

Introduction

The tumultuous presidential election is working its way to a close and, while the vote counting and litigation continue, we evaluate below the implications of a change in Administration on environmental policy in the US.

The environmental policy agenda to be advanced by a Biden Administration will be a marked contrast to that of the current Administration. The Biden environmental policy agenda includes, at front and center, a Plan for a Clean Energy Revolution to address climate change at the federal level and reengage with the global community to effect reductions in greenhouse gases; a greater focus on environmental justice and more significant enforcement; the likely revisiting of the Trump Administration's executive orders and regulatory rollbacks; and a fundamentally different view from the Trump Administration on how to evaluate chemicals risks, with material ramifications on ongoing efforts under the Toxic Substances Control Act and the Clean Air Act. Each of these is discussed below.

Climate Change

Addressing climate change at the federal level and reengaging with the global community to effect reductions in greenhouse gases will be a priority for the Biden Administration. Biden has released an ambitious agenda to address this "existential threat" that contemplates use of executive orders, legislative action and global outreach in what he calls the [Biden Plan for a Clean Energy Revolution](#). The plan contemplates:

- Full use of executive authority to significantly reduce greenhouse gas emissions, including:
 - Requiring aggressive methane emissions limits for new and existing oil and gas operations
 - Using the federal government procurement system to drive toward 100% clean energy and zero-emissions vehicles
 - Ensuring that all US government installations, buildings and facilities are more efficient and climate ready
 - Reducing greenhouse gas emissions from the transportation sector through the Clean Air Act, including the development of new fuel economy standards to ensure new light and medium duty vehicles will be electric
 - Promoting advanced biofuels
 - Adopting appliance and building-efficiency standards
 - Requiring that any federal permitting decisions consider the effects of greenhouse gas emissions and climate change
- Requiring public companies to disclose climate risks and greenhouse gas emissions in their operations and supply chains
- Permanently protecting the Arctic National Wildlife Refuge, establishing national parks and monuments, banning new oil and gas permitting on public lands and waters, and developing renewables on federal lands and waters to double offshore wind capacity by 2030
- Working with Congress to enact legislation to establish an "enforcement mechanism" to achieve economy-wide net-zero emissions by no later than 2050 and to invest US\$400,000 billion over 10 years in energy and climate research and innovation
- Establishing the Advanced Research Projects Agency to promote technology and innovation on climate change, including incentivizing the creation of new, sustainable fuels for aircraft and the development and deployment of carbon capture sequestration technology
- Incentivizing the deployment of clean technology throughout the economy, including improving the energy efficiency of buildings and building a new resilient infrastructure economy
- Reengaging with the global community on climate change, including:
 - Rejoining the Paris Agreement, an agreement within the United Nations Framework Convention on Climate Change (UNFCCC) to which 189 of the 193 members of UNFCCC have become parties, the long-term temperature goal of which is to keep the increase in global average temperature to well below 2°C (3.6°F) above pre-industrial levels
 - Convening, within the first 100 days, a climate world summit of the leaders of the major greenhouse gas-emitting nations of the world "to persuade them to join the United States in making more ambitious national pledges"
- Making environmental justice a priority across all federal agencies "to develop solutions for environmental injustices affecting communities of color, low-income communities and indigenous communities"

- Increasing enforcement of environmental laws and regulation and pursuing cases “to the fullest extent permitted by law” and “seek additional legislation as needed to hold corporate executives personally accountable”

In addition, the Biden transition team has received recommendations as to how to embed climate action within federal agencies and departments. For example, earlier this month, the [Climate 21 Project](#), a committee comprising experienced largely Obama-era government climate experts, released a 300-page report providing “actionable advice for a rapid-start, administration-wide response coordinated by the White House and accountable to the President in order to achieve his climate policy agenda.”

The recommendations are organized across 11 White House offices, federal departments and federal agencies, and provide high-level recommendations for each department and agency so that the Biden Administration can “hit the ground running” in prioritizing the response to climate change.

Environmental Enforcement and Environmental Justice

Environmental enforcement. The Trump Administration focused on EPA embracing the principles of “cooperative federalism” and working with states, local governments and tribes rather than dictating a one-size-fits-all federal mandate on environmental issues. EPA’s FY 2018-2022 Strategic Plan specifically implemented cooperative federalism in the compliance and enforcement process with states primarily taking the lead in enforcement programs. In light of cooperative federalism, there has been a decline in the number of federal enforcement cases initiated by EPA under the Trump Administration.

