

Practice Update

2020 Election Impact: The Potential Effect of a Biden Administration on Environmental Policy – Change in Direction

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As presumptive President-Elect Joseph R. Biden and Vice President-Elect Kamala D. Harris plan their administration and their transition, a Biden-Harris Administration can be expected to take more aggressive action in a number of federal environmental policy areas, particularly in the intersection of environmental justice (EJ), COVID-19, and climate impacts on historically disadvantaged, EJ communities.

In many ways, a Biden Administration will mark a sea change in federal environmental policy from the Trump Administration, at least in terms of executive branch action. At the same time, the U.S. Senate may very well remain in Republican control, which would place a limit on the reach of Biden environmental legislative efforts, but less so on agency actions. Evolving U.S. Supreme Court doctrine in administrative law may also constrain the scope of Biden executive action. Still, there may be areas of common ground between Democrats and Republicans in Washington D.C., including on Superfund, Brownfields, and infrastructure initiatives. The Democrats retain control of the U.S. House of Representatives, although with a smaller majority.

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Before the presidential election, in July 2020, the U.S. House passed the Moving Forward Act, a \$1.5 trillion bill, addressing and linking a wide-ranging infrastructure, transportation, housing, clean energy, climate change, and Brownfield package in a consolidated bill. While it did not pass the Senate, it could be a template for future negotiations. Biden likewise proposed a \$1.3 trillion “Build Back Better” infrastructure plan over 10 years. Still, Republican leadership has previously signaled preference for a more limited infrastructure bill – with less focus on climate and emissions issues.

Following the election, on November 8, Biden released the transition team’s website, [BuildBackBetter.com](https://www.buildbackbetter.com), which outlines four priorities for the Biden Administration: the COVID pandemic, economic recovery, climate change, and racial equity.

Below are a range of areas of environmental focus for the Biden Administration:

- **PFAS.** Under the Trump Administration, the U.S. Environmental Protection Agency (EPA) developed a national, multi-year PFAS Action Plan in February 2019 spanning EPA programs. PFAS (and related chemicals) are emerging contaminants present in airport fire-fighting foams and other products, which are persistent in the environment and pose major cleanup complexities. The EPA had started but not yet completed (i) the designation of PFAS as a “hazardous substance” under federal law and (ii) the development of a maximum contaminant level (MCL) for PFAS for drinking water. In the meantime, states have taken significant steps to regulate PFAS and major litigation is pending nationwide. The Biden Administration would be expected to focus on prioritizing and completing many of these EPA steps.
- **Environmental Justice.** The Black Lives Matter movement – along with the COVID pandemic – has placed a national focus and urgency on

environmental justice (EJ). More than 25 years ago, in 1994, the Clinton Administration issued Executive Order 12898, which created an Interagency Working Group on Environmental Justice within the federal government and directed federal agencies to develop and coordinate EJ strategies.

During the campaign, Biden pledged to revisit and revise the 1994 Executive Order, and Biden would be expected to place a major focus on the intersection of EJ, racial justice, COVID, and other environmental challenges. Some view the 1994 Executive Order as overly narrow and more concrete action necessary. In particular, Biden has proposed to (i) establish an Environmental and Climate Justice Division within the U.S. Department of Justice (DOJ) and (ii) elevate and re-establish existing federal EJ policy groups, which would report to the White House Council on Environmental Quality (CEQ). In addition, the Biden campaign pledged to implement by executive action aspects of the proposed Environmental Justice Act of 2019; support plaintiff-driven climate litigation; address legacy pollution; and strengthen and reform EPA's Office of Civil Rights. Overall, early EJ action is expected from the Biden-Harris Administration.

- **Climate Change**. Significant executive branch and administrative actions are also expected from a Biden-Harris Administration to address climate change, spur clean energy, and reverse or amend Trump Administration measures. Biden has pledged a U.S. goal of a 100 percent clean energy economy and net zero-emissions no later than 2050. Biden has also pledged a range of early executive branch actions on climate issues, including the U.S. rejoining the Paris climate accord. Biden's proposals include a \$1.7 trillion climate and EJ plan to advance new clean energy technologies and clean energy jobs; a focus on military and federal facilities, federal procurement, and permitting to support these

goals; and targeting 40 percent of the benefits of federal investments to EJ communities.

- **Superfund Reform & Brownfields.** The Trump Administration placed a major focus on streamlining the EPA's federal Superfund program as part of its core mission, establishing the Superfund Task Force in May 2017 and issuing its final report in September 2019, to expedite and advance the cleanup process, prioritize key sites, and place more emphasis on revitalizing properties. Relatedly, EPA's Brownfield cleanup and redevelopment programs have historically received bipartisan support – and there remains potential to expand EPA Brownfield funding and to ready more Superfund and other contaminated sites for reuse. Implementation of Biden's Build Back Better plan and manufacturing initiatives – including to promote the revitalization or retooling of closed or closing facilities in the U.S. through new federal tax credits – would also be expected to drive more Brownfield investment, cleanup, and redevelopment nationally. This area poses opportunity for bipartisan cooperation.

