

EPA under the Biden Administration – What the Regulated Community Can Expect

By Brett D. Heinrich and Dana B. Mehlman
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President Joseph R. Biden and his Administration will present a stark contrast to his predecessor’s approach to the environment. First and foremost, President Biden believes that climate change is the greatest threat facing our country and our planet, and he has a bold plan for a clean energy revolution. Biden has already directed all federal agencies and executive departments to immediately review and “take appropriate action to address” any regulations or other executive actions enacted by the Trump Administration “that were harmful to public health, damaging to the environment, unsupported by the best available science, or otherwise not in the national interest.”

I. The Familiar – A Renewed Focus on Environmental Enforcement and Compliance

Civil Enforcement

Many observed that, under the Trump Administration, measures of civil enforcement were indicative of a less aggressive enforcement program. The United States Environmental Protection Agency (EPA) took a “compliance first” approach, and was less concerned with enforcement than it was with compliance. Further, in his four-year term, Trump and his administration rolled back more than 100 environmental rules, dismantling policies related to air pollution and emissions, drilling and extraction, infrastructure and planning, wildlife, water pollution, and toxic chemicals.¹ Biden will likely seek to undo many of these deregulatory actions from the past four years.

The Biden Administration will return to an “enforcement first” approach, exercising its enforcement authority and reasserting its control. While this change in enforcement focus may not occur immediately, all regulated parties should anticipate an increase in the number of federally led cases as well as review and subsequent revisions of the EPA Strategic Plan and National Compliance Initiatives.

The Biden Administration will seek to strengthen environmental protections by promulgating new standards and by revising existing standards. For example, Biden has pledged to set enforceable limits for per- and polyfluoroalkyl substances (PFAS) in drinking water and to designate PFAS as a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In addition, due to Biden’s concurrent focus on the COVID-19 pandemic, the Biden Administration will likely enhance Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) enforcement to focus on the import and distribution of disinfectants and other antimicrobial products that make improper claims.

Criminal Enforcement

Under the Trump Administration, the EPA referred the fewest number of criminal anti-pollution cases to the Justice Department in 30 years. It is likely Biden will direct his EPA and Justice Department to pursue these cases to the fullest extent permitted by law and, when needed, seek additional legislation to hold corporate executives personally accountable, including jail time where merited.

¹ For specific examples, see: <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html>.

II. The Unfamiliar – A Comprehensive Approach to Global Climate Change/Greenhouse Gas

Background

In accepting that the country is already experiencing the impact of climate change in communities across the nation, Biden has framed climate change as one of the most important issues his administration will confront. Tackling climate change was a central plank of Biden's presidential campaign and centers on an economy-wide net-zero carbon emissions target by 2050. The United States accounts for only 15 percent of global emissions; in order to solve the climate change, an international approach is necessary.

- Rejoining of the Paris Climate Accord – On Wednesday January 20, 2021, the United States rejoined the 2015 Paris Climate Accord. Under the Accord, the United States pledged to reduce greenhouse gas emissions by 26 percent to 28 percent below 2005 levels by 2025. According to the Biden Administration, rejoining the Accord sends a signal to the international community and will also serve as a method for driving domestic policy.
- Revocation of the Keystone XL Pipeline Project – In addition, as part of his ambitious first-day agenda to tackle climate change, Biden signed an executive order revoking the presidential permit issued for the controversial Keystone XL Pipeline, a project that had planned to ship oil sands from western Canada to refineries on the United States Gulf Coast.
- Revival of the Obama-Era Greenhouse Gas (GHG) Emission Standards – On January 19, 2021, the D.C. Circuit vacated the Trump Administration's rollback of Obama-era greenhouse gas emission standards for existing power plants as well as the rule intended to replace them, finding the actions "rested critically on a mistaken reading of the Clean Air Act." As such, the Biden Administration no longer has to implement the rolling back of official agency regulations, and can instead target regulating carbon dioxide and other GHGs.
- Ban on Offshore Drilling – The Biden Administration will pursue a global moratorium on offshore drilling in the Arctic and reestablish climate change as a priority for the Arctic Council. The Biden Administration will look to reestablish the United States commitment to remove Arctic waters from consideration for oil and gas leasing and also work with Arctic Council member nations to extend the offshore drilling moratorium globally.
- Other Programs and Initiatives – Beyond all of the above, Biden plans to elevate climate change as a national security priority. Biden also plans to convene a climate world summit with the global goal of further reducing emissions beyond the Paris Climate Accord levels, including in industries such as aviation and shipping. Biden will also look to tie in trade policy with climate change emissions parameters.