In a Biden Administration, it is reasonable to presume that EPA will not adhere to this more limited role in federal enforcement. Instead, it is likely that EPA in a Biden Administration will take a more active, aggressive stance in pursuing civil and criminal enforcement cases at the federal level. EPA will also likely reinstate the use of supplemental environmental projects (SEPs) in resolving civil enforcement cases – a settlement tool that was phased out and ultimately eliminated under the Trump Administration.

In March 2020, the US Department of Justice (DOJ) announced that EPA lawyers may no longer use SEPs in consent decrees or settlements because “SEPs violate the spirit, if not the letter, of the Miscellaneous Receipts Act, which is intended to protect Congress’ constitutional power of the purse.” We expect that SEPs will be resurrected and allowed for use by EPA in settlements in a Biden Administration as a means to carry out specific projects and implement environmental justice goals.

Environmental justice. Under the Trump Administration, EPA implemented environmental justice with grants, resources, strategic planning and collaborative partnerships. EPA focused on eight priority areas and four challenges in its Environmental Justice 2020 Action Agenda, a strategic plan for environmental justice programs for 2016 to 2020. During his campaign, Biden repeatedly emphasized his view that EPA under the Trump Administration failed to address environmental and climate justice aggressively and this would change quickly in Biden’s Administration.

The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity describes several specific environmental injustice initiatives targeted for implementation by Biden’s Administration. These initiatives include more detailed monitoring and mapping of environmental conditions in low-income communities, creating environmental justice boards to coordinate and implement specific policies and agendas, and targeting resources and significant investments to disadvantaged communities.

Biden announced that he plans to establish an Environmental and Climate Justice Division with the DOJ. In addition, the Biden plan instructs the Attorney General to (i) implement, where possible, Senator Booker’s Environmental Justice Act of 2019; (ii) increase enforcement; (iii) strategically support plaintiff-driven climate litigation against polluters; (iv) address legacy pollution at sites; and (v) work closely with EPA’s Office of Civil Rights.

The Biden Plan reestablishes groups such as the White House Environmental Justice Advisory Council and the White House Environmental Justice Interagency Council, which will report directly to the President. These councils are tasked with developing performance metrics on environmental justice and publishing an annual public performance scorecard. These councils will also create a Climate and Economic Justice Screening Tool to monitor emissions, criteria pollutants and toxics in frontline and fence line communities.

The Biden Plan includes overhauling the EPA External Civil Rights Compliance Office. This includes revisiting and rescinding the *Select Steel* civil rights decision and the *Angelita C.* settlement related to claims filed under Title VI of the Civil Rights Act of 1964. (In 1998, EPA issued its first Title VI civil rights decision on a complaint against a Michigan environmental agency for permitting the Select Steel Company to operate a steel recycling facility in Flint, Michigan. In the *Select Steel* decision, EPA ruled that there was no violation of civil rights because there was no violation of the Clean Air Act. In 2011, EPA made a preliminary finding of environmental discrimination under Title VI and negotiated a settlement with the California Department of Pesticide Regulation in a complaint known as *Angelita C.* related to the re-licensing of methyl bromide. Complainants in *Angelita C.* argued that it took EPA more than a decade to resolve the case.

The Biden Plan contemplates working with Congress to reinstitute a private right of action to sue under Title VI. Biden’s plan also includes directing EPA to create a community notification program and establishing an Interagency Climate Equity Task Force. Other components of Biden’s plan include targeting resources to provide preferences in competitive grant programs and a goal of delivering 40% of benefits from investments in clean energy to disadvantaged communities.

Regulatory Activities to Watch

The Trump Administration deployed multiple tools, including executive orders, rewriting and repealing regulations, issuing regulatory guidance to shape regulatory interpretations, litigating certain cases and electing to withdraw from or decline to prosecute other cases, and, in concert with the 115th Congress, using the Congressional Review Act (CRA), to nullify 15 Obama-era regulations. In contrast, President Biden is focused on climate change, a clean energy future and more global engagement. The Biden Administration will likely deploy many of the same tools to implement the incoming President's policy goals.

