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CLIMATE REREGULATION IN A BIDEN ADMINISTRATION

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The Sabin Center for Climate Change Law develops legal techniques to fight climate change, trains law students and lawyers in their use, and provides the legal profession and the public with up-to-date resources on key topics in climate law and regulation. It works closely with the scientists at Columbia University's Earth Institute and with a wide range of governmental, non-governmental and academic organizations.

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CONTENTS

1. Introduction	1
2. Executive Actions	3
2.1 Rejoin the Paris Agreement	3
2.2 Recommit to Reducing Greenhouse Gas Emissions	3
2.3 Reverse the “America-First Offshore Energy Strategy”	4
2.4 Restore National Monuments	5
2.5 Reverse Expedition of Fossil Fuel Infrastructure Approvals	7
2.6 Reverse Expedited Environmental Reviews of Fossil Fuel Projects	9
2.7 Withdraw Executive Orders on Reducing Regulation and Controlling Regulatory Costs	10
2.8 Reestablish Climate Science Advisory Committee	11
2.9 Reaffirm Environmental Protections for the Oceans, Coasts, and Great Lakes	12
2.10 Revoke Presidential Authorization for Keystone XL Pipeline	13
2.11 Reinstate and Affirm Environmental Reviews notwithstanding COVID-19	14
2.12 Halt Deregulatory Orders following COVID-19	15
2.13 Reassess Agencies’ Regulatory Agendas	16
3. Environmental Protection Agency	17
3.1 Strengthen Greenhouse Gas Controls on Existing Power Plants	17
3.2 Maintain Greenhouse Gas Controls on New Power Plants	18
3.3 Reinstate and Expand Methane Emissions Controls on Oil and Gas Facilities	18
3.3.1 New Sources	18
3.3.2 Existing Sources	19
3.4 Reinstate Controls on Other Climate Super-Pollutants	20
3.4.1 The SNAP Rule	20
3.4.2 Refrigeration Leak Detection and Maintenance Rule	21

3.5	Halt the Distortion of Cost-Benefit Analysis	21
3.6	Reinstate Clean Air Act Permitting Requirements	22
3.7	Restore the Role of Science in Regulation	22
3.8	Maintain and Strengthen Controls on Toxic Coal Ash	23
4.	Department of the Interior	25
4.1	Protect Public Lands From Fossil Fuel Development	25
4.1.1	Reinstate Restrictions on Oil and Gas Development in Sage Grouse Habitat.....	25
4.1.2	Limit Oil and Gas Development in the Arctic National Wildlife Refuge.....	26
4.1.3	Restore the Federal Coal Leasing Moratorium and Programmatic Review	26
4.1.4	Halt Leasing Plan for Outer Continental Shelf Oil and Gas.....	28
4.2	Maintain Updated Coal, Oil and Gas Valuation Rule.....	29
4.3	Reinstate Climate Change and Mitigation Policies.....	29
4.4	Reinstate Policy for Managing National Parks in the Context of Continuous Change.....	30
4.5	Restore BLM Planning 2.0 Rule	30
4.6	Endangered Species Act Regulations	31
5.	Department of Energy	33
5.1	Reverse Expedited Approval of Natural Gas Exports	33
5.2	Tighten Energy Efficiency Standards for Lightbulbs	34
5.3	Tighten Energy Efficiency Standards for Dishwashers.....	36
5.4	Tighten Energy Efficiency Standards for Manufactured Housing.....	37
5.5	Maintain Existing Test Procedure Interim Waiver Process.....	38
5.6	Rescind Changes to the “Process Rule”	39
6.	Department of Transportation.....	40
6.1	Reinstate Greenhouse Gas Metric for Assessing Performance	40
6.2	Reinstate National Tire Fuel Efficiency Consumer Information Program	40
6.3	Set Effective Date for Corporate Average Fuel Economy Standard Penalties Rule.....	41

7. Joint Actions by EPA and the Department of Transportation	41
7.1 Restore California’s Authority to Set Climate-Protective Motor Vehicle Standards and State and Local Governments’ Authority to Adopt Rules that May Affect Fuel Economy	41
7.1.1 California’s Preemption Waiver	41
7.1.2 Other State and Local Vehicle Initiatives	43
7.2 Strengthen Motor Vehicle Emissions Standards	43
8. Forest Service	44
8.1 Withdraw Proposed Amendments to NEPA Procedures	44
8.2 Abandon Proposal to Streamline Oil and Gas Permitting in National Forests	45
8.3 Withdraw Plans to Allow Tree Harvesting and Road Construction in the Tongass National Forest	46
9. Council on Environmental Quality	46
9.1 Strengthening NEPA Regulations	46
9.2 Guidance on Climate Change and NEPA Reviews	48
10. Housing and Urban Development	49
10.1 Improve Floodplain Management and Mitigating Future Flood Risk	49
11. Small Business Administration	50
11.1 Apply the Federal Flood Risk Management Standard to Federal Loans	50
Appendix 1: Draft Executive Order on Addressing the Climate Crisis	51
Appendix 2: Actions a Biden Administration Can Undertake on Its First Day	55
Appendix 3: Table of Agency Reregulatory Actions Proposed	56

1. INTRODUCTION

On January 20, 2017, Inauguration Day, the Sabin Center for Climate Change Law at Columbia Law School launched the Climate Deregulation Tracker, the first of what would become numerous online trackers, news reports, academic analyses, and other resources designed to spotlight the Trump administration's use and abuse of executive authority to pursue its agenda to cut back on government regulations and to promote the extraction and use of fossil fuels. The Climate Deregulation Tracker has had a relatively narrow purpose: to keep tabs on the Trump administration's efforts to dismantle the federal government's climate-related regulations and policies and help inform members of the public so they more effectively voice their views on deregulation. In the almost four years since its launch, the Tracker has logged 159 executive branch actions that fit the bill. President Trump's actions have frequently taken the form of executive orders that describe national policies, such as prioritizing fossil fuel production and distribution, emphasizing economic uses of natural resources, expediting federal environmental reviews for infrastructure projects, and decreasing emissions and efficiency standards across the board. The President's executive orders have resulted in numerous agency actions designed to achieve outcomes consistent with the orders' stated policies. Examples include rules delaying, rescinding, and replacing greenhouse gas emissions standards for power plants, automobiles, oil and gas operations and landfills, and the revocation of policies and guidance that incorporate climate impacts into federal permitting, investment and other decision making.

This report charts a course for executive action that, under a new presidential administration, could fill a Climate Reregulation Tracker. For purposes of this analysis, we assume a Biden administration is in power in January 2021. We further assume that the new administration faces a divided Congress. As a consequence, we do not address the shape of potential climate legislation or reregulatory steps that Congress could undertake, though such steps would certainly be significant if they become available.¹ The actions we discuss here are

¹ For a thorough discussion of Congressional oversight powers, including disapproval of rules pursuant to the Congressional Review Act, see CONG. RESEARCH SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL (2020).

designed to restore (and enhance) facets of previously existing climate governance. Reregulating to address climate change is not uniformly an easy task. Where agencies have finalized rules that fail to incorporate or reverse climate mitigation and adaptation goals, for example, the process of reregulating will usually require starting the rulemaking process over. On the other hand, a new administration could revoke President Trump's executive orders, memoranda, and proclamations, as well certain types of departmental or agency directives and orders, immediately.

Throughout this paper we note the steps that a Biden administration can take to repair and rebuild the federal climate governance framework. These suggestions include, at the outset, executive actions for the President himself to take, and then address steps that each affected agency can take. Examples of such actions include rejoining the Paris Agreement, reapplying protections to various categories of public lands, reinstating or revisiting greenhouse gas emission standards for various major sources, revising energy efficiency standards to comport with the law, reestablishing processes to assess and account for environmental and public health impacts resulting from federal decisions, and enhancing resilience and equity through planning and standards for decision-making. We include, as an appendix, a draft executive order that President Biden could issue on his first day in office to instantly revoke as many of President Trump's deregulatory actions as legally possible, reset policies for the entire federal government, and promptly begin the critical work of setting the United States on a path toward addressing the climate crisis. Even more must be done to address the climate crisis, and this paper does not set forth all the possible actions that a new administration could take, but the actions set forth here would be important and necessary steps.²

² For a compilation of policy recommendations, see CLARA GREIDER & JORDAN GEROW, CLIMATE RECOMMENDATIONS FOR A NEW DEMOCRATIC PRESIDENT AND A NEW CONGRESS: A COMPILATION (2020), <https://climate.law.columbia.edu/sites/default/files/content/Climate%20Recommendations%20For%20a%20New%20Democratic%20President%20and%20a%20New%20Congress-%20A%20Compilation.pdf>. For an even fuller set of possible actions at the federal, state and local level, and in the private sector, see, LEGAL PATHWAYS TO DEEP DECARBONIZATION IN THE UNITED STATES (Michael B. Gerrard & John C. Dernbach, eds., Environmental Law Institute 2019), and the associated website, lpdd.org.

2. EXECUTIVE ACTIONS

2.1 Rejoin the Paris Agreement

President Trump announced on June 1, 2017, that he intended to withdraw the United States from the Paris Agreement. The Agreement allows a Party to begin the withdrawal process three years after becoming a Party. The United States formally gave notice of withdrawal on November 4, 2019. Withdrawal takes effect one year later; accordingly, the United States will cease to be a Party on November 4, 2020. A Biden administration could readily move to rejoin the Paris Agreement, even on “Day One.”³ There are two key components to this effort:

- As a matter of international law, the Agreement provides that, when a State joins the Agreement after it has already entered into force (which happened in late 2016), it becomes a Party thirty days later. Other Parties would not have any ability to block or otherwise condition the United States’ return.
- As a matter of domestic law, the President would have ample authority to join the Agreement, just as in 2016 when the United States submitted its instrument of acceptance.

Once the United States is again a Party, it will have an obligation to submit a greenhouse gas emissions target or, in Paris parlance, a “nationally determined contribution.”⁴

2.2 Recommit to Reducing Greenhouse Gas Emissions

President Trump issued Executive Order 13834 on May 17, 2018, requiring federal agencies to comply with statutory requirements related to energy and environmental performance “in a manner that increases efficiency, optimizes performance, eliminates unnecessary use of resources, and protects the environment.”⁵ Under the order, agencies are directed to “prioritize actions that reduce waste, cut costs, [and] enhance the resilience of Federal

³ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-110, arts. 20, 26

⁴ For more information on that issue, including U.S. options for fulfilling the obligation, see Susan Biniaz, *Returning to Paris: The Next U.S. “NDC”*, COLUMBIA CLIMATE LAW BLOG (March 11, 2020), <http://blogs.law.columbia.edu/climatechange/2020/03/11/returning-to-paris-the-next-u-s-ndc/>

⁵ Exec. Order No. 13834, 83 Fed. Reg. 23771 (May 17, 2018).

infrastructure and operations.” The order revokes President Obama’s Executive Order 13693, which set a goal of cutting the federal government’s greenhouse gas emissions by forty percent over ten years, and required federal agencies to develop plans for reducing emissions and periodically report on their progress.

On March 28, 2017 President Trump issued Executive Order 13783 which, along with specific directives to several agencies to review pending climate-related regulations, set out several key policy objectives that prioritize fossil fuel development.⁶ The Order emphasizes developing domestic energy resources, “while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation.”⁷

Elsewhere in this report we recommend steps to reverse the specific steps agencies have taken in response to Executive Order 13783. With respect to these executive orders themselves, a Biden administration could issue a new executive order to revoke these orders and recommit to reducing the federal government’s greenhouse gas emissions.⁸

2.3 Reverse the “America-First Offshore Energy Strategy”

President Trump issued Executive Order 13795 on April 28, 2017, establishing a national policy to “encourage energy exploration and production, including on the Outer Continental Shelf” (“OCS”) and outlining various measures to support oil and gas drilling on the OCS.⁹ Among other things, the Order reverses President Obama’s January 2015 and December 2016

⁶ Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 31, 2017). The specific actions undertaken by agencies in response to this order are described throughout this report. Those include, for example, EPA’s recent announcement that it will revise the new source performance standards for methane and volatile organic compounds. *See infra* Section 6.3.1.

⁷ 82 Fed. Reg. at 16093.

⁸ According to a recent UN report, to reach or only overshoot a 1.5°C warming scenario, global emissions will have to decline by 45% from 2010 levels by 2030, and reach net zero by 2050. *See Intergovernmental Panel on Climate Change, Mitigation Pathways Compatible with 1.5°C in the Context of Sustainable Development, in GLOBAL WARMING OF 1.5°C 93, 95 (2019), https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_Chapter2_Low_Res.pdf.*

⁹ Executive Order 13795, 82 Fed. Reg. 20815 (May 3, 2017).

withdrawals of OCS land in the Arctic and Atlantic oceans from oil and gas leasing,¹⁰ and directs the Department of the Interior (“DOI”) to consider revising the schedule of proposed lease sales in those and other areas.¹¹

The portion of Executive Order 13795 reopening certain OCS lands to oil and gas development was vacated by the U.S. District Court for the District of Alaska on March 29, 2019.¹² The federal defendants, the State of Alaska, and the American Petroleum Institute appealed the district court’s decision, have now fully briefed their appeal, and participated in oral argument in June 2020.¹³ If no decision is issued before President Trump’s term is over, a Biden administration could issue a new executive order revoking Order 13795. The administration could then file a motion to voluntarily dismiss its pending appeal as moot.¹⁴ If the Ninth Circuit affirms, further executive action may not be required. If the Ninth Circuit reverses the district court’s decision, the Biden administration could still withdraw President Trump’s executive order, effectively reinstating the limits President Obama set on oil and gas leasing on OCS lands.