III. Enhanced Focus on Securing Environmental Justice

Biden plans to make it a priority for all agencies to engage in community-driven approaches to develop solutions for environmental injustices affecting communities of color and low-income and indigenous communities. The Biden Administration will establish a new Environmental and Climate Justice Division within the DOJ to complement the work of the Environment and Natural Resources Division. In line with the new Division's mandate, Biden will instruct the Attorney General to: (i) implement, to the extent possible by executive action, Senator Cory Booker's (D-NJ) Environmental Justice Act of 2019; (ii) increase enforcement, in line with the commitments already detailed in the Biden Plan; (iii) strategically support ongoing plaintiff-driven climate litigation against polluters; (iv) address legacy pollution that includes real remedies to make communities safe, healthy, and whole; and (v) work hand-in-hand with EPA's Office of Civil Rights.

Biden will elevate and reestablish the White House Environmental Justice Advisory Council and White House Environmental Justice Interagency Council, both reporting directly to the Chair of the White House Council on Environmental Quality (CEQ). To support this work, Biden's CEQ will also have senior and dedicated environmental justice staff. These two councils will be charged with revising the 1994 Executive Order 12898 (EO 12898) on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations in order to address current and historic environmental injustice, in collaboration with local environmental justice leaders. These councils will be tasked with developing clear performance metrics to ensure accountability in the implementation of the Executive Order. Once the revised EO is finalized, the White House Environmental Justice Advisory Council and White House Environmental Justice Interagency Council will publish an annual public performance scorecard on its implementation.

IV. Biden's Plan for a Clean Energy Future

Biden has proposed an ambitious plan to make \$2 trillion in accelerated investments over four years on clean energy projects, to end carbon emissions from power plants by 2035, and to set the United States on the path to net-zero greenhouse gas emissions by 2050. Among Biden's proposed investments are infrastructure, the auto industry, the power sector, buildings, innovation, agriculture and conservation.

- Building a Modern Infrastructure – Biden plans to create millions of jobs building and upgrading a cleaner, safer, stronger infrastructure in both rural and urban areas. Included in Biden's ambitious plans are the transformation of our transportation infrastructure systems, including roads and bridges, rail, aviation, ports, and inland waterways, thereby making the movement of goods and people faster, cheaper, and cleaner. Biden will seek to expand rail and municipal transit networks as well as broadband and wireless broadband via 5G.
- Positioning the United States Auto Industry to Win the 21st Century with Technology Invented in America – In order to achieve this goal, Biden plans to use the power of federal procurement to increase demand for American-made, American-sourced clean vehicles. He plans to encourage consumers and manufacturers to go clean by providing consumers rebates to swap out old, less-efficient vehicles as well as targeted incentives for manufacturers to build or retool factories to assemble zero-emission vehicles, parts and associated infrastructure. In addition, he plans to make major public investments in automobile infrastructure, including 500,000 electric vehicle charging stations, and accelerating research on battery technology and supporting the development of domestic production capabilities.
- Achieve a Carbon Pollution-Free Power Sector by 2035 – Biden's plan is to marshal an historic investment in energy efficiency, clean energy, electrical systems and line infrastructure that will make it easier to electrify transportation, and new battery storage and transmission infrastructure that will address bottlenecks and unlock our full clean energy potential. To accomplish this, the Biden Administration plans to reform and extend current tax incentives that generate energy efficiency and clean energy jobs; develop innovative financing mechanisms that leverage private sector dollars to maximize investment in the clean energy revolution; and establish a technology-neutral Energy Efficiency and Clean Electricity Standard (EECES) for utilities and grid operators.
- Make Dramatic Investments in Energy Efficiency in Buildings – Biden seeks to upgrade four million commercial buildings and weatherize two million residential homes over four years. This historic investment in energy upgrades of homes, offices, warehouses, and public buildings will create jobs, make the places we live, work, and learn healthier, and reduce electricity bills for families, businesses, and local governments. Biden's residential plan is to include direct cash rebates and low-cost financing to upgrade and electrify home appliances, install more efficient windows, and cut residential energy bills.
- Pursue a Historic Investment in Clean Energy Innovation – As part of Biden's commitment to accelerate R&D investment, he will focus on strategic research areas like clean energy, clean transportation, clean industrial processes and clean materials over the next four years. Biden plans to create a new cross-agency Advanced Research Projects Agency on Climate to target technologies such as grid scale storage, advanced nuclear reactors, refrigerants with no global warming potential, production of carbon-free hydrogen, decarbonizing the food and agricultural sector, and capturing carbon dioxide through direct air capture systems. Investments will also be made in national laboratories and Historically Black Colleges and Universities to support and train existing and new talent.
- Advance Sustainable Agriculture and Conservation – Biden plans to invest in addressing the backlog of remediation, reclamation and restoration projects. Biden's initial focus will be on plugging orphaned or abandoned oil and gas wells and restore and reclaim abandoned coal, hardrock and uranium mines. Biden hopes to establish a new voluntary carbon farming market that rewards farmers for the carbon they sequester on their land and the greenhouse gas emission reductions, including from methane, that they secure. Biden has also proposed to reinvest in land grant universities' agricultural research so the public owns patents to agricultural advances.

