

CLIENT ALERT

EPA's Proposed Budget – Five Key Signals for Industry on EPA's Priorities

Feb.18.2015

On February 2, 2015, President Obama released his proposed \$8.6 billion budget for the U.S. Environmental Protection Agency ("EPA" or "the Agency") for fiscal year 2016 (October 1, 2015 through September 30, 2016). Seeking a \$452 million increase in funding above 2015 levels, the budget allocates significant resources to the Agency's top-priority climate change and air quality initiatives. With key members of Congress already expressing opposition to the funding request, approval of EPA's proposed budget is not likely. Nevertheless, EPA's budget signals the Agency's regulatory and enforcement priorities and how it intends to spend its resources, however limited, in the coming years. Below, we outline the top five takeaways from EPA's budget.

1. Climate Change Is the "Top Priority"

As stated throughout EPA's budget documents, **climate change** and the **Clean Power Plan** are the Agency's top regulatory priorities. EPA is seeking \$280 million (an \$89 million increase above 2015 funding) to support its climate change initiatives. This funding supports not only rulemaking efforts, which will target the largest greenhouse gas emitters, but also voluntary programs, and state and local community efforts to address and adapt to climate change.

The **Clean Power Plan**, which is EPA's proposed regulation of carbon dioxide emissions from existing power plants, lies at the heart of the Administration's climate strategy. EPA is requesting significant additional funding to support it. Given the Clean Power Plan's "breadth and uniqueness," EPA recognizes that finalizing, defending, and implementing the Plan will be "complex" and require significant resources, including technical and regulatory knowledge outside the Agency's traditional expertise. EPA states that it will dedicate both existing and new resources, at headquarters and in regional offices, to supporting state development of implementation plans. Notably, EPA is requesting 25 additional employees to support the state implementation efforts and develop technical guidance. EPA is additionally requesting 20 legal employees, distributed equally between headquarters and regional offices, to assist implementation, develop guidance, and defend the rule in litigation.

While EPA allocates \$25 million of its budget to assist states with implementing the Clean Power Plan, EPA is also seeking a \$4 billion dollar **Clean Power State Incentive Fund** beyond its discretionary budget to incentivize states to exceed their Clean Power Plan obligations. The fund would assist states in meeting their emissions targets earlier than required, reducing their carbon emissions beyond their mandatory target, or conducting other activities that "complement and advance the Clean Power Plan."

Identifying the transportation sector as the second largest source of greenhouse gases, EPA will also prioritize developing its **second phase greenhouse gas standards for medium- and heavy-duty vehicles**. EPA will also spend resources on implementing the existing greenhouse gas emission standards for both light- and heavy-duty vehicles and the renewable fuels program.

EPA also identifies a broad range of additional efforts to address greenhouse gas emissions, including listing lower global warming potential alternatives to hydrofluorocarbons (HFCs) through its **Significant New Alternatives Policy (SNAP) program**. Nearly every EPA program has identified some initiative for reducing greenhouse gas emissions. EPA also discusses a

number of voluntary programs that will encourage greenhouse gas reductions in industry, commercial and residential, and agricultural sectors.

Further, EPA plans under the National Environmental Policy Act to provide comments on the climate change impacts of projects in key areas, including oil and gas leasing and extraction, liquefied natural gas export facilities, oil and gas pipelines, coal and hard-rock mining, renewable energy development, nuclear power licensing/re-licensing, highway and airport expansion, flood control, port development, and management of national forests and public lands.

With EPA's heavy and pervasive emphasis on climate change initiatives, every industry should expect climate change concerns to influence the way they are regulated. Whether through direct regulation, an environmental impact review, or an opportunity to participate in a voluntary program, nearly all regulated entities will be touched by the Agency's climate change agenda. Industry may also see a corresponding decrease or delay in some of EPA's non-climate change regulatory activities because the climate change initiatives are likely to draw resources from other regulatory and enforcement efforts if Congress does not approve EPA's funding request.

2. Litigation Will Dictate Air Quality Priorities

Non-greenhouse gas air quality initiatives remain a significant priority for EPA, but litigation will likely dictate its specific regulatory activities. Although EPA is seeking additional funding and staffing to conduct regulatory reviews mandated by the Clean Air Act, EPA acknowledges that it does not have the resources to meet the statutory deadlines. For example, EPA admits that over 80 air toxics rules are overdue for review, and it expects litigation over the missed deadlines. Facing this reality, EPA states that it will prioritize its work "according to resources and to meet court-ordered deadlines."