2.4 Restore National Monuments

On April 26, 2017, President Trump issued Executive Order 13792, directing the Secretary of the Interior to review designations or expansions of designations of national monuments under the Antiquities Act.¹⁵ The Order notes that these designations may “create barriers to achieving energy independence, restrict public access to and use of Federal lands, burden State, tribal, and local governments, and otherwise curtail economic growth.”¹⁶

¹⁰ See Presidential Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf Offshore Alaska from Leasing Disposition (Jan. 27, 2015), <https://perma.cc/NL7Y-6WKX>; Presidential Memorandum on Withdrawal of Certain Areas off the Atlantic Coast on the Outer Continental Shelf from Mineral Leasing (Dec. 20, 2016), <https://perma.cc/BT7T-ZUJQ>.

¹¹ DOI actions taken in response to this executive order are discussed later in this report. See *infra* Section 4.1.4.

¹² League of Conservation Voters v. Trump, 363 F. Supp. 3d 1013 (D. Alaska 2019), *appeal docketed*, No. 19-35461 (9th Cir. May 29, 2019).

¹³ See League of Conservation Voters v. Trump, No. 19-35460 (9th Cir. May 29, 2019).

¹⁴ See Fed. R. App. P. 42(b).

¹⁵ Exec. Order No. 13792, 82 Fed. Reg. 20429 (Apr. 26, 2017).

¹⁶ *Id.*

Pursuant to that Order, on May 11, 2017, DOI issued a request for comments seeking public input on twenty-seven national monuments and five marine national monuments.¹⁷ After receiving over two million comments, DOI produced a final report recommending changes to several existing monuments and creating three new national monuments.¹⁸ In response to the final report, on December 4, 2017, President Trump issued Proclamations 9681 and 9682, reducing the size of the Bears Ears National Monument by 85% and Grand Staircase-Escalante National Monument by 50%, respectively.¹⁹ Hours later, a group of Native American tribes, environmental groups, and other stakeholders filed the first of several lawsuits arguing that President Trump has neither constitutional nor statutory authority to slash the size of these national monuments. The consolidated cases remain pending.²⁰

Opening these monuments to oil and gas development frees up vast reserves of oil and gas for extraction and eventual use—the Grand Staircase-Escalante National Monument previously contained an estimated 28 billion tons of coal, 136.5 billion gallons of oil, and 2.6-10.5 trillion cubic feet of natural gas.²¹

Under a Biden administration, the President could issue new proclamation restoring the original boundaries of each monument. Although its report does not alter the existing boundaries of any other existing monuments, DOI could withdraw its recommendations relating to other monuments or issue a new report recommending that existing monuments be retained or expanded.

¹⁷ Review of Certain National Monuments Established Since 1996; Notice of Opportunity for Public Comment, 82 Fed. Reg. 22016 (May 11, 2017).

¹⁸ *Forgotten Voices: The Inadequate Review and Improper Alteration of Our National Monuments*, 116th Cong. (2019) (Statement of Edwin Roberson, Utah State Director, Bureau of Land Management).

¹⁹ Proclamation 9681, 82 Fed. Reg. 58081 (Dec. 4, 2017); Proclamation 9682, 82 Fed. Reg. 58089 (Dec. 4, 2017).

²⁰ The parties' fully briefed cross-motions for summary judgment are pending before the court. See *Hopi Tribe et al. v. Trump et al.*, No. 1:17-cv-02590 (D.D.C. Dec 4, 2017).

²¹ See Michael Burger & Nadra Rahman, *The Zinke-Trump Attack on National Monuments is Motivated by Fossil Fuel Interests*, CLIMATE LAW BLOG (June 20, 2017), <http://blogs.law.columbia.edu/climatechange/2017/06/20/the-zinke-trump-attack-on-national-monuments-is-motivated-by-fossil-fuel-interests/>.

2.5 Reverse Expedition of Fossil Fuel Infrastructure Approvals

President Trump issued Executive Order 13867 on April 10, 2019, establishing a new process for issuing Presidential permits for cross-border infrastructure, including pipelines.²² The order asserts the President's exclusive authority to grant or deny presidential permits for cross-border infrastructure, and revokes the State Department's previous authority to conduct permitting for infrastructure projects such as the Keystone XL pipeline.

On April 10, 2019 President Trump also issued Executive Order 13868, which aims to expedite the approval of energy infrastructure, including but not limited to oil and gas pipelines. The order's key provisions include: directing the Environmental Protection Agency ("EPA") to review implementation of Section 401 of the Clean Water Act requiring federal permit applicants to obtain certifications from any states where potential water contamination could happen; directing Department of Transportation ("DOT") to update its safety regulations to allow the transport of liquefied natural gas in railroad tank cars; and directing the Secretary of Labor to investigate whether there are "discernible trends" in energy investments by retirement plans subject to the Employee Retirement Income Security Act.²³

Several agencies have taken action in response to President Trump's orders:

- On July 13, 2020 the Environmental Protection Agency finalized the Clean Water Act Section 401 Certification Rule, updating the requirements for water quality certification under the Clean Water Act to narrow states' and certain tribes' authority to condition and block infrastructure projects approved by the federal government.²⁴ The rule becomes effective on September 11, 2020. A group of state attorneys general have filed suit challenging the rule, arguing that the rule violates the Clean Water Act.²⁵
- On July 24, 2020 the DOT issued a final rule allowing bulk transport of liquified natural gas in rail tank cars.²⁶ The rule notes that the benefits it brings include

²² Exec. Order No. 13867, 84 Fed. Reg. 15491 (Apr. 15, 2019).

²³ Exec. Order No. 13868, 84 Fed. Reg. 15495 (Apr. 10, 2019).

²⁴ Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42210 (July 13, 2020).

²⁵ California et al. v. Wheeler, No. 3:20-cv-4869 (N.D. Cal. July 21, 2020).

²⁶ Hazardous Materials: Liquefied Natural Gas by Rail, 85 Fed. Reg. 44994 (July 24, 2020).

“increased transportation efficiency, increased modal safety, expanded fuel usage, improved accessibility to remote regions, and increased U.S. energy competitiveness.”²⁷ A group of state attorneys general and environmental organizations have filed suit challenging the rule, arguing that DOT failed to evaluate the environmental impacts of the rule.²⁸

- On July 30, 2020 the Department of Labor (“DOL”) finalized a rule providing that retirement plan managers may only select investments based on financial considerations, explicitly stating that “plan assets may not be enlisted in pursuit of other social or environmental objectives.”²⁹ The rule seeks to implement Executive Order 13867, and adds that “it is unlawful for a fiduciary to sacrifice return or accept additional risk to promote a public policy, political, or any other non-pecuniary goal.”³⁰ The final becomes effective on September 28, 2020.

A Biden administration could issue a new executive order or orders to revoke or modify Orders 13867 and 13868.³¹ A new order could, among other things, delegate authority to the State Department in the permitting process for cross-border infrastructure projects and recommit to ensuring that energy infrastructure permitting complies with federal law; direct EPA to reconsider and, if appropriate, repeal the Clean Water Act rule; direct DOT to reconsider and, if

²⁷ *Id.* at 45024.

²⁸ *Sierra Club et al. v. DOT et al.*, No. 20-01317 (D.C. Cir. Aug. 18, 2020).

²⁹ *Financial Factors in Selecting Plan Investments*, 85 Fed. Reg. 39113, 39116 (June 30, 2020).

³⁰ *Id.* 39117.

³¹ A new administration can revoke the prior administration’s executive orders at any time. *See* CONG. RESEARCH SERV., EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION, RS20846 (Aug. 16, 2014), available at <https://fas.org/sgp/crs/misc/RS20846.pdf>.

appropriate, repeal its gas-by-rail rule³²; and direct DOL to reconsider and, if appropriate, repeal its investment rule.³³

2.6 Reverse Expedited Environmental Reviews of Fossil Fuel Projects

On January 24, 2017, President Trump issued Executive Order 13766, directing the Chairman of the Council on Environmental Quality (“CEQ”) to put “high priority” infrastructure projects on a fast track, and to establish “expedited procedures and deadlines for completion of environmental reviews and approvals for such projects.”³⁴ The Order adds that “infrastructure projects in the United States have been routinely and excessively delayed by agency processes and procedures.”³⁵ On August 15, 2017, President Trump issued Executive Order 13807, titled “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects.”³⁶ The Order sets a policy of conducting environmental reviews in “a coordinated, consistent, predictable, and timely manner in order to give public and private investors the confidence necessary to make funding decisions for new infrastructure projects,” and presents the goal of completing all Federal environmental reviews for major infrastructure projects within two years.³⁷ On July 16, 2020, the CEQ published a rule amending the National Environmental Policy Act (“NEPA”) implementing regulations pursuant to the President’s Orders.³⁸

A Biden administration could issue a new executive order modifying or revoking President Trump’s orders. The Order could affirm that environmental review ought to be

³² A Biden Administration could go further by directing the SEC to create standardized disclosure requirements for climate change risk. For more information on the steps that the Trump administration has not taken in this respect, see Allison Herren Lee, Commissioner, SEC, Statement: “Modernizing” Regulation S-K: Ignoring the Elephant in the Room” (Jan. 30, 2020), <https://www.sec.gov/news/public-statement/lee-mds-2020-01-30>.

³³ In light of pending litigation, EPA and DOT could each seek a voluntary remand from the court to reconsider their respective rule, and then initiate a new rulemaking to replace them. See Joshua Revesz, *Voluntary Remands: A Critical Assessment*, 70 ADMIN. L. REV. 362, 391 (2018) (“Interadministration voluntary remands, like all voluntary remands, are almost always granted.”).

³⁴ Exec. Order No. 13766, 82 Fed. Reg. 8657 (Jan. 30, 2017).

³⁵ *Id.*

³⁶ Exec. Order No. 13807, 82 Fed. Reg. 40463 (Aug. 15, 2017).

³⁷ *Id.*

³⁸ See *infra* Section 3.1.

efficient, coordinated, consistent and, to the extent it is practicable, predictable while also affirming that environmental reviews must be done in whatever manner is necessary to appropriately inform decision making and protect the natural environment, consistent with the purposes of NEPA.

2.7 Withdraw Executive Orders on Reducing Regulation and Controlling Regulatory Costs

President Trump issued Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs on January 30, 2017, which directed all agencies to control regulatory costs by: (1) ensuring that the “incremental costs” of all new regulations that are finalized this year, including repealed regulations, are no greater than zero, and (2) identifying two regulations to repeal for every new regulation that is proposed. The Office of Management and Budget (“OMB”) issued final guidance on the implementation of Executive Order 13771 on April 5, 2018.³⁹ With regards to the 2-for-1 directive, the guidance clarified that agencies must in fact implement (as opposed to merely identify) two deregulatory actions for each new regulatory proposal. With regards to the zero-incremental costs directive, the guidance states that regulatory benefits such as public health benefits and energy efficiency savings should not be accounted for when measuring the “incremental costs” of regulatory actions. The guidance also recognizes that agencies “should continue to comply with all applicable laws and requirements” when promulgating regulations, but does not specify how agencies should handle the inevitable legal conflict between the directives outlined in the executive order and guidance and the rules that govern both the substantive and procedural aspects of agency rulemaking.⁴⁰

³⁹ OMB, Memorandum: “Guidance Implementing Executive Order 13771, Titled ‘Reducing Regulation and Controlling Regulatory Costs’” (April 5, 2017), https://www.regulationwriters.com/downloads/OIRA_2nd_Guidance_Memo_on_EO_13771.pdf.

⁴⁰ Executive Order 13771 was challenged in court, but the action was ultimately dismissed on standing grounds. *Pub. Citizen, Inc. v. Trump*, 435 F. Supp. 3d 144, 153 (D.D.C. 2019).

A Biden administration could revoke or modify the order and accompanying guidance immediately upon taking office in order to restore the status quo ante.⁴¹ Regulatory processes would then be governed by the Administrative Procedure Act (“APA”), other statutory provisions, and the executive guidance found in OMB Circular A-4 and Executive Order 12866 (“Regulatory Planning and Review”).⁴² The administration could also introduce new guidance on cost-benefit analysis to supplement OMB Circular A-4. Such guidance could provide uniform standards and clear direction on how to account for public health benefits, climate change-related costs, and other regulatory impacts.⁴³

On February 24, 2017 issued Executive Order 13777, complementing his two-for-one order by directing agencies to establish “Regulatory Reform Task Forces” to evaluate existing regulations and make recommendations to the agency head regarding the repeal, replacement, or modification of regulations.⁴⁴ Those task forces are directed to identify existing rules that eliminate jobs or hinder job creation, among other criteria.⁴⁵

A Biden administration could revoke Executive Order 13777, or issue guidance or a new order clarifying that Regulatory Reform Task Forces should not recommend repealing rules designed to achieve climate adaptation or mitigation goals even if those rules would otherwise fall within Order 13777’s ambit.