Expected Executive Order Reversals or Revisions

The incoming Biden Administration will be facing a number of Trump policies established by executive order, policy or agency guidance. President Biden can quickly reverse these current policies simply by withdrawing the executive order, policy or guidance, or declining to enforce it. The top half-dozen or so executive orders likely facing Biden revision or rescission are:

- [E.O. 13771](#): "Reducing Regulation and Controlling Regulatory Costs," which has the goal of eliminating duplicative regulations by directing every agency to identify existing regulations for elimination and eliminate two for every one new regulation (January 30, 2017)
- [E.O. 13778](#): "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule," which directed the US EPA and the Army Corps of Engineers (Corps) to review the "Waters of the United States" or "WOTUS" Rule, 80 Fed. Reg. 37054 (June 29, 2015) for consistency with the Clean Water Act (CWA) (February 28, 2017)
- [E.O. 13783](#): "Promoting Energy Independence & Economic Growth," which directed all agencies to "review existing regulations that potentially burden the development or use of domestically produced energy resources" and "suspend, revise, or rescind those that unduly burden the development of domestic energy resources" and directed EPA to review the Clean Power Plan and related rules for suspension, revisions or rescission (March 28, 2017)
- [E.O. 13792](#): "Review of Designations Under the Antiquities Act," which requires the Secretary of Interior to review all national monument designations or expansions since January 1, 1996, where the designation or expanded designation covers more than 100,000 acres (this review led to the reduction of the Bears Ears National Monument and Grand Staircase Escalante National Monument under separate actions) (April 26, 2017)
- [E.O. 13807](#): "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects," which recognized that "more efficient and effective Federal infrastructure decisions can transform our economy," required coordination among approving agencies, and directed that environmental review and approval of major infrastructure projects be completed within an average of two years (August 15, 2017)

- [E.O. 13868](#): "Promoting Energy Infrastructure and Economic Growth," which is designed to promote private investment in energy infrastructure and through efficient permitting processes and includes direction to EPA to review Section 401 of the CWA and related regulations and guidance and issue new guidance on the state § 401 certification process (April 10, 2019)
- [E.O. 13927](#): "Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities," which directs agencies to use existing authority to speed up environmental review processes to promote economic recovery from the emergency caused by COVID-19 (June 24, 2020)

Other Anticipated Regulatory Policy Reversals

The Biden Administration can also quickly reverse or revise a number of Trump Administration policies simply by rescinding or revising agency memos, guidance documents or policies. Some of the likely candidates for immediate action include:

- EPA's Guidance on Significant Impact levels for ozone and fine particulate under the prevention of significant deterioration (PSD) permitting program, which provides a new analytical approach that states can use to determine whether a proposed PSD source causes or contributes to a violation of NAAQS or PSD (April 17, 2018)
- EPA's memo providing state flexibility under the Clean Air Act in their State Implementation Plans (SIPs) regarding the Start-Up, Shut Down & Malfunction SIP policy (October 9, 2020)
- Reversal of BLM decisions and land plans made under Deputy Director William Perry Pendley

Potential Use of the Congressional Review Act

The CRA, adopted in 1996, gives Congress the opportunity to nullify, by a simple majority vote of both chambers (with no filibuster available), any rule adopted by the executive branch that was finalized within 60 Senate session days or 60 House legislative days before the date on which the previous Congress adjourned its final session. 5 U.S.C. § 801(d).

The makeup of Congress may hinder presidential policy implementation. At this time, Democrats gained one seat and Republicans lost one in the Senate, with the outcome in Georgia pending a January run-off.

It is likely that Republicans will retain a slim Senate majority. In the 435-member House, Democrats held a clear majority going into the election. Democrats have lost 13 seats, currently holding 218, while Republicans have gained six and are currently holding 202, with 15 seats still undecided. Democrats are expected to retain the House majority, but by a slimmer margin.

The implication is that sweeping congressional reforms are unlikely, the CRA will likely not be a useful tool, and the Biden Administration will need to rely on executive orders and the lengthier process of rewriting regulations.

Because an action to nullify a regulation must pass both houses, unless both Georgia run-offs result in Democrat victors, the CRA will be an ineffective tool to effect policy changes. If availing, these regulations are among the most likely targets:

