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Client Alert: What to Expect from the Biden Administration's Environmental Policy

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During the 2016 campaign, Candidate Trump made one priority clear and that would be deregulating federal agencies should he win the presidency. In particular, Candidate Trump stated the United States Environmental Protection Agency (U.S. EPA) was at the top of his list for deregulation. Once in office, President Trump proposed to cut the U.S. EPA by 31 percent, lay off 25 percent of the employees, and eliminate 56 programs. He also signed an executive order to repeal most of President Obama's rules and policies related to climate change.

In stark contrast, during the 2020 campaign, Candidate Biden made it clear he intended to reverse President Trump's deregulation policy and to focus on climate change and environmental justice.^[1] Immediately after being sworn into office, President Biden signed several executive orders that withdrew a series of the Trump Administration's executive orders—a similar action that President Trump did once sworn into office in 2017. But, this is the only thing that the two Presidents have in common when it comes to implementing their environmental policies.

In his first executive order addressing environmental regulation,^[2] the Biden Administration outlined its policy:

Our Nation has an abiding commitment to empower our workers and communities; promote and protect our public health and the environment; and conserve our national treasures and monuments, places that secure our national memory. Where the Federal Government has failed to meet that commitment in the past, it must advance environmental justice. In carrying out this charge, the Federal Government must be guided by the best science and be protected by processes that ensure the integrity of Federal decision-making. It is, therefore, the policy of my administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.^[3]

The executive order further stated that the administration would conduct an immediate review of agency actions taken between January 20, 2017 and January 20, 2021. Further, in a letter from the U.S. EPA Acting General Counsel, President Biden requested a review of pending regulations by the new administration. Likewise, the Biden Administration asked the Department of Justice (DOJ) to stay litigation challenging the Agency's rules^[4]

These actions are not uncommon for a new administration from opposing parties. Like the Trump Administration, the Biden Administration began to implement its environmental policy via executive orders. However, unlike President Trump, President Biden has also issued far more U.S. EPA Federal Register filings in the first month of his administration (Figure 1).^[5] Unlike the Trump Administration, this signals that the Biden Administration will take an aggressive approach to environmental regulation and enforcement.



Figure 1. EPA Federal Register filings during the first 30 days of the past five administrations.

Regulations to be Reviewed, Revised, or Rescinded; Delayed Effective or Implementation Dates for Regulations.

Like the Trump Administration, the Biden Administration has already identified regulations that it intends to immediately review and possibly revise or rescind. These include:

Air

- "Standards of Performance for Volatile Organic Liquid Storage Vessels (Including Petroleum Liquid Storage Vessels) for Which Construction, Reconstruction, or Modification Commenced After July 23, 1984," 86 Fed. Reg. 5013 (January 19, 2021).
- "Review of the Ozone National Ambient Air Quality Standards," 85 Fed. Reg. 87256 (December 31, 2020).
- "Review of the National Ambient Air Quality Standards for Particulate Matter," 85 Fed. Reg. 82684 (December 18, 2020).
- "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act," 85 Fed. Reg. 73854 (November 19, 2020).
- "National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review," 85 Fed. Reg. 31286 (May 22, 2020).
- "Air Plan Approval; Texas; Dallas-Fort Worth Area Redesignation and Maintenance Plan for Revoked

- Ozone National Ambient Air Quality Standards," 85 Fed. Reg. 19096 (April 6, 2020).
- "Air Plan Approval; Texas; Houston-Galveston-Brazoria Area Redesignation and Maintenance Plan for Revoked Ozone National Ambient Air Quality Standards; Section 185 Fee Program," 85 Fed. Reg. 8411 (February 14, 2020).
- "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act," 84 Fed. Reg. 69834 (December 19, 2019).
- "Findings of Failure To Submit a Clean Air Act Section 110 State Implementation Plan for Interstate Transport for the 2015 Ozone National Ambient Air Quality Standards (NAAQS)," 84 Fed. Reg. 66612 (December 5, 2019).
- "Adopting Requirements in Emission Guidelines for Municipal Solid Waste Landfills," 84 Fed. Reg. 44547 (August 26, 2019).
- "U.S. Environmental Protection Agency, Memorandum Regarding Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans (October 9, 2020).