2.8 Reestablish Climate Science Advisory Committee

On August 20, 2017, the Advisory Committee for the Sustained National Climate Assessment’s charter expired, and the Trump administration informed members that the charter

⁴¹ See *infra*, Appendix: Draft Executive Order on Addressing the Climate Crisis. The draft executive order included as an appendix to this report is consistent with, though not identical to, the recommendations discussed throughout this report. The draft order embodies the policy priorities that a Biden administration could adopt to immediately begin rebuilding federal climate governance and identifies which of President Trump’s executive orders the new administration should revoke. Throughout this report we note several instances where a Biden administration could select among different approach including, as above, modifying or clarifying President Trump’s executive orders without revoking them wholesale.

⁴² Exec. Order 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

⁴³ See GREIDER & GEROW, *supra* note 2, at 31–52 (recommending actions relating to taxation and pricing).

⁴⁴ Exec. Order No. 13777, 82 Fed. Reg. 12285 (Mar. 1, 2017).

⁴⁵ *Id.* at 12286.

would not be renewed.⁴⁶ The National Oceanic and Atmospheric Administration (“NOAA”) established the fifteen-member Committee in 2015 to, among other objectives, advise state and local governments and businesses on how climate change is likely to impact the United States, analyze trends in global climate change, and support NOAA’s climate-related decisions.⁴⁷

A Biden administration could direct NOAA to reestablish the panel or to convene a new panel to achieve comparable goals.⁴⁸

2.9 Reaffirm Environmental Protections for the Oceans, Coasts, and Great Lakes

On June 19, 2018, President Trump issued Executive Order 13840, setting national policy with respect to the ocean, coasts, and Great Lakes.⁴⁹ The Order revokes President Obama’s policy order addressing the same waters—in that Order, President Obama affirmed that marine environments provide both jobs and ecological services, and affirmed that “America’s stewardship of the ocean, our coasts, and the Great Lakes is intrinsically linked to environmental sustainability, human health and well-being, national prosperity, adaptation to climate and other environmental changes, social justice, international diplomacy, and national and homeland security.”⁵⁰ President Trump’s superseding order makes no mention of climate change or ecological services, and sets out a policy of “ensur[ing] that Federal regulations and management decisions do not prevent productive and sustainable use of ocean, coastal, and Great Lakes waters.”⁵¹

⁴⁶ The Committee’s charter expired by operation of law two years after it was created. See 40 C.F.R. § 102-3.55 (providing, subject to exceptions, that an advisory committee automatically terminates two years after it is established); Jeff Tollefson, *U.S. Government Disbands Climate-Science Advisory Committee*, SCIENTIFIC AMERICAN (Aug. 21, 2017), <https://www.scientificamerican.com/article/u-s-government-disbands-climate-science-advisory-committee/>.

⁴⁷ Dep’t of Comm., Charter of the Advisory Committee for the Sustained National Climate Assessment (2015), <https://cybercemetery.unt.edu/archive/sncaadvisorycommittee/20190411205152/https://sncaadvisorycommittee.noaa.gov/Portals/0/Charter-Page/ACSNCA-signed-charter-only.pdf>.

⁴⁸ Requirements for establishing, renewing, or reestablishing a federal advisory committee are codified at 40 C.F.R. Part 102-3.5 *et seq.*

⁴⁹ Exec. Order No. 13840, 83 Fed. Reg. 29431 (June 22, 2018).

⁵⁰ Exec. Order No. 13547, 75 Fed. Reg. 43021 (July 22, 2010).

⁵¹ 83 Fed. Reg. at 29431.

A Biden administration could issue a new executive order revoking President Trump's Order. A Biden administration could go further, and issue a new executive order reaffirming the importance of managing marine resources in a way that recognizes their inherent value, the ecological services they provide, and the necessity of addressing the climate change implications of decisions relating to marine resources.⁵²

2.10 Revoke Presidential Authorization for Keystone XL Pipeline

On March 29, 2019, President Trump issued a Presidential permit authorizing TransCanada to construct, connect, operate, and maintain the Keystone XL pipeline segment at the U.S.-Canada border⁵³. The Obama Administration had previously rejected TransCanada's application, in part due to concerns about climate change.⁵⁴

The Biden campaign announced in May 2020 that Vice President Biden "strongly opposed" the Keystone XL pipeline in the last Administration and "will proudly stand in the Roosevelt Room again as president and stop it for good by rescinding the Keystone XL Pipeline permit."

The approval/denial of permits regarding transboundary pipelines has historically resided with the President as a matter of constitutional authority. As such, Biden as President would have the authority to rescind the Keystone XL permit at any time. He could rescind the permit right away or do so following a White House or interagency process. The timing/process/reasoning related to the rescission of the Keystone XL permit would presumably depend mainly upon considerations of domestic and international litigation risks.

⁵² See *infra*, Appendix: Draft Executive Order on Addressing the Climate Crisis. As noted above the draft order embodies the policy priorities that a Biden administration could adopt, but throughout this report we note several instances where a Biden administration could go even further in an initial executive order. See also *supra*, note 42.

⁵³ Presidential Permit of March 29, 2019 Authorizing TransCanada Keystone Pipeline, L.P., to Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, 84 Fed. Reg. 13101 (Apr. 3, 2019).

⁵⁴ Statement by the President on the Keystone XL Pipeline (Nov. 6, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/11/06/statement-president-keystone-xl-pipeline>

It should also be noted that, on April 10, 2019, shortly after issuance of the Presidential permit on Keystone XL, President Trump issued Executive Order 13867,⁵⁵ which revised the process for the development and issuance of Presidential permits with respect to certain facilities, including pipelines, and land transportation crossings at the international boundaries of the United States. It expressly revoked the previous Presidential delegation of authority to the Secretary of State, giving the Secretary a more limited role and anchoring all decision-making regarding permits (e.g., issuing, denying) firmly with the President. While not relevant to rescission of the Keystone XL pipeline, the Administration would presumably also want to consider which procedures it wanted to implement for the review/approval of Presidential permits generally.⁵⁶

2.11 Reinstate and Affirm Environmental Reviews notwithstanding COVID-19

President Trump signed Executive Order 13927 on June 4, 2020, seeking to use "emergency authorities" to waive aspects of NEPA in support of accelerating the nation's economic recovery from COVID-19.⁵⁷ The president directed agencies to identify opportunities to waive environmental reviews under NEPA for highways, fossil fuel facilities and other infrastructure projects, and to "use, to the fullest extent possible and consistent with applicable law, emergency procedures, statutory exemptions, categorical exclusions, analyses that have already been completed, and concise and focused analyses, consistent with NEPA, CEQ's NEPA regulations, and agencies' NEPA procedures."⁵⁸ The order also instructs agencies to use emergency authorities under other cornerstone environmental statutes, such as the Endangered Species Act and the Clean Water Act, to expedite approvals.

As of July 31, 2020, no agencies had taken action pursuant to the order. A Biden administration could issue a new executive Order revoking President Trump's Order and

⁵⁵ Exec. Order 13867, 84 Fed. Reg. 15491 (Apr. 15, 2019).

⁵⁶ *See supra* Section 2.5.

⁵⁷ Exec. Order No. 13927, 85 Fed. Reg. 35165 (June 9, 2020).

⁵⁸ *Id.*

instructing federal agencies to review proposed infrastructure projects consistent with the purposes and requirements of the Clean Water Act, Endangered Species Act, and NEPA.⁵⁹

2.12 Halt Deregulatory Orders following COVID-19

On May 19, 2020, President Trump issued Executive Order 13924 instructing agencies to address the economic emergency caused by the COVID-19 crisis "by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery."⁶⁰ The order further directs agencies "to consider exercising appropriate temporary enforcement discretion or appropriate temporary extensions of time," and to determine whether any regulations that have been temporarily suspended in response to the pandemic should be permanently rescinded.

Pursuant to that order, the Consumer Product Safety Commission delayed the effective date of the commission's standard for hand-held infant carriers from August 3, 2020 to January 1, 2021 without notice-and-comment.

A Biden administration could issue a new executive order revoking President Trump's Order and instructing agencies not to engage in deregulatory activity under the auspices of COVID-19 recovery.

⁵⁹ Largely in response to President Trump's repeated invocation of emergency authority to enact controversial policies, some commentators, advocates and activists have proposed that a new president could invoke emergency authority to address climate change. See, e.g., Dan Farber, *Using Emergency Powers to Fight Climate Change*, EXPERT FORUM (Jan. 15, 2019), <https://www.acslaw.org/expertforum/using-emergency-powers-to-fight-climate-change/>; Press Release, Center for Biological Diversity, 500 Groups Call for Next President to Declare National Climate Emergency (Dec. 9, 2019), <https://biologicaldiversity.org/w/news/press-releases/500-groups-call-next-president-declare-national-climate-emergency-2019-12-09/>; Carolyn Kormann, *The Case for Declaring a National Climate Emergency*, NEW YORKER (July 11, 2019), <https://www.newyorker.com/news/news-desk/the-case-for-declaring-a-national-climate-emergency>.

⁶⁰ Exec. Order No. 13924, 85 Fed. Reg. 31553 (May 19, 2020).

2.13 Reassess Agencies' Regulatory Agendas

EPA and other agencies produce regulatory agenda describing the rulemaking activity they intend to engage in.⁶¹ These agendas include rule that have been proposed and which EPA intends to finalize, actions to be proposed, and others in a “prerule” consideration stage.⁶² EPA’s agenda for 2020 included, for example, its rules addressing the role of science in regulation,⁶³ overhauling its approach to cost-benefit analyses,⁶⁴ new source performance standards regulating carbon dioxide emissions from new coal-fired power plants.⁶⁵

A Biden Administration should review existing agency regulatory agendas to identify any ongoing or planned rulemakings that should be withdrawn or abandoned. A Biden Administration could go a step further, and review the agencies’ spring 2016 regulatory agendas to identify any then-planned regulations, subsequently abandoned by the Trump administration.⁶⁶

⁶¹ See, e.g., Off. of Info. & Reg. Aff., *Agency Rule List – Spring 2020* [Environmental Protection Agency], REGINFO.GOV,

https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=2000&csrf_token=AC743E89E59C2C658BE6CC0CEAAFF926A4C09EA0DA331584E138781F6AC45F94B946DC8E1E4415F4989022B68806D72DDA7C.

⁶² *Id.*

⁶³ See *infra* Section 3.7.

⁶⁴ See *infra* Section 3.5.

⁶⁵ See *infra* Section 3.2.

⁶⁶ See, e.g., Off. of Info. & Reg. Aff., *Agency Rule List – Spring 2016* [Environmental Protection Agency], REGINFO.GOV,

https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPubId=201610&showStage=longterm&agencyCd=2000&csrf_token=AC743E89E59C2C658BE6CC0CEAAFF926A4C09EA0DA331584E138781F6AC45F94B946DC8E1E4415F4989022B68806D72DDA7C.

3. ENVIRONMENTAL PROTECTION AGENCY

3.1 Strengthen Greenhouse Gas Controls on Existing Power Plants

On June 19, 2019, EPA repealed the Clean Power Plan and published the Affordable Clean Energy (“ACE”) Rule.⁶⁷ The Clean Power Plan was the Obama administration’s rule to regulate carbon dioxide emissions from existing fossil fuel-fired power plants.⁶⁸ The Clean Power Plan would have required states to achieve certain emission reduction targets and given them flexibility to meet those targets through such means as switching from coal to natural gas and from natural gas to renewable energy, and energy efficiency. The ACE Rule, by contrast, defines the “best system of emissions reduction” as increased efficiency at coal-fired power plants, and does not cover natural gas plants at all. The Clean Power Plan was expected to reduce emissions by approximately 30% by 2030.⁶⁹ EPA projects that the ACE Rule will reduce carbon dioxide emissions by 0.7% by 2030, but it may not reduce them at all.⁷⁰ Both EPA’s repeal of the Clean Power Plan and its replacement with the ACE rule are the subject of litigation currently pending before the D.C. Circuit.⁷¹

On April 3, 2017, EPA also withdrew two proposed rules that would have supplemented the Clean Power Plan final rule: (i) a rule establishing federal plans and model rules for implementing the greenhouse gas emission guidelines for existing power plants, and (ii) a rule concerning details of the Clean Power Plan’s Clean Energy Incentive Program.⁷²

⁶⁷ 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. 32, 520 (July 8, 2019).

⁶⁸ Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64510 (Oct. 23, 2015).

⁶⁹ EPA, FACT SHEET: CLEAN POWER PLAN BY THE NUMBERS (2015), <https://archive.epa.gov/epa/sites/production/files/2015-08/documents/fs-cpp-by-the-numbers.pdf>.

⁷⁰ Regulatory Impact Assessment of ACE Rule, EPA-452/R-18-006, 1-5, 3-11 (June 19, 2019), https://www.epa.gov/sites/production/files/2018-08/documents/utilities_ria_proposed_ace_2018-08.pdf.

⁷¹ American Lung Association, et al v. EPA, et al, No. 19-01140 (D.C. Cir. Jul 8, 2019).

⁷² Withdrawal of Proposed Rules: Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; and Clean Energy Incentive Program Design Details, 82 Fed. Reg. 16144 (Apr. 3, 2017).