Although not specifically mentioned in President-Elect Biden's "Build Back Better" plan, several key elements of the Trump Administration's efforts to cut back long-standing environmental regulations could very well be reversed by a Biden-Harris Administration. These include those under the Clean Air Act, the Clean Water Act, and the National Environmental Policy Act.

- **Clean Air Act.** The Trump Administration finalized the Safe Affordable Fuel Efficient (SAFE) Vehicles Final Rule, which rolled back the auto emissions standards promulgated by the Obama Administration. The rule establishes a requirement for a 1.5 percent annual decrease in auto emissions for the next five years, which was a reduction of the previous required decrease from 5 percent per year. The rule also preempts states from enacting more stringent standards. A challenge directed principally at the preemption

provision of the rule is pending in the U.S. Court of Appeals for the D.C. Circuit, which was filed by environmental groups and the attorneys general of several states.

The Trump Administration also finalized a rule rolling back the Obama-era “Methane Emissions Rule,” which under the Obama Administration allowed the EPA to regulate methane emissions from new and modified oil and gas operations under the Clean Air Act. The Trump Administration’s new rule rescinds the greenhouse gas (GHG) and volatile organic compounds (VOC) standards applicable to sources in the oil and gas transmission and storage segments and rescinds the methane requirements of the New Source Performance Standards (NSPS) applicable to sources in the production and processing segments. Specifically, the EPA’s methane deregulations lowered the social cost of methane from the Obama-era estimate of \$1,400 to \$55 per metric ton. The rule was finalized in 2020 and remains the subject of several court challenges.

In addition, in March 2017, President Trump issued an executive order directing the EPA to review the Obama Administration’s Clean Power Program (CPP) and requested that the D.C. Circuit postpone consideration of the CPP pending the administration’s internal review. While the Trump Administration worked on repealing the CPP, it issued the Affordable Clean Energy (ACE) Rule, which established guidelines for states to develop carbon emission reductions standards for existing coal-fired power plants. However, instead of establishing binding, numeric performance standards for CO₂ emissions, the ACE Rule defines the best system of emission reduction (BSER) as “heat rate improvement” measures, also known as efficiency improvements. The rule was finalized in July 2019, and in August 2019, a coalition of 23 attorneys general filed a challenge to the ACE Rule in the D.C. Circuit. This litigation is still on-going.

- **Clean Water Act.** The Trump Administration published and finalized the Waters of the United States (WOTUS) rule, which narrowed the definition of waters subject to federal jurisdiction under the permitting requirements of the Clean Water Act. Disputes over the scope of the definition have been on-going since the 1980s and escalated after the U.S. Supreme Court's 2006 decision in *Rapanos v. United States*, 547 U.S. 715. There, the Supreme Court struck the then-applicable regulatory definition, but there was not majority decision as to what the proper scope of the definition should be, as Justices Scalia and Kennedy each defined the scope differently. One of the first acts of the Trump Administration in 2017 was to issue an executive order requiring the U.S. Army Corps of Engineers and the EPA to promulgate a regulation following Justice Scalia's limited definition rather than Justice Kennedy's. The rule was finalized in 2020 and remains the subject of several court challenges.
- **National Environmental Policy Act (NEPA).** NEPA requires federal agencies to incorporate environmental consideration in their decision-making processes. It requires detailed analyses of the environmental impact of "major federal actions," which analyses are often contained in an Environmental Impact Statement (EIS). The CEQ finalized a rule that, in the opinion of many environmental groups, weakens NEPA by limiting the scope review in an EIS, most significantly limiting the extent to which climate change may be considered to inform those impacts. As is the case with other Trump Administration environmental regulations, these regulations have been the subject of judicial challenges.

Formally reversing these Trump Administration regulations will generally require rule-making under the federal Administrative Procedure Act, a lengthy process that entails issuing draft regulations, accepting and reviewing comments, and issuing a final rule. However, the process could be shortened by having a Biden DOJ consent to entry of

judgments vacating the Trump Administration's regulations, which reversal would restore the previous regulations.

Overall, the breadth and scope of Biden-Harris Administration steps in the environmental arena will depend in part on the composition of the U.S. Congress. If the Senate remains in Republican control, Biden would be expected to rely more on executive branch actions and/or seek cooperation and compromise with the Senate, such as on infrastructure or manufacturing issues. Still, the Biden-Harris Administration has signaled that it will have a major, early focus on the intersection of EJ, racial equity, public health, and environmental protection policies and on climate change challenges.

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