V. Key Environmental Cabinet and Cabinet-Rank Nominees

Michael S. Regan – Administrator of the Environmental Protection Agency (EPA)

On December 17, 2020, Biden picked Michael S. Regan as his choice to lead the EPA, one of the cabinet departments impacted most by the Trump Administration. Mr. Regan's confirmation hearing before the Senate Environment and Public Works Committee took place on February 3, 2021, where he received strong bipartisan support. Mr. Regan was named Secretary of the North Carolina Department of Environmental Quality (DEQ) on January 3, 2017. As DEQ secretary, Regan oversaw the state agency whose mission is to protect North Carolina's environment and natural resources and administer regulatory and public assistance programs aimed at protecting the quality of North Carolina's air, water and land, its coastal fisheries, and the public's health. Prior to his service to North Carolina, he served as the Associate Vice President of U.S. Climate and Energy and Southeast Regional Director of the Environmental Defense Fund (EDF) where he led the EDF's efforts to reduce the impacts of climate change and air quality pollution. He also worked with the Environmental Protection Agency's air quality and energy programs for both the Clinton and Bush Administrations.

During his tenure as DEQ Secretary, he launched an Environmental Justice and Equity Board with a charter to advise the Secretary on how best to advance environmental justice and promote community engagement, particularly across historically underserved and marginalized communities. He also worked to develop the North Carolina's Clean Energy Plan, which aims to reduce private sector greenhouse gas emissions by 2030 and ultimately move towards carbon neutrality by 2050. Some of his greatest achievements include securing an agreement with Duke Energy for the largest coal ash contamination cleanup in the country and ordering the chemical company Chemours to address and eliminate PFAS into the Cape Fear River.

Brenda Mallory – Chairman of the Council on Environmental Quality (CEQ)

Brenda Mallory is the Director of Regulatory Policy at the Southern Environmental Law Center (SELC), where she coordinates the development and implementation of SELC's regulatory policy agenda. She joined SELC after serving as the Executive Director and Senior Counsel for the Conservation Litigation Project, a project supporting the protection of environmental and conservation values on public lands.

During the Obama Administration, Mallory served as the General Counsel for the White House Council on Environmental Quality, supporting the administration in advancing the President's environmental, energy, and natural resources agenda and overseeing environmental reviews for virtually all major infrastructure projects, including pipelines and highways. Prior to joining CEQ, among other roles, Brenda served as the Acting General Counsel and the Principal Deputy General Counsel at the EPA.

John Kerry – Special Presidential Envoy for Climate

On November 23, Biden announced that he would appoint John Kerry as Special Presidential Envoy for Climate, a new Cabinet-level role in which the former Secretary of State will seek to persuade skeptical global leaders, impacted by the Trump Administration's hostility toward climate science, that the United States is prepared to resume its leadership role. As the Special Presidential Envoy for Climate, Former Secretary of State John Kerry has become the highest-ranking United States official ever to have a portfolio exclusively devoted to climate change. Not only will Kerry serve in this new Cabinet-level position, but he will also serve on the National Security Council, indicative of the effect climate change has on national security. The elevation of climate change represented by Kerry's appointment indicates a clear shift in both policy and approach from the prior administration's denial of the climate crisis.