Under a Biden administration, EPA could issue a notice of proposed rulemaking to repeal the ACE Rule and replace it with a new rule regulating greenhouse gas (“GHG”) emissions from existing power plants. The prevailing view among commentators and advocates appears to be that a new EPA should not simply re-propose the Clean Power Plan; that rule had been challenged in court by Republican attorneys general and industry groups, and stayed by the Supreme Court pending completion of litigation, indicating that there was at least a good chance the rule might not survive Supreme Court review.

3.2 Maintain Greenhouse Gas Controls on New Power Plants

On December 20, 2018, EPA published proposed rules to weaken the new source performance standards regulating carbon dioxide emissions from new coal-fired power plants.⁷³ The existing standards, issued in 2015, require new coal-fired power plants to limit their carbon dioxide emissions to 1,400 pounds per megawatt hour of generation.⁷⁴ The proposal would increase the standards to 1,900 pounds of carbon dioxide per megawatt hour for larger units and 2,000 pounds of carbon dioxide per megawatt hour for smaller units. At this moment, the proposed rule has not been finalized.

Under a Biden administration, EPA could withdraw the proposed rule and keep the existing standards in place.

3.3 Reinstate and Expand Methane Emissions Controls on Oil and Gas Facilities

3.3.1 New Sources

On August 13, 2020, EPA announced two final rules revising the new source performance standards⁷⁵ for methane and volatile organic compound (“VOC”) emissions from the oil and gas

⁷³ Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 84 Fed. Reg. 65424 (Dec. 20, 2018).

⁷⁴ Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64510 (Oct. 23, 2015).

⁷⁵ Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, 77 Fed. Reg. 494900 (Aug. 16, 2012); Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35824 (June 3, 2016).

sector.⁷⁶ The standards previously applied to certain oil and gas production, processing, transmission, and storage facilities that were constructed or modified after September 18, 2015 (“new facilities”). The standards included both emission reduction targets (e.g., 95% reduction in methane emissions from centrifugal compressors) and operational standards (e.g., requiring methane capture at well completion and methane leak detection and repair).

In one of the two final rules announced in August 2020, EPA rescinded the methane standards applicable to all new oil and gas facilities, and the VOC standards applicable to new facilities used in oil and gas transmission. In the other, EPA revised various provisions of the VOC standards applicable to new oil and gas production and processing facilities, including weakening certain leak detection and repair requirements applicable to such facilities.

Under a Biden administration, EPA could issue a notice of proposed rulemaking to repeal the August 2020 rules and either reinstate the previous standards or develop new standards.

3.3.2 Existing Sources

EPA could also develop methane emissions guidelines for existing facilities (i.e., constructed or modified before September 18, 2015).⁷⁷ EPA announced plans to develop such guidelines on March 10, 2016,⁷⁸ and issued an Information Collection Request (“ICR”) to obtain data needed to develop the guidelines on November 10, 2016.⁷⁹ The ICR was withdrawn by EPA on March 2, 2017.⁸⁰ On June 14, 2017, EPA announced that it would not move ahead with plans to regulate methane emissions from existing sources.⁸¹ Under a Biden administration, EPA could

⁷⁶ Env'tl. Prot. Agency, *EPA Issues Final Policy and Technical Amendments to the New Source Performance Standards for the Oil and Natural Gas Industry, Oil and Natural Gas Air Standards* (Aug. 13, 2020), <https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/epa-issues-final-policy-and-technical>.

⁷⁷ Under section 111(b) of the Clean Air Act, EPA can only issue emissions guidelines with respect to existing sources of pollution, which would be subject to new source performance standards if they were new sources. See 42 U.S.C. § 7411(d).

⁷⁸ See Gina McCarthy, *EPA Taking Steps to Cut Methane Emissions from Existing Oil and Gas Sources*, THE EPA BLOG (Mar. 10, 2016), <https://perma.cc/VO9H-MP63>.

⁷⁹ Env'tl. Prot. Agency, *Background on the Information Request for the Oil and Natural Gas Industry, Controlling Air Pollution from the Oil and Gas Industry*, <https://perma.cc/NS9T-5Z3E> (Mar. 2, 2017).

⁸⁰ *Id.*

⁸¹ Spring 2017 Unified Agenda of Federal Regulatory and Deregulatory Actions, 2060-AT29: Emissions Guidelines for Existing Oil and Natural Gas Sector, <https://perma.cc/EMJ8-PEYT> (June 14, 2017).

reissue the ICR and initiate notice-and-comment rulemaking to develop emissions guidelines for existing oil and gas facilities.

3.4 Reinstate Controls on Other Climate Super-Pollutants

3.4.1 The SNAP Rule

On April 27, 2018, EPA announced that it would not enforce a 2015 rule restricting the use of hydrofluorocarbons (“HFCs”).⁸² HFCs are a set of chemicals often referred to as “climate super-pollutants” because they are powerful greenhouse gases. They are typically used in cooling and to replace earlier refrigerants that damage the ozone layer. EPA’s Significant New Alternatives Policy (“SNAP”) program lists acceptable and unacceptable substitutes for ozone-depleting substances. In 2015 EPA added HFCs to the list of unacceptable substitutes, prohibiting replacing ozone-depleting substances with HFCs and ordering regulated parties that had already made the switch to find another substitute.⁸³ On August 8, 2017, the D.C. Circuit Court of Appeals ruled that EPA lacked authority to force regulated entities that had already switched from ozone-depleting substances to HFCs to switch to another substitute.⁸⁴

On April 7, 2020, the D.C. Circuit Court of Appeals ruled that EPA acted unlawfully in issuing its guidance on nonenforcement. The Court explained that it had previously held that EPA could not compel operators who had already switched to HFCs to make another switch to a new substitute but that EPA did have the authority to prohibit operators currently using ozone-depleting substances from switching to HFCs.⁸⁵

Under a Biden administration, EPA could issue new guidance clarifying that the 2015 rule remains in effect to the extent that it prospectively prohibits replacing ozone-depleting substances with HFCs.

⁸² Protection of Stratospheric Ozone: Notification of Guidance and a Stakeholder Meeting Concerning the Significant New Alternatives Policy (SNAP) Program, 83 Fed. Reg. 18431 (Apr. 27, 2018).

⁸³ Protection of Stratospheric Ozone: Change of Listing Status for Certain Substitutes Under the Significant New Alternatives Policy Program, 80 Fed. Reg. 42869 (July 20, 2015).

⁸⁴ *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct 322 (2018).

⁸⁵ *NRDC v. Wheeler*, 955 F.3d 68 (D.C. Cir. 2020).

3.4.2 Refrigeration Leak Detection and Maintenance Rule

On February 26, 2020, EPA finalized a rule that relaxes the requirements that owners and operators of refrigeration equipment have leak detection and maintenance programs for HFCs.⁸⁶ EPA's action rescinded a 2016 regulation extending certain refrigerant management regulations to substitute refrigerants such as HFCs.⁸⁷ Under the new rule, appliances with 50 or more pounds of substitute refrigerants will no longer be subject to requirements for leak inspection and reporting, retrofitting or retiring appliances that are not repaired, or maintaining related records.

Under a Biden administration, EPA could initiate a new rulemaking to repeal the 2020 rule and reinstate the 2016 detection and maintenance requirements for HFCs.

3.5 Halt the Distortion of Cost-Benefit Analysis

On June 11, 2020, EPA proposed a rule to overhaul its approach to cost-benefit analysis under the Clean Air Act.⁸⁸ Most significantly for greenhouse gas emissions regulation, the proposal would require the agency to limit consideration of co-benefits, such as the public health benefits associated with reducing conventional air pollution, including particulate matter, nitrogen oxides and sulfur dioxide. Such a limitation could interfere with EPA's ability to accurately assess the benefits of greenhouse gas regulations.

Under a Biden administration, EPA could withdraw the proposed rule or, if the proposed rule is finalized before a Democratic president takes office, EPA could issue a notice of proposed rulemaking to repeal the rule. Without this proposed rule, EPA can return to its use of OMB Circular A-4 and the *Guidelines for Preparing Economic Analyses*, an EPA guidance document that provided peer-reviewed information on how to conduct cost-benefit analysis for environmental regulations.⁸⁹

⁸⁶ Protection of Stratospheric Ozone: Revisions to the Refrigerant Management Program's Extension to Substitutes, 85 Fed. Reg. 14150 (Mar. 11, 2020).

⁸⁷ Protection of Stratospheric Ozone: Update to the Refrigerant Management Requirements Under the Clean Air Act, 81 Fed. Reg. 82272 (Nov. 18, 2016).

⁸⁸ Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 85 Fed. Reg. 35612 (June 11, 2020).

⁸⁹ ENVTL. PROTECTION AGENCY, GUIDELINES FOR PREPARING ECONOMIC ANALYSES (2010), https://www.epa.gov/sites/production/files/2017-09/documents/ee-0568-52_0.pdf.

3.6 Reinstate Clean Air Act Permitting Requirements

On November 26, 2019, EPA issued guidance revising key Clean Air Act definitions in a way that could relax permitting requirements across a number of industries.⁹⁰ The guidance narrows EPA's reading of the word "adjacent" in deciding whether different operations run by the same company qualify as a single source significant enough to require a pre-construction permit under the New Source Review ("NSR") program. The new guidance instructs EPA to look at "physical proximity" as opposed to "functional interrelatedness," and could allow some operators to avoid the need for an NSR permit where such a permit would have previously been required. The NSR requirement triggers the need for greenhouse gas controls for certain sources.⁹¹ Under a Biden administration, EPA could withdraw this guidance and issue a new memorandum restoring Obama-era guidance that directed EPA to consider a range of factors, of which physical proximity was only one part.⁹²

3.7 Restore the Role of Science in Regulation

On April 30, 2018, EPA published a proposed rule requiring dose-response data and models underlying the science used to justify regulatory decisions to be made publicly available in a manner sufficient for independent validation and analysis.⁹³ EPA subsequently proposed various changes to the rule.⁹⁴ The proposed changes would, among other things, expand the application of the rule to all data and models underlying the science relied upon in both promulgating regulatory decisions and finalizing influential scientific information.⁹⁵ As

⁹⁰ Env'tl. Protection Agency, Memorandum Interpreting "Adjacent" for New Source Review and Title V Source Determinations in All Industries Other than Oil and Gas (2019), https://www.epa.gov/sites/production/files/2019-12/documents/adjacent_guidance.pdf.

⁹¹ 41 U.S.C. § 7502(c)(5); *see also* Utility Air Regulatory Group v. EPA, 573 U.S. 302 (2014).

⁹² *See, e.g.*, GINA MCCARTHY, ENVTL. PROTECTION AGENCY, WITHDRAWAL OF SOURCE DETERMINATIONS FOR OIL AND GAS INDUSTRIES 2 (2009), <https://19january2017snapshot.epa.gov/sites/production/files/2015-07/documents/oilgaswithdrawal.pdf> ("Permitting authorities should therefore rely foremost on three regulatory criteria . . . (1) whether the activities are under the control of the same person[;] . . . (2) whether the activities are located on one or more contiguous or adjacent properties; and (3) whether the activities belong to the same industrial grouping.").

⁹³ Strengthening Transparency in Regulatory Science, 83 Fed. Reg. 18768, 18770 (Apr. 30, 2018).

⁹⁴ Strengthening Transparency in Regulatory Science, Supplemental Notice of Proposed Rulemaking, 85 Fed. Reg. 15396 (Mar. 18, 2020).

⁹⁵ *Id.*

numerous commenters pointed out, the effect of the rule would vastly restrict the scientific evidence available to the agency and would “exclude foundational research that could best inform the agency.”⁹⁶ At the same time, the proposed rule would provide opponents of EPA rulemaking additional avenues to challenge proposed and final rules that rely on climate science.

Under a Biden administration, EPA could withdraw the proposed rule or, if the proposed rule is finalized before President Biden takes office, EPA could issue a notice of proposed rulemaking to repeal the rule.

3.8 Maintain and Strengthen Controls on Toxic Coal Ash

On April 17, 2015, EPA finalized national regulations on the disposal of coal ash under the Resource Conservation and Recovery Act.⁹⁷ Coal ash, the residue left after burning coal, can contain mercury, arsenic and other toxins. Coal ash is disposed in surface impoundments where it mixes with water, also known as “coal ash ponds,” which can leak without proper lining. The 2015 rule required any existing unlined coal ash ponds that were causing groundwater contamination above certain levels to stop receiving ash, and also considered ponds with a compacted soil liner to be “lined” for purposes of the rule, and therefore able to continue receiving ash. In August 2018 the D.C. Circuit Court of Appeals vacated the portion of the 2015 rule that permitted unlined coal ash ponds to continue to operate until they caused groundwater

⁹⁶ Letter from the American Association for the Advancement of Science to Andrew Wheeler, Administrator, Environmental Protection Agency (May 18, 2020), <https://www.aaas.org/sites/default/files/2020-05/EPA-Supplemental-MultiSociety-Comments.pdf>; see also H. Holden Thorp et al., *Joint statement [of editors of Science, Nature, PLOS, Cell Press, and the Proceedings of the National Academy of Sciences] on EPA proposed rule and public availability of data* (2019), 336 SCIENCE (2019) (“Discounting evidence from the decision-making process on the basis that some data are confidential runs counter to the EPA stated mission “to reduce environmental risks...based on the best available scientific information.”); Letter from 100 Law Professors to Andrew Wheeler, Administrator, Environmental Protection Agency (May 18, 2020), <https://legal-planet.org/wp-content/uploads/2020/05/Law-Profes-EPA-HO-OA-2018-0259-Comment-FINAL-5-17-20.pdf> (“The Proposed Rule, if adopted, will impose serious costs to public health and safety. Not only does EPA lack authority to issue the Proposed Rule, but the revisions in the SNPRM strike at the very heart of EPA’s mission, in clear contravention of EPA’s authorizing statutes.”).