Beyond its court-driven agenda, EPA identified priority industries for its air toxics rule review including (but not limited to) Integrated Iron and Steel Manufacturing, Aerospace Manufacturing, Coke Ovens, Publicly Owned Treatment Works, Plywood and Composite Wood Products, Ethylene Production, and several coatings source categories. EPA further explained that it will look for opportunities to meet its regulatory obligations more efficiently by taking multiple regulatory actions that affect the same industry at the same time.

In addition to its air toxics reviews, EPA will continue its mandatory review of the National Ambient Air Quality Standards. Aside from climate change, EPA identifies ozone and particulate matter as the most important air quality issues.

EPA will also commit resources to advancing state implementation plans. EPA is requesting 25 additional employees to address the backlog of state implementation plans awaiting processing and to assist with other permitting demands. EPA will also commit resources to evaluating state regional haze programs and state progress under those programs. EPA will also work with states on addressing interstate pollution issues.

3. Chemical and Pesticide Safety Reviews Prioritized to Meet Deadlines

EPA is reallocating resources in its chemicals and pesticides offices to prioritize reviews facing programmatic and statutory deadlines. Significantly, EPA is diverting resources from its Toxic Substances Control Act (TSCA) chemicals risk management efforts to accelerate the completion of chemical risk assessments. This reallocation aims to help EPA achieve its goal of

conducting risk assessments for all chemicals listed in the first TSCA Work Plan by 2018. EPA plans to complete seven risk assessments by the end of fiscal year 2015 and 10 additional risk assessments in fiscal year 2016. Similarly, EPA will continue its efforts under the Federal Insecticide, Fungicide, and Rodenticide Act to review all current pesticide registrations by 2022. For new registrations, EPA expects to conduct comprehensive environmental assessments to ensure compliance with the Endangered Species Act. EPA is also requesting additional funding to address pesticide risks for pollinators.

4. Big Impact Enforcement

Although requesting a \$66 million increase in funding for its civil and criminal enforcement efforts, EPA identifies financial constraints as motivating its focus on the highest impact, most serious pollution problems. "High impact" cases are more likely to involve larger facilities or multiple violations, rather than a single violation by a single, small entity. EPA recognizes that this approach will lead to prioritizing "complex cases that require significant investment and a long-term commitment." EPA's enforcement resources will also be focused on supporting the Agency's other goals, including addressing climate change and improving air quality. Specific enforcement goals include:

- Targeting large pollution sources, such as coal-fired utilities, acid, cement, glass, and natural gas exploration and production industries;
- Targeting Clean Air Act New Source Review/Prevention of Significant Deterioration and air toxics violations;
- Targeting Resource Conservation and Recovery Act violations at mineral processing facilities;
- Targeting "multi-media" problems at energy extraction sites;
- Targeting pollution from raw sewage, animal waste, and stormwater runoff, including through efforts to bring municipal sewage and stormwater plans into compliance; and,
- Targeting violations in communities demonstrating environmental justice concerns.

In another effort to do more with fewer resources, EPA plans to accelerate its **Next Generation Compliance** strategy, which is designed to increase compliance through the use of advanced monitoring and information technology. While Next Generation Compliance includes various measures to streamline reporting, monitoring, and pollution detection, a central component is public access to compliance and monitoring data. EPA believes that making this information available will incentivize compliance and promote accountability. In January 2015, EPA released a memorandum describing four different Next Generation Compliance tools that should be considered for inclusion in civil enforcement settlements: advanced monitoring (e.g., fence-line monitoring of air pollution), independent third-party verification, electronic reporting, and public accountability through increased transparency of compliance obligations and data.

5. Bracing for Litigation

To support all of its regulatory and enforcement priorities, EPA is also seeking almost 20 new legal employees (separate from the 20 legal personnel requested to support just the Clean Power Plan). EPA explains that it needs these legal resources not only to speed up regulatory actions requiring legal input (like permitting), but also to defend EPA's actions in litigation. EPA states that judicial challenges to EPA actions have not only increased in number, but have also become more complex, and thus demand greater legal review and support.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Elliott P. Laws

Partner – Washington, D.C.

Phone: +1 202.624.2798

Email: elaws@crowell.com

Kirsten L. Nathanson

Partner – Washington, D.C.

Phone: +1 202.624.2887

Email: knathanson@crowell.com