- [Notice of Availability of the National Petroleum Reserve in Alaska Integrated Activity Plan Final Environmental Impact Statement](#), which, as noted above, opens an additional 6.6 million acres of the National Petroleum Reserve-Alaska to oil and gas leasing, including the Teshekpuk Lake Special Area (June 26, 2020)
- [Clean Water Act Section 401 Certification Rule](#), which updates and clarifies the procedural requirements and state and tribal authority to issue water quality certifications pursuant to the Clean Water Act (July 13, 2020)
- [Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act](#), which reforms and expedites the National Environmental Policy Act (NEPA) process for reviewing projects with significant environmental impacts (July 16, 2020) (codified at 40 C.F.R. pts. 1500-05, 07-08)
- [Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources](#), which removes the transmission and storage segment from the oil and gas industry source category, rescinds the methane-specific requirements of source category applicable to sources in the production and processing segments, and expands regulatory exemptions and compliance options applicable to fugitive emissions, well site pneumatic pumps and closed vent system certifications (September 14, 2020)
- [Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act](#), which amends the NESHAPS regulations to permit major air emissions sources of hazardous air pollutants that fall below potential to emit thresholds to be reclassified as “area sources” at any time upon achieving that reduction (October 1, 2020)
- [Special Areas: Roadless Area Conservation: National Forest System Lands in Alaska](#), which exempt the Tongass National Forest from the 2001 Roadless Area Conservation Rule and permit timber harvesting and road construction/reconstruction within approximately 9.3 million acres of the Tongass National Forest (October 29, 2020)
- Coal ash disposal regulations – [Part A](#) and [Part B](#), which requires that unlined coal ash surface impoundments are required to retrofit or close, establishes liner requirements, and grants certain facilities additional time to develop alternative capacity to manage their waste streams (Part A effective September 28, 2020; Part B effective December 14, 2020)
- [Regulations Governing Take of Migratory Birds](#), which was proposed on February 3, 2020, and would narrow the prohibitions on the “take” of migratory birds to prohibit only those actions directed at migratory birds, their nests or their eggs (projected to be finalized by January 20, 2021)

Potential Re-regulatory Efforts

Biden has express goals to protect biodiversity by conserving 30% of America’s lands and waters by 2030, by permanently protecting the Arctic National Wildlife Refuge, establishing national parks and monuments, banning new oil and gas permitting on public lands and waters, and establishing programs to enhance reforestation. Some of these objectives will require new regulations and to the extent that the Biden Administration seeks to undo final rules issued by the Trump Administration, the sponsoring agency will have to launch entirely new rulemakings – a process that generally takes years and will likely involve litigation. To repeal a regulation, an agency must give a reasoned explanation and provide public notice and comment. Having implemented this process, the Trump Administration took extensive steps to document the rationale for its reversal of Obama policies, meaning that Biden’s agencies may have a steeper burden to meet the “reasoned explanation” criterion. Additionally, with regard to some of the regulations that the Biden Administration will likely seek to reverse, litigation is already in full swing challenging Obama Administration predecessor regulations, meaning that litigation progeny will likely be involved in reversing some of the Trump-era regulations. The Biden Administration is most likely to seek to undo the following by new regulations:

- The Affordable Clean Energy Rule, which repealed and replaced the Obama Administration’s Clean Power Plan, replacing a regulation adopted under Clean Air Act Section 111 to reduce carbon dioxide emissions from US power plants with a system that defers to the states to establish their own, potentially less stringent, standards
- NEPA reforms finalized July 16, 2020 – if the Trump Administration’s rule cannot be nullified under the CRA, the Biden Administration may work to repeal the regulations; alternatively, it could decline to defend them in pending litigation, or both
- The oil and gas sector methane rule finalized on September 14, 2020 – if Democrats cannot use the CRA to nullify, the Biden Administration EPA will likely seek to repeal those revisions
- Trump-era rules relaxing fuel economy and carbon dioxide emission standards for passenger cars and light-duty trucks
- The September 27, 2019 [final rule revoking California’s waiver](#), which enables California to set more stringent automobile emission and fuel economy standards; given that California is the Vice President’s home state, it is anticipated that the Biden Administration will give priority to repealing this rule
- Recently adopted aircraft air emission standards that the Biden Administration has vocally criticized
- The Navigable Waters Protection Rule, which took effect on June 22, 2020 (except in Colorado) and is currently being litigated, to reinstate CWA federal jurisdiction over ephemeral streams and wetlands that connect to major underground water bodies
- The July 13, 2020 CWA 401 Certification Rule that reaffirms the statutory timelines for states to issue water quality certifications

- The rule modifying the Endangered Species Act implementation adopted by the US Fish and Wildlife Service and the National Oceanic and Atmospheric Administration providing that the agencies now consider economic factors in deciding whether to categorize species as endangered or threatened, and no longer confer the same protections upon threatened species as they do upon endangered species
- The August BLM record of decision opening the Coastal Plain of ANWR to oil and gas leasing
- The October 29, 2020 rule exempting more than 9 million acres in the Tongass National Forest from the 2001 Roadless Area Conservation Rule

Chemicals

The Biden Administration enters as EPA sits at a critical juncture in its efforts to implement the 2016 TSCA Amendments. Among other things, EPA is engaged in extensive efforts to (1) complete risk evaluations of the “first ten” substances; (2) proceed with the “next twenty” substance risk evaluations; (3) issue final TSCA “framework” rules; and (4) issue rules streamlining its review of pre-manufacture notices.