⁹⁷ Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21301 (Oct. 14, 2015).

contamination, and vacated the portion of the rule that defined ponds with clay linings as “lined” (“USWAG decision”)⁹⁸

Prior to the USWAG decision, EPA had promulgated a final rule, in July 2018, extending the deadline for leaking unlined coal ash ponds to stop receiving waste until October 31, 2020. Following another legal challenge, the D.C. Circuit remanded the rule to the EPA for further consideration in light of the USWAG decision.⁹⁹

On July 29, 2019, EPA proposed a rule under which an environmental demonstration would be required when uncapped coal ash is placed within five feet of an aquifer, within 50 feet of a body of water, or within a 100-year flood plain, among other places.¹⁰⁰ On November 4, 2019, EPA also proposed to amend the coal ash rules to accurately reflect the USWAG decision by requiring the closure of all unlined coal ash ponds, including ponds lined with clay and regardless of whether they are currently contaminating groundwater.¹⁰¹ On February 19, 2020, EPA proposed further revising current rules to allow coal ash pond operators to escape the lining requirement by showing that they are using an alternative method to prevent leaks.¹⁰² The proposed revisions would also allow coal ash ponds that are closing to continue to receive coal ash, so long as the operator receives EPA approval.

Under a Biden administration, EPA could withdraw its proposed rule exempting some pond operators to from the lining requirement and allowing ponds that are set to close to continue to receive ash until they close. Or, if the proposed rule is finalized before President Biden takes office, EPA could issue a notice of proposed rulemaking to repeal the rule. EPA should not

⁹⁸ See *Utility Solid Waste Activities Grp. (USWAG) v. Env'tl. Protection Agency*, 901 F.3d 414 (D.C. Cir. 2018).

⁹⁹ See *Waterkeeper Alliance Inc., et al. v. Environmental Protection Agency*, No. 18-1289 (D.C. Cir. 2018).

¹⁰⁰ *Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Enhancing Public Access to Information; Reconsideration of Beneficial Use Criteria and Piles*, 84 Fed. Reg. 40353 (July 19, 2019).

¹⁰¹ *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*, 84 Fed. Reg. 65941 (Dec. 2, 2019).

¹⁰² *Hazardous and Solid Waste Management System: Disposal of CCR; A Holistic Approach to Closure Part B: Alternate Demonstration for Unlined Surface Impoundments; Implementation of Closure*, 85 Fed. Reg. 12456 (Mar. 3, 2020).

withdraw or repeal the portion of the November 2019 proposal that would have required operators to close any unlined coal ash ponds regardless of current leaks.

4. DEPARTMENT OF THE INTERIOR

4.1 Protect Public Lands From Fossil Fuel Development

4.1.1 Reinstate Restrictions on Oil and Gas Development in Sage Grouse Habitat

On June 7, 2017, then Secretary of the Interior Ryan Zinke issued Secretarial Order 3353 which established a Sage-Grouse Review Team.¹⁰³ The team was directed to, among other things, review land use plan amendments adopted in 2015 to protect sage-grouse habitat and identify provisions that may require modification or rescission to enable energy and other development on the lands.¹⁰⁴

In response to Secretarial Order 3353, on March 15, 2019, the Bureau of Land Management (“BLM”) announced amendments to seventy-three land use plans covering areas incorporating sage-grouse habitat in California, Colorado, Idaho, Nevada, Oregon, Utah, and Wyoming.¹⁰⁵ The amendments relaxed restrictions on oil and gas development on approximately nine million acres of previously protected sage-grouse habitat. On March 27, 2019, environmental groups filed a challenge to these amendments, asking the court to reinstate the more-protective plans in place as of 2015.¹⁰⁶

Under a Biden administration, a new Secretary of the Interior could issue a secretarial order revoking Order 3353 and disbanding the Sage-Grouse Review Team. BLM could also initiate a notice and comment process to amend land use plans to reinstate protections for sage-grouse habitat.¹⁰⁷ The government could then seek to stay the pending litigation pending the

¹⁰³ DOI Secretarial Order 3353 (June 7, 2017), <https://perma.cc/GKY7-B2JJ>.

¹⁰⁴ *Id.*

¹⁰⁵ Bureau of Land Management, Sage-Grouse Conservation Plan Amendments Supported by Affected States’ Governors (Mar. 15, 2019), <https://perma.cc/R45E-PNSG>.

¹⁰⁶ Western Watersheds Project et al. v. Bernhardt, No. 16-cv-0083, Proposed First Supplemental Complaint (D. Idaho Mar. 27, 2019).

¹⁰⁷ BLM issues and amends land use plans through a notice and comment process set out in its regulations. *See* 43 CFR § 1610.1 et seq.

outcome of a new rulemaking, and move to dismiss the action as moot when more a more protective land use plan is in place.

4.1.2 Limit Oil and Gas Development in the Arctic National Wildlife Refuge

On September 12, 2019, BLM published a final environmental (“EIS”) on the implementation of an oil and gas leasing program within the Coastal Plain of the Arctic National Wildlife Refuge.¹⁰⁸ The final EIS identifies a “preferred” leasing program which would make the entire Coastal Plain area under federal control (i.e., approximately 1.5 million acres) available for oil and gas leasing.¹⁰⁹ On August 17, 2020, BLM finalized a record of decision adopting the preferred program.¹¹⁰

Under a Biden administration, BLM could initiate a new review process to revise the program and restrict leasing to the minimum acreage required to be made available by law.¹¹¹

4.1.3 Restore the Federal Coal Leasing Moratorium and Programmatic Review

During the Obama administration, DOI issued Secretarial Order 3338 which called for the preparation of a programmatic EIS (“PEIS”) analyzing the cumulative effects of the federal coal leasing program, as well as potential leasing and management reforms that could be enacted to mitigate adverse effects.¹¹² One key issue to be addressed in the PEIS was the effect of federal coal leasing on greenhouse gas emissions, including emissions from the production and consumption of federal coal. DOI also announced a moratorium on federal coal leasing during the environmental review and reform process.

¹⁰⁸ See BLM, *Coastal Plain Oil and Gas Leasing EIS*, BLM NATIONAL NEPA REGISTER, <https://eplanning.blm.gov/eplanning-ui/project/102555/510> (last updated June 8, 2020).

¹⁰⁹ BLM, *Coastal Plain Oil and Gas Leasing Program: Environmental Impact Statement ES-3* (2019), <http://perma.cc/DQ6T-GZBG>.

¹¹⁰ *Coastal Plain Oil and Gas Leasing Program Record of Decision*, DOI-BLM-AK-0000-2018-0002-EIS (2020), https://eplanning.blm.gov/public_projects/102555/200241580/20024135/250030339/Coastal%20Plain%20Record%20of%20Decision.pdf

¹¹¹ Section 20001(c) of the Tax Cuts and Jobs Act of 2017 (P.L. 115-97) requires the Secretary of the Interior to conduct at least two lease sales, each covering at least 400,000 acres, in the Coastal Plain within ten years of the date of enactment of the Act.

¹¹² DOI Secretarial Order No. 3338 (2016).

President Trump's Executive Order 13771 directed DOI to "take all steps necessary and appropriate to amend or withdraw" Secretarial Order 3338, and to "lift any and all moratoria on Federal land coal leasing activities related to Order 3338," consistent with the President's goals of promoting domestic energy production and revitalizing the coal industry. On March 29, 2017, DOI issued Secretarial Order 3348, which revoked Order 3338 and terminated both the moratorium on federal coal leasing and the programmatic environmental review process.

DOI was sued for reinstating the federal coal leasing program without conducting a NEPA review of this action. In 2019, a district court in Montana held that this action did in fact trigger NEPA requirements.¹¹³ Just one month after that decision, BLM published a draft environmental assessment ("EA") for lifting the federal coal leasing moratorium it which it claimed that this action would not have significant environmental impacts because it had simply reinstated the coal leasing program earlier than it otherwise would have (the assumption being that the moratorium would have ended by March 2019 upon completion of a PEIS) and thus Secretarial Order 3348 merely changed the timing of impacts. BLM only provided a 20-day comment period for the draft EA.¹¹⁴ BLM published a final EA and finding of no significant impact for the program in February 2020.¹¹⁵ Environmental groups filed a lawsuit challenging the adequacy of the final EA, and that litigation is still in the pleading stage.¹¹⁶

Under a Biden administration DOI and BLM could re-instate the federal coal leasing review and moratorium. BLM had already commenced the scoping process for the programmatic review and could resume the NEPA process where it left off, building upon the prior scoping activities. The administration could also alter the scope of the programmatic review to look at the effects of *all* federal fossil fuel leasing decisions or initiate a concurrent review of oil and gas leasing activities. A more comprehensive approach, which includes oil and gas leases, would allow for better analysis of cumulative effects across leasing decisions and would provide the

¹¹³ *Citizens for Clean Energy v. DOI*, No. 4:17-cv-00030 (D. Mont. April 19, 2019).

¹¹⁴ See BLM, Draft Environmental Assessment, Lifting the Pause on the Issuance of New Federal Coal Leases for Thermal (Steam) Coal: Environmental Assessment, DOI-BLM-WO-WO2100-2019-0001-EA (May 22, 2019).

¹¹⁵ BLM, Final Environmental Assessment: Lifting the Pause on the Issuance of New Federal Coal Leases for Thermal (Steam) Coal, DOI-BLM-WO-WO2100-2019-0001-EA (Feb. 26, 2020).

¹¹⁶ *Citizens for Clean Energy et al. v. DOE*, No. 4:17-cv-30-BMM (D. Mont. Filed 7/20/20).

foundation for a more integrated policy approach for managing fossil fuel resources in light of climate change and other environmental challenges.¹¹⁷

4.1.4 Halt Leasing Plan for Outer Continental Shelf Oil and Gas

In furtherance of Executive Order 13795, on May 1, 2017, then Secretary of the Interior Ryan Zinke issued Secretarial Order 3350 directing the Bureau of Ocean Energy Management (“BOEM”) to develop a new five-year OCS leasing plan.¹¹⁸ Pursuant to the Secretarial Order, on July 3, 2017, BOEM initiated development of a new OCS leasing plan for the period from 2019 to 2024 by issuing a request for information and comments.¹¹⁹ On January 4, 2018, BOEM published the 2019-2024 National OCS Oil and Gas Leasing Draft Proposed Program (“DPP”) which proposes a schedule of forty-seven lease sales covering over ninety-eight percent of the OCS.¹²⁰ At the time it issued the DPP, BOEM also announced its intent to prepare a PEIS for the 2019-2024 leasing program.¹²¹

Under a Biden administration, a new Secretary of the Interior could issue a secretarial order revoking Order 3350. If the DPP is not finalized prior to during President Trump’s term, under a Biden administration, BOEM could withdraw it and proceed with the 2017-2022 National OCS Oil and Gas Leasing Program, which was approved on January 17, 2017. A new five-year leasing plan would need to be developed for the post-2022 period.¹²² If the DPP is finalized during

¹¹⁷ For a more comprehensive set of recommendations on steps a Biden Administration could take that would go beyond restoring the status quo, see GREIDER & GEROW, *supra* note 4, at 31–52, 140–42.

¹¹⁸ DOI Secretarial Order 3350 (May 1, 2017), <https://perma.cc/8QN8-37GC>.

¹¹⁹ Request for Information and Comments on the Preparation of the 2019-2024 National Outer Continental Shelf Oil and Gas Leasing Program MAA10400, 82 Fed. Reg. 30886 (July 3, 2017).

¹²⁰ Notice of Availability of the 2019-2024 Draft Proposed Outer Continental Shelf Oil and Gas Leasing Program and Notice of Intent to Prepare a Programmatic Environmental Impact Statement, 83 Fed. Reg. 829 (Jan. 8, 2018).

¹²¹ *Id.*

¹²² The development of OCS oil and gas leasing programs is governed by the Outer Continental Shelf Lands Act and regulations adopted pursuant to that Act. Prior to developing a new program, BOEM must issue a request for information and comments. BOEM must then publish, and invite comments on, a proposed program and draft programmatic environmental impact statement. After reviewing any comments received, BOEM must publish a final proposed program and final programmatic EIS and submit both documents to the President and Congress. The Secretary of the Interior may approve the proposed final program 60 days after it is submitted to the President and Congress. *See* 42 U.S.C. § 1344; 30 C.F.R. §§ 556.204 – 556.205.

President Trump's term, under a Biden administration, BOEM could initiate development of a new five-year leasing plan by issuing a request for information and comments.

4.2 Maintain Updated Coal, Oil and Gas Valuation Rule

In 2016, DOI issued a Coal, Oil, and Gas Valuation Rule to boost revenue for taxpayers and states by changing how energy companies value sales of coal, oil and gas extracted from federal and tribal land. In August 2017, DOI repealed the 2016 Valuation Rule¹²³; a California District Court vacated that repeal in March 2019, concluding that DOI had violated the APA, and reinstating the 2016 Valuation Rule.¹²⁴

On August 7, 2020, DOI proposed revisions to the 2016 Coal, Oil, and Gas Valuation Rule.¹²⁵ The proposed revisions respond to President Trump's Executive Orders 13783 (Promoting Energy Independence and Economic Growth) and 13795 (Implementing an America-First Offshore Energy Strategy).¹²⁶ The new proposal seeks comment on measures to achieve the President's policy goals by (1) providing mechanisms that simplify reporting, and (2) promoting new and continued domestic energy production.