Climate Change

- "Pollutant-Specific Significant Contribution Finding for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, and Process for Determining Significance of Other New Source Performance Standards Source Categories," 86 Fed. Reg. 2542 (January 13, 2021).
- "Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations," 84 Fed. Reg. 32520 (July 8, 2019).
- "Control of Air Pollution From Airplanes and Airplane Engines: GHG Emission Standards and Test Procedures," 86 Fed. Reg. 2136 (January 11, 2021).
- "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration," 85 Fed. Reg. 57398 (September 15, 2020).
- "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review," 85 Fed. Reg. 57018 (September 14, 2020).
- "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program," 84 Fed. Reg. 51310 (September 27, 2019).
- "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks," 85 Fed. Reg. 24174 (April 30, 2020).
- "Protection of Stratospheric Ozone: Revisions to the Refrigerant Management Program's Extension to Substitutes," 85 Fed. Reg. 14150 (March 11, 2020).

Toxics

- "Hexachlorobutadiene (HCBd); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h)," 86 Fed. Reg. 922 (January 6, 2021).
- "Pentachlorothiophenol (PCTP); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h)," 86 Fed. Reg. 911 (January 6, 2021).
- "Phenol, Isopropylated Phosphate (3:1) (PIP 3:1); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h)," 86 Fed. Reg. 894 (January 6, 2021).
- "Decabromodiphenyl Ether (DecaBDE); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h)," 86 Fed. Reg. 880 (January 6, 2021).
- "2,4,6-tris(tert-butyl)phenol (2,4,6-TTBP); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h)," 86 Fed. Reg. 866 (January 6, 2021).
- "Methylene Chloride (MC); Final Toxic Substances Control Act (TSCA) Risk Evaluation; Notice of

- Availability," 85 Fed. Reg. 37942 (June 24, 2020).
- "Pesticides; Agricultural Worker Protection Standard; Revision of the Application Exclusion Zone Requirements," 85 Fed. Reg. 68760 (October 30, 2020).
- "Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h)," 84 Fed. Reg. 36728 (July 29, 2019).
- "Chlorpyrifos; Final Order Denying Objections to March 2017 Petition Denial Order," 84 Fed. Reg. 35555 (July 24, 2019).
- "Methylene Chloride; Regulation of Paint and Coating Removal for Consumer Use Under TSCA Section 6(a)," 84 Fed. Reg. 11420 (March 27, 2019).
- "Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act," 82 Fed. Reg. 33726 (July 20, 2017).

EPA Science, Litigation, and Regulatory Review

- "Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information," 86 Fed. Reg. 469 (January 6, 2021).
- "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process," 85 Fed. Reg. 84130 (December 23, 2020).
- "EPA Guidance; Administrative Procedures for Issuance and Public Petitions," 85 Fed. Reg. 66230 (October 19, 2020).
- "Streamlining Procedures for Permit Appeals," 85 Fed. Reg. 51650 (August 21, 2020).
- "On-Site Civil Inspection Procedures," 85 Fed. Reg. 12224 (March 2, 2020).

Waste

- "Review of Dust-Lead Post Abatement Clearance Levels," 86 Fed. Reg. 983 (January 7, 2021).
- "Review of the Dust-Lead Hazard Standards and the Definition of Lead-Based Paint," 84 Fed. Reg. 32632 (July 9, 2019).
- "Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; A Holistic Approach to Closure Part A: Deadline To Initiate Closure," 85 Fed. Reg. 53516 (August 28, 2020).
- "Hazardous and Solid Waste Management System: Disposal of CCR; A Holistic Approach to Closure Part B: Alternate Demonstration for Unlined Surface Impoundments," 85 Fed. Reg. 72506 (November 12, 2020).
- "Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Amendments to the National Minimum Criteria (Phase One, Part One)," 83 Fed. Reg. 36435 (July 30, 2018).
- "Financial Responsibility Requirements Under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry," 83 Fed. Reg. 7556 (February 21, 2018).