Kerry has long worked on climate issues. As Secretary of State, he played a key role in negotiating the Paris agreement, which was adopted by nearly 200 nations in 2015 and was aimed at addressing the negative impacts of climate change.

Gina McCarthy – Domestic Climate Coordinator/White House Climate Czar

Gina McCarthy will serve as a domestic counterpoint to John Kerry in his position as Special Presidential Envoy for Climate. McCarthy's assignment is ambitious. She will be responsible for coordinating efforts across the entire federal government aimed at significantly lowering United States greenhouse gas emissions.

McCarthy led the Environmental Protection Agency under former President Barack Obama and is currently chief executive of the Natural Resources Defense Council. McCarthy has years of experience in environmental policy at both the state and

federal levels. As EPA administrator, she oversaw Obama's Clean Power Plan, the first national standards for reducing carbon dioxide emissions from power plants. Earlier in her career, McCarthy was commissioner of the Connecticut Department of Environmental Protection and helped develop a multistate program to reduce greenhouse gas emissions.

Deb Haaland – Secretary of the Department of the Interior (DOI)

The nomination of Deb Haaland to lead the Interior Department is historic. If confirmed, she will become the first Native American cabinet secretary. The Department of the Interior manages more than 440 million acres of public lands, including national parks and monuments, and oversees energy development on public lands and waters as well as the Fish and Wildlife Service and the Bureau of Reclamation. During her time in Congress, Haaland has served as Vice Chair of the United States House Committee on Natural Resources; as the Chair of the Subcommittee on National Parks, Forests and Public Lands; and as a member of the subcommittee for Indigenous Peoples of the United States.

Further, Haaland has special insight never before represented by an Interior Secretary, as the Department is involved in many aspects of the lives of Native Americans, through its oversight of the Bureau of Indian Affairs, the Bureau of Indian Education, and the Bureau of Trust Funds Administration, responsible for holding billions of dollars generated from tribal lands. Historically, the relationship between the Interior Department and the 574 federally recognized tribes has been troubling, with allegations of treaties not honored by the United States as well as mismanagement of billions of trust fund dollars.

Jennifer Granholm – Secretary of the Department of Energy (DOE)

Former Michigan Gov. Jennifer Granholm has been nominated to run the Energy Department, the agency that would play a key role in helping develop the technologies needed to fulfill Biden's pledge to move the country towards a clean-energy transformation. On Wednesday, February 3, 2021, the Senate Energy and Natural Resources Committee voted 13 to 4 to advance the nomination to the full Senate. Granholm is experienced in dealing with the auto industry, which could be advantageous as Biden seeks to speed the rollout of electric vehicles and the network of charging stations needed to power them. Transportation is the largest greenhouse gas-emitting sector in the United States, so Biden's quest to achieve net-zero greenhouse gas emissions by 2050 requires large-scale adoption of electric cars, trucks, buses, trains and planes.

Pete Buttigieg – Secretary of the Department of Transportation (DOT)

On Tuesday, February 2, 2021, by a vote of 86 to 13, the Senate confirmed Pete Buttigieg as President Biden's Transportation Secretary. As a presidential candidate, Buttigieg rolled out a \$1 trillion infrastructure plan that prioritized upgrading the country's crumbling infrastructure and expanding broadband internet access through payments to state and local governments.

The role of transportation secretary is expected to play a central role in Biden's push for a bipartisan infrastructure package. During his Senate confirmation hearing on Thursday, January 21, 2021, Buttigieg touted Biden's climate-focused policies and discussed a generational opportunity to transform the country's transportation and infrastructure systems. He also indicated that he supported "green" investments and that it was essential to act on climate.

The Bottom Line

All regulated parties under a Biden-led EPA should expect an increase in environmental enforcement, not only in the number of cases brought but also in the severity of these cases from a fine and penalty standpoint. The Biden Administration is proposing a bold new approach to addressing climate change and greenhouse gas emissions. Moreover, the Biden Administration will reenergize environmental justice programs and actions. The Biden Administration's proposed investment in clean energy projects include infrastructure, the auto industry, clean energy innovation and power, energy efficient buildings and sustainable agriculture. With an ambitious agenda, the Biden Administration's effect on the regulated community and the environment is likely to be impactful.

If you have any questions regarding the topics discussed in this article, please contact **Brett D. Heinrich** at +1 (312) 609-7799, **Dana B. Mehlman** at +1 (312) 609-7509, or any Vedder Price attorney with whom you have worked.