A Biden administration could withdraw the proposed rule, and either retain the 2016 Valuation Rule or propose an alternative that does not promote fossil fuel use.

4.3 Reinstate Climate Change and Mitigation Policies

On December 22, 2017, then Deputy Secretary of the Interior David Bernhardt issued Secretarial Order 3360 rescinding the DOI Manuals on Climate Change Policy and Landscape-Scale Mitigation Policy, the BLM Mitigation Manual, and the BLM Mitigation Handbook.¹²⁷ Under a Biden administration, DOI could issue a new secretarial order revoking Order 3360, and reinstating the manuals and handbooks.

¹²³ Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 82 Fed. Reg. 36934 (Aug. 7, 2017).

¹²⁴ *Becerra v. Dep't of Interior*, 381 F. Supp. 1153 (N.D. Cal. 2019).

¹²⁵ Office of Nat. Res. Revenue, 2020 Valuation Reform and Civil Penalty Rule (Aug. 7, 2020), https://www.onrr.gov/Laws_R_D/2020ProposedValRule.pdf.

¹²⁶ *Id.* at 11–12.

¹²⁷ DOI Secretarial Order 3360 (Dec. 22, 2017), <https://perma.cc/XT94-YN43>.

4.4 Reinstate Policy for Managing National Parks in the Context of Continuous Change

On August 16, 2017, the National Parks Service (“NPS”) rescinded Director’s Order #100, which reaffirmed that resource stewardship was a preeminent duty of the NPS.¹²⁸ The Order noted that “The overarching goal of NPS resource management should be to steward NPS resources for continuous change that is not yet fully understood, in order to preserve ecological integrity and cultural and historical authenticity, provide visitors with transformative experiences, and form the core of a national conservation land- and seascape.”¹²⁹ The policy specifically recognized that “[c]limate change is creating and will continue to drive dynamic environmental shifts that affect natural and cultural resources, facilities, visitation patterns, and visitor experiences.”¹³⁰

Under a Biden administration, NPS could reinstate the Director’s Order or issue a new Order to take its place.

4.5 Restore BLM Planning 2.0 Rule

On March 27, 2017 President Trump signed a Congressional Review Act (“CRA”) resolution to repeal Bureau of Land Management BLM’s Planning 2.0 rule.¹³¹ The Planning 2.0 rule contained provisions aimed at ensuring that BLM officials incorporate the most current data and technology into their plans and reviews, and one goal of the rule was to allow BLM to more readily address changing conditions on public lands caused by climate change.¹³² The rule noted that “The BLM will consider relevant resource management concerns, such as climate change and the need for climate change adaptation, when assessing the baseline condition, trend, and potential future condition and when identifying the planning issues for any given resource management plan.”¹³³

¹²⁸ Rob Hotakainen, *NPS chief scraps climate-focused order*, GREENWIRE (Aug. 31, 2017), <https://www.eenews.net/stories/1060059511>.

¹²⁹ Nat’l Parks. Serv., Dir. Order #100, Resource Stewardship for the 21st Century (2016) at 1.1.

¹³⁰ *Id.*

¹³¹ H.J. Res. 44, Pub. L. No. 115-12, 131 Stat. 76.

¹³² Resource Management Planning, 81 Fed. Reg. 89580 (Dec. 12, 2016)

¹³³ *Id.* at 89657.

Under a Biden administration, BLM could initiate a new rulemaking to replace the Planning 2.0 rule, though it would have to address the CRA's prohibition on reinstating a rule "in substantially the same form" as the repealed rule without intervening legislation.¹³⁴

4.6 Endangered Species Act Regulations

On August 27, 2019, the U.S. Fish and Wildlife Service ("FWS") and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service ("NMFS") published three final rules amending the implementing regulations of the Endangered Species Act ("ESA").¹³⁵ The amendments modify key requirements pertaining to listing determinations, critical habitat designations, interagency consultations, and taking prohibitions, ultimately weakening protections for species and making it easier for public and private projects to proceed despite the potential for adverse impacts on threatened and endangered species (or species which would be listed as such prior to the amendments). The final rules were immediately challenged in court, and case remains pending.¹³⁶

Some of the new provisions may limit agency discretion to consider future climate change impacts in listing and critical habitat designations.¹³⁷ The new amendments also make it more difficult for FWS and NMFS to designate critical habitat in areas not presently occupied by a

¹³⁴ 5 U.S.C. § 801(b)(2) ("A rule that [is invalidated under the CRA] may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.").

¹³⁵ Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45020 (Aug. 27, 2019); FWS, Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976 (Aug. 27, 2019); FWS, Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44753 (Aug. 27, 2019).

¹³⁶ Center For Biological Diversity et al. v. Bernhardt et al., No. 4:19-cv-05206 (N.D. Cal. Aug 21, 2019).

¹³⁷ For example: the revised ESA regulations require FWS and NMFS to analyze whether a species is likely to become an endangered species within the "foreseeable future" when determining whether to list that species as threatened, and the new amendments define the "foreseeable future" to extend "only so far into the future as the services can reasonably determine that *both* the future threats and the species' responses to those threats are likely." 84 Fed. Reg. at 45052 (emphasis added). Limiting the analysis of "foreseeable future" risks in this fashion may result in FWS and NMFS ignoring long-range climate change projections, because even where climate change poses a clear threat to the species, there may be considerable uncertainty as to how the species will respond to that threat.

species—a limitation which could negatively impact species whose habitat is shifting due to changing climatic conditions.¹³⁸ In addition, the amendments authorize the agencies to determine that the designation of critical habitat is not prudent in situations where “threats to the species’ habitat stem solely from causes that cannot be addressed by management actions that may be identified through consultation” under the ESA,¹³⁹ while this does not necessarily preclude FWS or NMFS from designating critical habitat for species that are threatened by climate change, the rule signals that intent.¹⁴⁰ Finally, the amendments repeal language which required that agencies make listing determinations “without reference to the possible economic or other impacts of such determinations,” thus seeking to allow agencies to consider economic impacts in listing decisions in contradiction to the clear statutory language.¹⁴¹

Under a Biden administration FWS and NMFS could initiate a new rulemaking process to repeal the amendments in part or in whole. This re-regulation process could also entail updating the ESA regulations with new guidance and directives to agencies on how to account for modern environmental challenges such as climate change in ESA consultations, listing decisions, critical habitat designations, and conservation plans. For example, a Biden administration could replace the new language requiring greater level of certainty in listing and habitat designations with a

¹³⁸ The ESA expressly defines “critical habitat” to include areas “outside the geographical area occupied by the species at the time it is listed... upon a determination by the Secretary that such areas are essential for the conservation of the species.” 16 U.S.C. § 1532(5)(a). But the amendments impose new constraints on unoccupied habitat designations specifying that: (i) the services must first determine that presently occupied habitat is inadequate for the survival of the species before even considering the designation of unoccupied habitat, and (ii) “for an unoccupied area to be considered essential, the Secretary must determine that there is a *reasonable certainty* both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.” 84 Fed. Reg. at 45053. This would preclude FWS and NMFS from designating unoccupied habitat that *could* provide a significant conservation benefit to species whose ranges are shifting due to climate change, unless the services can show with *near certainty* that the habitat will provide those benefits.

¹³⁹ 84 Fed. Reg. at 45053.

¹⁴⁰ *See id.* at 45042 (preamble stating that a critical habitat designation would not be prudent for “species experiencing threats stemming from melting glaciers, sea level rise, or reduced snowpack” because “a critical habitat designation and any resulting section 7(a)(2) consultation, or conservation effort identified through such consultation, could not ensure protection of the habitat.”)

¹⁴¹ *Id.* at 45024.

more precautionary approach to species management that includes guidance on how to account for uncertainty and changing baseline conditions.¹⁴²

5. DEPARTMENT OF ENERGY

5.1 Reverse Expedited Approval of Natural Gas Exports

The Department of Energy (“DOE”) has taken steps to expedite natural gas export approvals during the Trump administration. In 2018, DOE issued a final rule to provide for automated approval of applications for “small-scale” exports of natural gas (up to 51.75 billion cubic feet per year) to countries with which the U.S. has not entered into a free trade agreement and with which trade is not prohibited by U.S. law or policy.¹⁴³ The federal government does not have good data on whether and to what extent natural gas exports may reduce greenhouse gas emissions (i.e., by reducing overseas coal use). DOE has omitted renewable energy from past studies on energy substitution and natural gas exports.¹⁴⁴ Expanding natural gas production and transmission infrastructure also locks in the use of natural gas, and recent studies have found that such infrastructure emits significantly more methane than previously estimated, which raises questions about the emission reduction benefits of fuel switching to natural gas.¹⁴⁵

DOE also issued a proposed rule on May 1, 2020, which would categorically exclude “export of natural gas and associated transportation by marine vessel” from the department’s

¹⁴² Existing NMFS guidance on climate change in the context of ESA provides, for example, that absent information to the contrary listing decisions will be made in light of the high-emissions RCP 8.5 scenario. See Memorandum from Eileen Sobeck, Assistant Administrator for Fisheries, NOAA, to Regional Administrators 2-3 (2016), file:///C:/Users/DJM/Desktop/pr_climate_change_guidance_june_2016_OPR3.pdf.

¹⁴³ Final Rule: Small-Scale Natural Gas Exports, 83 Fed. Reg. 35106 (July 25, 2018).

¹⁴⁴ See Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas From the United States: 2019 Update-Response to Comments, 85 Fed. Reg. 72 (Jan. 2, 2020); DOE, LIFE CYCLE GREENHOUSE GAS PERSPECTIVE ON EXPORTING LIQUIFIED NATURAL GAS FROM THE UNITED STATES: 2019 UPDATE (2019); DOE, LIFE-CYCLE GREENHOUSE GAS PERSPECTIVE ON EXPORTING LIQUIFIED NATURAL GAS FROM THE UNITED STATES (2014).

¹⁴⁵ See, e.g., Letter from Hillary Aidun & Romany Webb, Sabin Center for Climate Change Law, to Office of NEPA Policy and Compliance, Dep’t of Energy (June 1, 2020), <https://climate.law.columbia.edu/sites/default/files/content/%5BFINAL%5D%20DOE%20Comment%20Letter%20%5B6-1-20%5D.pdf>; Ramón A. Alvarez et al., *Assessment of Methane Emissions from U.S. Oil and Gas Supply Chain*, 361 SCIENCE 186 (2018).

NEPA procedures.¹⁴⁶ If finalized, the rule would allow DOE to approve larger scale natural gas exports without any analysis of environmental consequences, including upstream and downstream greenhouse gas emissions associated with the production and end use of the natural gas exports. This would also exacerbate the information deficit noted above – specifically, the lack of federal analysis on the impacts of natural gas exports on energy use and corresponding greenhouse gas emissions.

Under a Biden administration, DOE could initiate rulemaking to repeal the small-scale export approval rule, and either withdraw the proposed NEPA exemption or else, if it is finalized and published, initiate rulemaking to repeal the exemption and reinstate prior procedures. DOE could also introduce new procedures or safeguards aimed at ensuring DOE accounts for the full range of climate impacts in its natural gas export approvals and related policies. For example, the administration could direct DOE to conduct a lifecycle assessment of greenhouse gas emissions from natural gas exports that accounts for renewable energy, and then use the data from this assessment to inform natural gas export decisions. Such an assessment could also be part of a programmatic NEPA review

5.2 Tighten Energy Efficiency Standards for Lightbulbs

Under President Trump DOE has taken a number of steps to weaken energy efficiency standards applicable to a variety of types of lightbulbs. On February 6, 2019, DOE issued a notice of proposed rulemaking proposing to withdraw certain definitions relating to general service lamps (“GSLs”) and general service incandescent lamps (“GSILs”), which were finalized in January 2017.¹⁴⁷ The 2017 definitions had the effect of expanding the number of types of lightbulbs subject to efficiency regulations, including to candle- and globe-shaped bulbs and bulbs for candelabras, ceiling fixtures and track lighting. DOE finalized the withdrawal of these expanded

¹⁴⁶ National Environmental Policy Act Implementing Procedures, 85 Fed. Reg. 25340 (May 1, 2020).