EPA is also working to issue a draft significant new use rule limiting PFAS use, as part of a broader debate about the regulation of “forever chemicals.” Similarly, chemicals risks continue to play material roles in the development and implementation of other EPA regulations, including numerous residual risk and technology rules in various stages of development (and litigation) under the Clean Air Act.

The Biden Administration is expected to have a fundamentally different view from the Trump Administration on how to evaluate chemicals risks, with material ramifications on all of these ongoing efforts. Substantial changes are expected to EPA’s ongoing TSCA risk evaluations, including:

- Expanding the range of uses addressed
- Broadening the array of exposures and routes of exposure considered (instead of focusing on areas of greatest concern), as well as considering cumulative impacts from exposures
- A particular focus on sensitive subpopulations to advance environmental justice policies
- Assessing exposure risks without considering other regulations that already govern emissions and limit exposure to chemicals (including exposure to air emissions, water supplies and waste sites)
- Completing workplace risk evaluations without considering protective equipment

These likely policy changes could impact not only the upcoming “next 20” risk evaluations, but also the ongoing “first ten” risk evaluations. EPA has finalized only four of the first 10 risk evaluations, but the agency has said that it plans to finalize the remaining six by year’s end (or shortly thereafter). Even if EPA completes all 10 of the risk evaluations, however, the Biden EPA could reopen them or initiate “supplemental” risk evaluations on the 10 substances to address the issues above.

The Biden EPA also likely would revisit EPA’s position in the pending appeals of completed risk evaluations, potentially including settlements that call for remand, which could result in reconsideration of, and revisions to, the risk evaluations by the Biden EPA. If that were to happen, the timeline for any actions by the agency to address the risks identified to date in “first ten” chemicals would be delayed. Regardless of what happens with the first 10 risk evaluations, it is virtually certain that the Biden EPA will take a substantially broader approach with the risk evaluations for the “next twenty” substances. Ultimately, we expect broader “unreasonable risk” findings that will require additional restrictions and requirements to address under TSCA.

While the changes to TSCA’s new chemicals program may be more subtle, they will be equally profound. Consistent with an overall more conservative approach, the Biden EPA’s focus is expected to shift toward requiring a more complete understanding upfront before acting on new chemicals. That is expected to translate into additional EPA requests for upfront data from submitters who seek approval for new substances. Overall, the Biden Administration’s more stringent approach to risk analysis (and resource limitations) will further slow efforts to win EPA approval of new chemicals – particularly during the period soon after inauguration while agency staff work to adapt.

We also expect to see more frequent and extensive use of EPA’s testing and information gathering authorities under TSCA. This is expected to include TSCA §4 testing orders – not only in the context of assessing risks associated with new chemicals, but also with respect to existing substances, particularly those undergoing prioritization and/or risk evaluations. Further, we expect EPA to exercise its authority under TSCA’s §8(a) reporting rules and potentially even the issuance of subpoenas to collect chemical risks information where other less controversial measures prove unsuccessful.

The Biden Administration is also expected to move to set regulations on “forever chemicals” in water and other media (soil and air). For example, it has issued an express policy statement that “Biden will tackle PFAS pollution by designating PFAS as a hazardous substance, setting enforceable limits for PFAS in the Safe Drinking Water Act, prioritizing substitutes through procurement, and accelerating toxicity studies and research on PFAS.” More specifically, EPA is currently working on national drinking water limits for two “forever” chemicals, perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA). EPA is also currently working on [analyses](#) of five specific PFAS: perfluorononanoate (PFNA), perfluorobutyrate (PFBA), perfluorohexanoic acid (PFHxA), perfluorohexane sulfonic acid (PFHxS) and perfluorodecanoate (PFDA).

The Biden Administration will likely accelerate those processes to speed the regulation of these PFAS compounds. Further, the new administration is expected to restrict the introduction of new PFAS (and new uses of PFAS) through refinement and finalization of a Significant New Use Rule (SNUR) under TSCA. Environmental organizations are also pressuring the administration to impose additional testing requirements on industry under TSCA to assess existing PFAS exposure risks.

Finally, environmental and scientific organizations are urging the Biden Administration to make structural changes to the way chemical exposure risks are assessed – both within and beyond TSCA. Requests include unifying cancer and non-cancer risk assessments, placing greater emphasis on environmental justice concerns and sensitive groups, further assessing potential conflicts of interest and increasing the focus on research and data. Early indications suggest the Biden Administration is open to pursuing structural changes to chemical risk assessment, which would have ripple effects across the full range of EPA programs.

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