Water

- "National Primary Drinking Water Regulations: Lead and Copper Rule Revisions," 86 Fed. Reg. 4198 (January 15, 2021).
- "NPDES Electronic Reporting Rule—Phase 2 Extension," 85 Fed. Reg. 69189 (November 2, 2020).
- "Steam Electric Reconsideration Rule," 85 Fed. Reg. 64650 (October 13, 2020).
- "Drinking Water: Final Action on Perchlorate," 85 Fed. Reg. 43990 (July 21, 2020).
- "Clean Water Act Section 401 Certification Rule," 85 Fed. Reg. 42210 (July 13, 2020).
- "The Navigable Waters Protection Rule: Definition of 'Waters of the United States,'" 85 Fed. Reg. 22250 (April 21, 2020).

- “U.S. Environmental Protection Agency, Evaluation of Maryland's Phase III Watershed Implementation Plan (WIP),” (December 19, 2019).

This review concerns many industry stakeholders that based their business decisions on the industry-friendly Trump Administration.

Rescinded Executive Orders, Presidential Memorandum, Presidential Reports, Guidance, and Technical Reports.

In the first six months of the Trump Administration, President Trump signed a series of executive orders rescinding the Obama Administration's executive orders, Presidential Memorandum, Presidential Reports, and U.S. EPA Guidance and Technical Reports.^[6] Most of these focused on President Obama's climate change policy. It is expected that President Biden will take similar actions.

The Supreme Court and the Biden Administration

On January 19, 2021, the U.S. Circuit Court of Appeals for the D.C. Circuit issued a decision that vacated the Trump Administration's Affordable Clean Energy Rule,^[7] which the Trump Administration promulgated after repealing and replacing the Obama Administration's Clean Power Plan – a plan intended to combat climate change. The vacatur appears as a win for the Biden Administration, which is making climate change a major environmental policy, allowing U.S. EPA to promulgate more stringent rules. However, there is an unknown factor – the new Supreme Court. If there is a petition to the Supreme Court to review the D.C. Circuit's opinion and it is granted, the rule's vacatur will be before a conservative majority that includes three Trump-appointed justices.

However, it cannot be assumed that the Supreme Court will be deferential to the Trump's Administration's Affordable Clean Energy (ACE) rule. The case, *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) that shaped courts' deference to Agency actions (such as promulgating regulations), has been increasingly under attack primarily by conservative judges. Following the strict interpretation of law that the late Justice Scalia took, both Justice Gorsuch and Justice Kavanaugh have written opinions challenging Agency deference. While Justice Coney Barret has not issued any significant administrative law opinions, she is a textualist that stresses the importance of interpreting constitutional and statutory provisions consistent with the original meaning of their text.

This does not bode well for the Biden Administration and its aggressive environmental policy. There is a good chance that the Supreme Court will hear challenges to his regulations and may see the Supreme Court limit Agency deference. Thus, the Biden Administration may face a difficult time pushing his environmental policies forward.

Conclusion

Although the Biden Administration has only been in office for a little more than a month, his aggressive approach to environmental policy is clear. While hailed by environmentalist and non-governmental organizations, industry is facing uncertainty of how a radical change from regulation under the Trump Administration to regulation under President Biden will impact business decisions. This uncertainty is compounded by President Trump's appointment of conservative judges that seek the opportunity to limit Agency deference. Thus, while the Biden Administration hopes to make environmental policies a priority, he could face challenges that limit his ability to regulate.

^[1] “Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” <https://www.epa.gov/environmentaljustice>, last visited February 5, 2021.

^[2] Executive Order, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (January 20, 2021).

^[3] *Id.*

^[4] Correspondence from Melissa A. Hoffer, Acting U.S. EPA General Counsel, to Jean E. Williams and Bruce S. Gelber, Deputy Assistant Attorneys General, Environment and Natural Resources Division, U.S. Department of Justice (January 21, 2021).

^[5] This does not include additional rules that could impact the environment that the Secretary of the Interior must reconsider, revise, or rescind.

^[6] C.A. Budzynski (July 26, 2017), Environmental Law: What to Expect from President Trump's Administration, available at <https://www.shumaker.com/latest-thinking/publications/2017/07/environmental-law-what-to-expect-from-president-trumps-administration>.

^[7] *American Lung Association v. EPA*, No. 19-1140 (Jan. 19, 2021), available at [https://www.cadc.uscourts.gov/internet/opinions.nsf/6356486C5963F49185258662005677F6/\\$file/19-1140.correctedopinion.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/6356486C5963F49185258662005677F6/$file/19-1140.correctedopinion.pdf).