¹⁴⁷ Energy Conservation Program: Energy Conservation Standards for General Service Lamps, Final Determination, 84 Fed. Reg. 3120 (Feb. 11, 2019).

definitions on September 5, 2019.¹⁴⁸ A group of states and environmental organizations has challenged DOE's withdrawal.¹⁴⁹

Also on September 5, 2019, DOE proposed repealing light bulb efficiency standards for general service incandescent lamps (which are the common, pear-shaped lightbulbs also known as "A-lamps") set to become effective on January 1, 2020, determining that the new, more stringent lightbulb standards were "not economically justified."¹⁵⁰ Together with the earlier withdrawal of the definitional changes, the repeal would drastically reduce the potential for energy reductions from lighting by limiting the bulbs subject to efficiency standards and by lessening the stringency of those standards. DOE finalized this repeal on December 27, 2019.¹⁵¹

Under a Biden administration, DOE could take two complementary approaches to re-effectuate the withdrawn definitional changes and repealed standards. First, DOE could initiate a new rulemaking to reinstate the broader definitions of GSLs and GSILs in place before DOE's 2019 rulemaking. DOE could also begin a new assessment of standards for incandescent lamps, and incorporate a more complete view of the climate impacts of efficiency standards to conclude that more stringent lightbulb standards are justified. In developing proposed amended standards, DOE is required to design standards that achieve the maximum efficiency improvements that DOE determines are technologically feasible and economically justified.¹⁵² A so-called "anti-backsliding" provision prohibits DOE from issuing a standard that increases maximum allowable energy use of a covered product.¹⁵³ DOE has express authority under the Energy Conservation and Policy Act ("EPCA") to propose standards for lightbulbs according to these parameters.¹⁵⁴

¹⁴⁸ Energy Conservation Program: Definition for General Service Lamps, Final rules; withdrawal, 84 Fed. Reg. 46661 (Sept. 5, 2019).

¹⁴⁹ *New York v. Department of Energy*, No. 19-3652 (2d Cir. Nov. 04, 2019).

¹⁵⁰ Energy Conservation Program: Energy Conservation Standards for General Service Incandescent Lamps, Notice of proposed determination and request for comment, 84 Fed. Reg. 46830, 46381 (Sept. 5, 2019).

¹⁵¹ Energy Conservation Program: Energy Conservation Standards for General Service Incandescent Lamps, Final determination, 84 Fed. Reg. 71626 (Dec. 27, 2019).

¹⁵² 42 U.S.C. § 6295(o)(2)(A).

¹⁵³ 42 U.S.C. § 6295(o)(1).

¹⁵⁴ 42 U.S.C. § 6295(i).

Second, and in tandem with issuing notices of proposed rulemakings, DOE could enforce the congressionally-mandated minimum standard of 45 lumens per watt for GSLs until the standards put forth in the new rulemaking processes go into effect. The Energy Independence and Security Act of 2007 (“EISA”)¹⁵⁵, which amended EPCA, not only required DOE to issue new final lightbulb standards in 2017 and 2020, it also included a “backstop” standard of 45 lumens per watt, effective January 1, 2020, if DOE “fail[ed] to complete a rulemaking... or if the final rule does not produce savings that are greater than or equal to the savings from a minimum efficacy standard of 45 lumens per watt.”¹⁵⁶ Because DOE withdrew the definitional changes and repealed the finalized standards scheduled to go into effect on January 1, 2020, DOE either “failed to complete a rulemaking” or the final rule, having never gone into effect, did “not produce savings that are greater than or equal to... 45 lumens per watt,” the backstop standard is already in effect.

5.3 Tighten Energy Efficiency Standards for Dishwashers

On July 16, 2019, DOE issued a notice of proposed rulemaking proposing to define a new product class under EPCA that would include dishwashers with cycle times of less than one hour.¹⁵⁷ The notice of proposed rulemaking was issued in response to an April 2018 notice of petition for rulemaking by the Competitive Enterprise Institute (“CEI”) and comments received in response to such notice of petition for rulemaking.¹⁵⁸ CEI and its supporters argued that appliance standards applicable to dishwashers caused dishwashers to have longer run times, leading to “dissatisfaction of consumers.”¹⁵⁹ A new product class would have the effect of removing the dishwashers with shorter run times from the efficiency standards of the existing dishwasher product class.¹⁶⁰

¹⁵⁵ U.S. Pub. L. 110-140 (2007).

¹⁵⁶ 42 U.S.C. § 6295(i)(6)(A)(v).

¹⁵⁷ Energy Conservation Program: Energy Conservation Standards for Dishwashers, Grant of Petition for Rulemaking, 84 Fed. Reg. 33869 (July 16, 2019).

¹⁵⁸ Energy Conservation Program: Energy Conservation Standards for Dishwashers, Notification of Petition for Rulemaking, 83 Fed. Reg. 17768 (Apr. 24, 2018).

¹⁵⁹ Petition for Rulemaking on a New Product Class of Fast Dishwashers, Competitive Enterprise Institute (Mar. 21, 2018), published with 83 Fed. Reg. 17768, at 17772.

¹⁶⁰ *Id.* at 17776; *see also* 42 U.S.C. § 6295(o)(1) (“The Secretary may not prescribe any *amended* standard which increases the maximum allowable energy use, or . . . decreases the minimum required energy efficiency, of a covered product.”) (emphasis added).

Under a Biden administration, DOE could issue a final rule declining to define the new product class, or issue a new proposed rule declining to define the new product class and then finalize *that* rule. A final rule is due by July 16, 2022, three years after the date DOE granted CEI's petition.¹⁶¹ If DOE issues a final rule defining the new dishwasher product class prior to President Trump leaving office, under a Biden administration, DOE could initiate a new rulemaking to repeal, withdraw or eliminate the new dishwasher product class. In developing proposed amended standards, DOE is required to design standards that achieve the maximum efficiency improvements that DOE determines are technologically feasible and economically justified.¹⁶² An anti-backsliding provision prohibits DOE from issuing a standard that increases maximum allowable energy use of a covered product.¹⁶³ DOE has express authority under EPCA to propose standards for dishwashers according to these parameters.¹⁶⁴ The proposed rule appears to directly violate the anti-backsliding provision.

5.4 Tighten Energy Efficiency Standards for Manufactured Housing

In January 2017, DOE withdrew a June 2016 proposed rule¹⁶⁵ that sought to establish energy conservation standards for manufactured housing, as required by the EISA. The proposed rule was withdrawn along with many others in connection with the Trump administration's so-called "regulatory freeze" memorandum issued on the first day of the Trump presidency.¹⁶⁶ Though DOE issued an August 2018 notice of data availability and request for information¹⁶⁷ and published notice of an April 2019 advisory committee meeting,¹⁶⁸ no new proposed or final rule has been issued with respect to energy conservation standards for manufactured housing.

¹⁶¹ 42 U.S.C. § 6295(n)(4).

¹⁶² *Id.* § 6295(o)(2)(A).

¹⁶³ *Id.* § 6295(o)(1).

¹⁶⁴ *Id.* § 6295(g).

¹⁶⁵ Energy Conservation Standards for Manufactured Housing, Notice of proposed rulemaking and public meeting, 81 Fed. Reg. 39756 (Jun. 17, 2016).

¹⁶⁶ Memorandum for the Heads and Acting heads of Executive Departments and Agencies, 66 Fed. Reg. 7701 (Jan. 24, 2017).

¹⁶⁷ Energy Conservation Program: Energy Conservation Standards for Manufactured Housing, Notice of data availability; request for information, 83 Fed. Reg. 38073 (Aug. 3, 2018).

¹⁶⁸ Notice of a Federal Advisory Committee Meeting; Manufactured Housing Consensus Committee, 84 Fed. Reg. 4096 (Feb. 14, 2019).

Under a Biden administration, DOE could initiate a new rulemaking for “Energy Conservation Standards for Manufactured Housing.”¹⁶⁹ DOE has express authority under Section 413 of the EISA¹⁷⁰ to propose standards for manufactured housing according to these parameters, and is required to update such standards no later than one year after any revision to the International Energy Conservation Code.¹⁷¹

5.5 Maintain Existing Test Procedure Interim Waiver Process

On May 1, 2019, DOE issued a notice of proposed rulemaking proposing to “streamline” the process by which an appliance manufacturer can obtain a temporary, interim waiver from test procedure requirements.¹⁷² Specifically, DOE’s proposed rule would amend the existing interim waiver process by deeming an interim waiver granted if DOE fails to respond to the waiver request within 30 days.¹⁷³ The proposed rule has not been finalized, despite a June 26, 2019 notice of extension¹⁷⁴ and a July 22, 2019 re-opening of the public comment period with respect to the proposed rule.¹⁷⁵

Under a Biden administration, DOE could withdraw the proposed rule. If the DOE issues a final rule in line with the proposed rule prior to President Trump leaving office, DOE under a Biden administration could initiate a new rulemaking to repeal the rule, or otherwise modify the test procedure interim waiver process to requiring any such interim waiver to be affirmatively granted by the DOE.

¹⁶⁹ In December 2017 the Sierra Club filed an action seeking to compel DOE to promulgate energy efficiency standards for manufactured housing. *Sierra Club v. Perry*, 1:17-cv-02700 (D.D.C. Dec. 18, 2017). On November 22, 2019 the court approved a consent decree pursuant to which DOE must propose standards by May 2021 and must finalize those standards no later than February 2022. *Sierra Club v. Perry*, 1:17-cv-02700 (D.D.C. Nov. 22, 2019).

¹⁷⁰ 42 U.S.C. § 17071.

¹⁷¹ *Id.* § 17071(b)(3)(B).

¹⁷² Test Procedure Interim Waiver Process, Notice of proposed rulemaking; request for comment, 84 Fed. Reg. 18414 (May 1, 2019).

¹⁷³ *Id.*

¹⁷⁴ Test Procedure Interim Waiver Process, Notice of webinar and extension of public comment period, 84 Fed. Reg. 30047 (June 26, 2019).

¹⁷⁵ Test Procedure Interim Waiver Process, Proposed rule; re-opening of public comment period, 84 Fed. Reg. 35040 (July 22, 2019).

5.6 Rescind Changes to the “Process Rule”

On February 14, 2020, DOE issued a final rule amending its “process rule,” which governs the process of updating standards for each product covered by EPCA’s appliance energy conservation standards.¹⁷⁶ The revisions to the process rule allow industry stakeholders more influence over how the energy use of their products is tested and increase the threshold energy savings a standard change must achieve to trigger the updating process to 0.3 quadrillion BTUs in site energy saved over 30 years or a ten percent improvement as compared to existing standards.¹⁷⁷ This amended process rule would result in many fewer new standards. On April 14, 2020, a group of state attorneys general and environmental organizations filed petitions for review of the final rule before the Ninth Circuit.¹⁷⁸ On August 18, 2020, DOE issued a final rule, effective October 19, 2020, that would further amend the process rule to place a larger weight on the burden to an appliance’s effectiveness in determining whether a trial standard level was economically justified.¹⁷⁹

Under a Biden administration, DOE could initiate a new rulemaking to repeal both amendments to the process rule; the agency could also issue a request for information from relevant stakeholders to determine the content of any new process rule.

¹⁷⁶ Energy Conservation Program for Appliance Standards: Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, Final rule, 85 Fed. Reg. 8626 (Feb. 14, 2020).

¹⁷⁷ *Id.* at 8705.

¹⁷⁸ See *California v. Dep’t of Energy*, No. 20-71068 (9th Cir. Apr. 14, 2020); *Natural Resources Defense Council, Inc. v. Brouillette*, No. 20-71071 (9th Cir. Apr. 14, 2020).

¹⁷⁹ Energy Conservation Program for Appliance Standards: Procedures for Evaluating Statutory Factors for Use in New or Revised Energy Conservation Standards, 85 Fed. Reg. 50937 (Aug. 18, 2020).

6. DEPARTMENT OF TRANSPORTATION

6.1 Reinstate Greenhouse Gas Metric for Assessing Performance

On May 31, 2018, the Federal Highway Administration (“FHWA”) repealed a regulation establishing performance standards for state and regional highway planning.¹⁸⁰ The regulations, issued in 2017, required that state and regional highway planners receiving federal funding tally and report anticipated greenhouse gas emissions from vehicles traveling on their roads.¹⁸¹ Such reporting is no longer required as a result of the repeal.

Under a Biden administration, the FHWA could initiate a new rulemaking to reinstate the greenhouse gas reporting requirement.

6.2 Reinstate National Tire Fuel Efficiency Consumer Information Program

On January 26, 2017, the Department of Transportation withdrew a proposed rule that would have implemented the EISA requirement to establish a national tire fuel efficiency consumer information program for replacement tires designed for use on motor vehicles.¹⁸² The proposed rule was part of a two-part rulemaking process aimed at creating a national tire fuel efficiency consumer information program. In 2010, the National Highway Traffic Safety Administration (“NHTSA”) published a final rule (part 1) specifying the test procedures to be used to rate the performance and energy efficiency of replacement passenger car tires for this new program. The purpose of the now withdrawn proposed rule (part 2) was to address how this information would be made available to consumers.

Under a Biden administration, NHTSA could initiate a new rulemaking re-proposing the rule.

¹⁸⁰ National Performance Management Measures; Assessing Performance of the National Highway System, Freight Movement on the Interstate System, and Congestion Mitigation and Air Quality Improvement Program, 83 Fed. Reg. 24920 (May 31, 2018).

¹⁸¹ National Performance Management Measures; Assessing Pavement Condition for the National Highway Performance Program and Bridge Condition for the National Highway Performance Program, 82 Fed. Reg. 5970 (Jan. 18, 2017).

¹⁸² *Tire Fuel Efficiency Consumer Information--Part 2*, REGINFO.GOV, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201610&RIN=2127-AK76>.

6.3 Set Effective Date for Corporate Average Fuel Economy Standard Penalties Rule

NHTSA announced on July 12, 2017 that it would indefinitely delay the effective date of an Obama-era rule to increase penalties on automakers that don't meet fuel efficiency standards.¹⁸³ Among other things, the rule would apply a penalty rate of \$14 per tenth-of-an-mpg to model year 2019 and later fleets, and would increase that penalty in light of inflation.¹⁸⁴

Under a Biden administration, NHTSA could issue a notice setting an effective date for the rule.

