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PERSPECTIVE

Bills respond to rollback of environmental laws

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During the past few weeks, the Trump administration began taking significant action to deliver its promised repeal or replacement of various federal laws affecting air, water, climate, endangered species and public land, including its proposed 31 percent cut to the U.S. Environmental Protection Agency's budget. To both hedge against and work around an expected ongoing rollback of environmental, natural resources and public health protections, California state senators recently unveiled three pieces of legislation: Senate Bills 49, 50 and 51.

SB 49 would make federal environmental standards enforceable under state law; SB 50 would establish a policy to discourage the conveyance of federal public land in California to owners other than the federal government; and SB 51 includes proposed whistleblower protections for federal employees working in the environmental sciences and climate change-related fields.

A close look at SB 49 reveals important legal issues that would emerge if the bill is enacted in its current form.

SB 49 Summary

SB 49, the California Environmental, Public Health, and Workers Defense Act, states that the federal Clean Air Act, Clean Water Act, Safe Drinking Water Act and Endangered Species Act, as well as other federal environmental laws, establish baseline standards for the protection of the environment, natural resources and public health. Recognizing that existing state law also regulates air and water pollution as well as the protection of endangered and threatened species, SB 49 would prohibit state and local agencies from amending or revising their analogous statutes and regulations to be less stringent than those baseline federal standards "in existence as of January 1, 2016, or January 1, 2017, whichever is more stringent."

State and local agencies adopting new pollutant standards would also be required to ensure that the new standards are at least as stringent as any comparable baseline federal standards. However, SB 49 would not undermine California agencies' existing ability to establish rules and regulations more stringent than federal law, to the extent authorized.

SB 49 would specifically require all species listed as endangered or threatened pursuant to the federal Endangered Species Act as of January 1, 2017, to be listed as endangered or threatened (if not already listed) under the California Endangered Species Act. Any new or revised consistency determination or incidental take permit issued after January 1, 2018, would be required to contain conditions at least as stringent as any relevant baseline federal standards, "including, but not limited to, any federal incidental take statement, incidental take permit, or biological opinion in effect and applicable to a permittee or project as of January 1, 2016, or January 1, 2017, whichever is more stringent." SB 49 also specifically targets various

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President Donald Trump signs executive orders in the White House, Feb. 28.

U.S. EPA air quality programs and would require the California Air Resources Board and state air districts to establish equivalent programs at least as stringent as the federal baseline.

Also noteworthy, SB 49 would take federal citizen suit provisions set forth in the Clean Air Act, Clean Water Act, Safe Drinking Water Act and Endangered Species Act and authorize them under state law. Each of these federal laws allows a person to bring an action in the public interest to enforce many of the federal requirements contained within, and to impose civil penalties for violation of those requirements. Under SB 49, if the federal government relaxes the baseline federal standards or repeals the federal citizen suit provisions, then a private citizen would be allowed to enforce the federal law requirements under state law, provided that the private citizen notify the attorney general and follow other requirements, where applicable. If successful in court, private citizens would be able to seek an award of attorney's fees and other court costs. The citizen suit provisions would be in addition to existing enforcement remedies available under state law.

SB 49 Implementation Issues

SB 49 raises numerous implementation issues. First and foremost, the bill defines "baseline federal standards" as those "federal laws *in existence* as of January 1, 2016, or January 1, 2017, whichever is more stringent" (emphasis added). Unfortunately, "in existence" is not defined — a phrase that has a significantly different legal meaning than the phrase "in effect." A law that is "in effect" is enforceable, whereas one that is merely "in existence" may be enforceable as effective, or it may not yet be effective for a number of reasons, one being that the law is stayed pending litigation over its legality.

This latter circumstance calls into question whether the Clean Water Rule and the Clean Power Plan —

controversial federal rules that were both "in existence" before January 1, 2017 — would qualify as baseline federal standards. President Donald J. Trump already ordered a complete reconsideration of the Clean Water Rule, and is also poised to order a repeal of the Clean Power Plan. Environmental advocacy groups would likely argue that these rules were "in existence" for the purposes of SB 49 and are therefore enforceable baseline federal standards, a position the regulated community is likely to vigorously contest. Numerous other environmental laws alleged as "in existence" may spark similar controversy. (Note: SB 49's subdivision applicable to endangered species refers to federal standards "in effect," which conflicts with the definition of "baseline federal standards.")

Secondly, significant litigation could occur over the issue of stringency — whether a state pollutant limitation is less stringent than the federal baseline. For example, if a state-of-the-art method for measuring compliance more accurately identifies an environmental impairment with a decreased level of effort or expense, environmental groups might argue that the new method is less stringent, allegedly in violation of SB 49. State agencies would be placed on the defensive as they attempt to incorporate new science and technology into permits.

The issue of stringency also affects the citizen suit provisions of SB 49 and challenges to standing. If the federal government revises standards or requirements to be less stringent than the applicable federal baseline, then a citizen suit under state law would be allowed. In addition to the differing interpretations of whether a federal standard is relaxed *enough* to trigger the citizen suit provision, two other related questions are raised: (1) Who decides whether the federal government revised a standard to be less stringent — the private citizen, or the state, and (2) how many standards must be relaxed before a private citizen is authorized to sue — is one sufficient?

Similarly, if the federal government narrows the scope of the citizen suit provisions (e.g., requiring economic injury akin to California Business and Professions Code Section 17200), would this be tantamount to a repeal under the plain language of SB 49? Environmental advocacy groups might argue in the affirmative. Ultimately, a defendant would have various reasons to challenge the plaintiff's standing.

Further, SB 49 creates apparently unintended consequences if baseline federal standards are enforced under California law. One primary example is the application of subvention requirements for unfunded state mandates, a constitutional rule that requires the state to reimburse local agencies for state-mandated costs. If the baseline federal standards become enforceable only by virtue of state law, then state agencies would no longer be able to invoke the federal mandate exception to this constitutional rule. In *Department of Finance et al. v. Commission on State Mandates*, 1 Cal. 5th 749 (2016), the California Supreme Court held that certain requirements in a state-issued municipal stormwater permit were state-mandated costs because they were not mandated by the federal Clean Water Act. Under SB 49, all permit conditions implementing repealed or relaxed federal standards would ostensibly become state mandates potentially subject to subvention.

Next Steps

Much uncertainty remains as to the Trump administration's plans for the multitude of federal environmental laws in effect and in existence. There is also a possibility that courts will reverse these federal actions several years later. Nevertheless, SB 49 illustrates the difficulties in legislating about federal action that has not yet happened. The bill's broad and ambiguous language raises many issues that will likely generate extensive litigation. If SB 49 continues to make its way through the California Legislature, the bill's scope and meaning need to be clarified before it is submitted for a final vote.

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