jackson, the new EPA administrator, will have already acted on the three most salient items within EPA's jurisdiction on the biggest environmental issue of the day, climate change, by:

- granting California's application for a waiver from the federal motor vehicle emission standards, thereby allowing California's own stricter standards to take effect there and in sixteen other states;
- making a finding that greenhouse gases (GHGs) pose an endangerment to human health and welfare, as per the U.S. Supreme Court decision in *Massachusetts v. EPA*; and
- reversing her predecessor's eleventh-hour ruling that the Clean Air Act's best available control technology requirements do not apply to carbon dioxide emissions.

With these issues presumed to be behind her, here are my suggestions for seven things that Administrator Jackson should do.

1. *Consider GHG impacts in permitting decisions*—Case law has made clear that climate change impacts are appropriate for consideration under the National Environmental Policy Act (NEPA). Thus environmental impact statements have begun to explore projects' impacts on GHGs. But the judge-made functional equivalence doctrine exempts most EPA actions from NEPA. Notwithstanding this exemption, EPA should consider GHG impacts in all of its permitting and regulatory decisions and quantify the relative GHG impacts of various alternatives for important actions.

2. *Take civil rights complaints seriously*—Since 1993, EPA has received several hundred citizen complaints that particular actions—especially permitting decisions by state environmental agencies that receive EPA funds—contravened the principles of environmental justice by violating Title VI of the Civil Rights Act. A frequent pattern has been for EPA to sit on a complaint for an extended period and then dismiss it. In fact, of these several hundred complaints, the total number granted were (depending on how one counts) either one or zero. This track record does not denote serious consideration.

3. *Let EPA's scientists be scientists*—During the past eight years, inconvenient scientific findings were often cast aside. As reported by Professor Jonathan Cannon, a former EPA general counsel, the Union of Concerned Scientists surveyed over 1,500 EPA staff scientists in early 2008; 889 of the scientists reported that they had experienced political pressure, 400 had seen their work misrepresented by EPA policymakers, and 285 had observed EPA policies justified by partial or biased information. EPA has many fine scientists; they should be allowed to do their jobs, and their findings should be heeded.

4. *Let EPA's lawyers be lawyers*—EPA also has many fine lawyers. Often their advice fares no better than that of their scientist colleagues. Nowhere is this more apparent than in the recent implementation of the Clean Air Act. EPA has accumulated an unenviable record of rulemakings being annulled by the U.S. Court of Appeals for the D.C. Circuit, often because EPA's lawyers were overridden.

5. *Restore the public's right to know*—In December 2006, EPA issued a new rule under the Toxics Release Inventory (TRI) that raised the reporting thresholds and otherwise shielded many facilities that store or handle dangerous chemicals from key reporting requirements. This reduces community awareness of nearby hazards and impedes emergency response planning. Also worthy of reversal is President Bush's 2007 order exempting many federal facilities from TRI reporting.

6. *Consider safety hazards in remedial decisions*—EPA often requires major hazardous waste sites to be remediated by massive excavation or dredging projects in which the waste is trucked to distant landfills. Several studies have shown that the health and safety hazards caused by these projects—especially to motorists who share the roads with waste-hauling trucks— sometimes greatly exceed the health and safety benefits of the selected cleanups.

7. *Regulate electronic waste*—Massive quantities of used computers and other electronic equipment are exported from the United States to India, Pakistan, and other countries where they are dismantled under appalling environmental and occupational conditions. As recommended by the Government Accountability Office, EPA should expand the applicability of its e-waste rules and strengthen their enforcement.

In January 2009, **Michael B. Gerrard** *became a professor of professional practice at Columbia Law School and director of its new Center for Climate Change Law. He is a former chair of the ABA Section of Environment, Energy, and Resources.*