7. JOINT ACTIONS BY EPA AND THE DEPARTMENT OF TRANSPORTATION

7.1 Restore California's Authority to Set Climate-Protective Motor Vehicle Standards and State and Local Governments' Authority to Adopt Rules that May Affect Fuel Economy

7.1.1 California's Preemption Waiver

On September 27, 2019, EPA and NHTSA finalized "Part One" of the SAFE Rule.¹⁸⁵ In doing so, EPA took final action to revoke California's authority to set its own vehicle emissions standards that are more climate-protective than federal requirements. The EPA's mandate to set emission standards for new motor vehicles under the Clean Air Act generally preempts states' ability to establish such standards. However, California can seek a waiver to set its own regulations that are at least as protective as applicable federal rules, which other states may follow. In 2013 EPA granted California a preemption waiver for its Advanced Clean Car ("ACC") regulations. The ACC program is comprised of California's low emission vehicle program,

¹⁸³ Civil Penalties, 82 Fed. Reg. 32139 (July 12, 2017).

¹⁸⁴ Civil Penalties, 81 Fed. Reg. 95489 95491 (Jan. 27, 2017).

¹⁸⁵ The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51310 (Sept. 27, 2019).

greenhouse gas standards, and zero-emission vehicle (“ZEV”) program. The ZEV program requires a certain percentage of vehicles in the state to produce no carbon dioxide tailpipe emissions. In 2019, California’s greenhouse gas standards covered 35.8% of U.S. light-duty vehicle sales, counting both California and other states that adopted those standards.¹⁸⁶ Part One of the SAFE Rule withdrew the preemption waiver for California’s greenhouse gas standards and the ZEV mandate. As discussed below, in Part One of the SAFE Rule NHTSA also finalized a new rule purporting to preempt ZEV mandates and state and local regulations on tailpipe greenhouse gas emissions.

Shortly after Part One of the SAFE Rule was finalized, it was challenged by environmental organizations, states, and industry groups arguing, among other things, that EPA lacks the authority to withdraw a preemption waiver it previously granted.¹⁸⁷ The litigation challenging Part One of the SAFE Rule is ongoing.

Under a Biden administration, EPA could publish a notice in the Federal Register rescinding the action and beginning to reinstate California’s 2013 waiver. EPA could then move to dismiss the ongoing challenge to the waiver revocation as moot.¹⁸⁸ Alternatively, if California petitions EPA for a new preemption waiver with respect to its greenhouse gas and ZEV standards, EPA could begin the process of approving such a waiver.¹⁸⁹ In addition to the other

¹⁸⁶ CALIFORNIA AIR RESOURCES BOARD, STATES THAT HAVE ADOPTED CALIFORNIA’S VEHICLE STANDARDS UNDER SECTION 117 OF THE FEDERAL CLEAN AIR ACT (2019), <https://ww2.arb.ca.gov/resources/documents/states-have-adopted-californias-vehicle-standards-under-section-117-federal>.

¹⁸⁷ *Union of Concerned Scientists v. National Highway Traffic Safety Administration*, No. 19-1230 (D.C. Cir. Oct. 28, 2019).

¹⁸⁸ Because the ongoing litigation also challenges NHTSA’s new preemption rule, EPA’s rescission of the waiver revocation would not moot the case entirely.

¹⁸⁹ Section 209(b)(1) provides that EPA shall approve such a waiver after notice and opportunity for public hearing if, among others, the standard California seeks is at least as stringent as federal regulations. *See* 42 U.S.C. § 7543(b).

U.S. states following California’s emissions standards, Canada is likely to adopt those standards as well, further extending the impact of restoring California’s preemption waiver.¹⁹⁰

7.1.2 Other State and Local Vehicle Initiatives

In Part One of the SAFE Rule, NHTSA also finalized a rule purporting to expand the preemptive scope of the EPCA. NHTSA’s authority under EPCA to set fuel economy standards preempts states’ ability to set such standards. NHTSA’s new rule interprets EPCA as preempting any State or local requirement limiting tailpipe carbon dioxide emissions from automobiles, and as preempting any requirement that “has the direct and substantial effect of regulating fuel consumption.”¹⁹¹ The rule thus would not prohibit state or local greenhouse gas regulations that have no effect, or only an incidental effect on fuel economy.¹⁹² The rule further confirms that all ZEV mandates are preempted.¹⁹³

Under a Biden administration, NHTSA could initiate a new rulemaking to rescind the preemption rule.

7.2 Strengthen Motor Vehicle Emissions Standards

On March 31, 2020, EPA and NHTSA finalized a rule rolling back motor vehicle fuel efficiency and GHG emission standards.¹⁹⁴ The new Safe Affordable Fuel Efficient (“SAFE”) Vehicle Rule sets revised standards for corporate average fuel economy and tailpipe carbon dioxide emissions for passenger vehicles and light-duty trucks for model years 2021-2026. Under the SAFE Rule, the fuel economy and carbon dioxide emissions standards for covered vehicles will increase in stringency by 1.5% per year from model year 2020 over model years 2021-2026. The SAFE Rule replaced requirements issued in 2012 that would have achieved a 5%

¹⁹⁰ Memorandum of Understanding Between the California Air Res. Bd., of the State of California, and Env’t and Climate Change Canada, of the Gov’t of Canada to Enhance Coop. on Measures That Mitigate Greenhouse Gas Emissions 2 (June 26, 2019) (agreeing to “[c]ollaborate on the development of our respective greenhouse gas regulations for light-duty vehicles that require meaningful improvements in vehicle efficiency every year, such as those currently in effect”), https://www.energy.ca.gov/sites/default/files/2019-12/ECCC-CARB-MOU-June-26_ada.pdf

¹⁹¹ 84 Fed. Reg. at 51313.

¹⁹² *Id.*

¹⁹³ *Id.* at 51314.

¹⁹⁴ The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24174 (Apr. 30, 2020).

improvement per year in carbon dioxide emissions standards and fuel economy standards for light-duty vehicles.¹⁹⁵ The SAFE rule was challenged shortly after the Trump administration finalized it, and that litigation remains pending.¹⁹⁶

Under a Biden administration, EPA and NHTSA could initiate a new rulemaking to rescind the SAFE Rule, reinstate the previous standards, and promulgate new greenhouse gas and corporate average fuel economy standards for model years 2022 and beyond.

8. FOREST SERVICE

8.1 Withdraw Proposed Amendments to NEPA Procedures

On June 13, 2019, the U.S. Forest Service (“USFS”) proposed amendments to its NEPA regulations aimed at increasing the efficiency of environmental reviews.¹⁹⁷ The proposed amendments would, among other things, exempt certain activities from environmental review requirements, including activities related to oil and gas exploration and development. USFS has not taken any official action since receiving comments on the proposal, but a final rule may be forthcoming now that CEQ has finalized revisions to its implementing NEPA regulations.

Under a Biden administration USFS could withdraw the proposed rule. If USFS issues a final rule, USFS could initiate a rulemaking to repeal that rule in whole or in part.¹⁹⁸ This directive to USFS could be expressly or implicitly included as part of an executive branch-wide initiative to repeal and replace the Trump administration’s revisions to NEPA regulations.¹⁹⁹

¹⁹⁵ 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62624 (Oct. 15, 2012).

¹⁹⁶ *Competitive Enterprise Institute v. NHTSA*, No. 20-1145 (D.C. Cir. May 1, 2020).

¹⁹⁷ USFS, National Environmental Policy Act (NEPA) Compliance, 85 Fed. Reg. 27544 (June 13, 2019).

¹⁹⁸ There are provisions in the rule that the Biden administration may want to leave in place, such as those related to adaptive management and condition-based management.

¹⁹⁹ See Section 9.1 for additional discussion of the CEQ NEPA regulations.

8.2 Abandon Proposal to Streamline Oil and Gas Permitting in National Forests

On September 13, 2018, USFS published an advance notice of proposed rulemaking seeking comment on how it should modify existing regulations to streamline and expedite the oil and gas permitting on national forest lands.²⁰⁰ The notice describes potential revisions to simplify the permitting process, adding that “[t]he intent of these potential changes would be to decrease permitting times by removing regulatory burdens that unnecessarily encumber energy production,” and that “[t]hese potential changes would promote domestic oil and gas production.”²⁰¹ Specifically, USFS is soliciting comment on the following topics:

- Streamlining and reforming the process used by USFS to identify National Forest System lands that the Bureau of Land Management may offer for oil and gas leasing;
- Updating regulatory provisions concerning lease stipulation waivers, exceptions and modifications;
- Clarifying procedures for review and approval of surface use plans of operations;
- Updating the language addressing the operator's responsibility to protect natural resources and the environment;
- Clarifying language regarding inspections and compliance; and
- Addressing geophysical/seismic operations associated with minerals related matters in a manner that mirrors BLM regulations.²⁰²

Under a Biden administration, USFS could withdraw the notice or a proposed rule (if one is proposed). Or, if a proposed rule is published and finalized before a Democratic president takes office, a Biden administration could initiate a new rulemaking to repeal the rule.

²⁰⁰ Oil and Gas Resources, 83 Fed. Reg. 46458 (Sept. 13, 2018).

²⁰¹ *Id.* at 46459.

²⁰² *Id.* at 46460.

8.3 Withdraw Plans to Allow Tree Harvesting and Road Construction in the Tongass National Forest

On October 17, 2019, USFS issued a notice of proposed rulemaking that would exempt the Tongass National Forest from the Service's 2001 Roadless Area Conservation Rule.²⁰³ The Roadless Area Conservation Rule prohibits most timber harvesting and new road construction in the National Forest, and recognizes both that "the agency's first and highest priority is to ensure sustainability for resources under its jurisdiction," and "the agency's responsibility as a world leader in natural resource conservation by setting an example for the global community."²⁰⁴ USFS's proposed rule exempting the Tongass National Forest makes no mention of climate change or the forest's role as a carbon sink, but focuses instead on Alaska's stated preference for rural economic development opportunities.²⁰⁵

Under a Biden administration, USFS could withdraw the proposed rule or, if the proposed rule is finalized before a Democratic president takes office, issue a notice of proposed rulemaking to repeal the rule.

9. COUNCIL ON ENVIRONMENTAL QUALITY

9.1 Strengthening NEPA Regulations

On July 16, 2020 the CEQ published a final rule amending the NEPA implementing regulations.²⁰⁶ The rule contains a number of provisions aimed at curtailing environmental analysis, limiting disclosures to the public, and expediting federal approvals for major projects such as fossil fuel leases and supply infrastructure. For example, the rule:

- eliminates requirements to evaluate cumulative effects and effects from cumulative actions;

²⁰³ Special Areas; Roadless Area Conservation; National Forest System Lands in Alaska, 84 Fed. Reg. 55522 (Oct. 17, 2019).

²⁰⁴ Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3243, 3266 (Jan. 21, 2001).

²⁰⁵ 84 Fed. Reg. at 55523.

²⁰⁶ Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304 (July 16, 2020).

- collapses the distinction between direct and indirect effects, instead directing agencies to analyze impacts that are “reasonably foreseeable” and have a “reasonably close causal connection” to the action²⁰⁷;
- seeks to curtail consideration of effects by stating that “effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain”²⁰⁸;
- repeals the guidelines on significance determinations (which required consideration of context, intensity, and a number of enumerated factors). Instead, it directs agencies to “analyze the potentially affected environment and degree of the effects of the action” when evaluating significance²⁰⁹;
- seeks to limit the scope of impacts that are relevant to significance determinations, for example by telling agencies that “in the case of a site-specific action, significance would usually depend only upon the effects in the local area”²¹⁰; and
- establishes presumptive time limits for environmental assessments (one year) and EISs (two years).²¹¹

Environmental groups filed a lawsuits challenging the regulatory amendments shortly after the final rule was issued, arguing that CEQ violated the APA by abruptly abandoning central provisions of its long-standing NEPA regulations without adequate justification, ignoring critical concerns raised in public comments, and promulgating new regulations which seek to limit NEPA reviews in a way that totally undermines the purpose and goals of the NEPA statute.²¹²

²⁰⁷ 40 C.F.R. § 1508.1(g).

²⁰⁸ *Id.* § 1508.1(g)(2).

²⁰⁹ *Id.* § 1501.3(b).

²¹⁰ *Id.* § 1501.3(b)(i).

²¹¹ *Id.* § 1501.10(a).

²¹² Alaska Community Action on Toxics et al v. CEQ, No. 3:20-cv-5199 (N.D. Cal. July 29, 2020); Wild Virginia et al. v CEQ, No. 3:20-cv-0045 (W.D. Va. July 29, 2020).

While the actual effect of these amendments remains to be seen, under a Biden administration, CEQ could initiate a new rulemaking process to restore key provisions of the NEPA regulations and repeal the arbitrary limitations and loopholes included in the 2020 amendments. CEQ could also use this opportunity to update the NEPA regulations in a manner consistent with the statute, as opposed to merely reverting to the previous regulatory scheme. That said, it would be prudent to restore key regulatory provisions as quickly as possible to minimize the disruption to agency practices. To help mitigate that disruption, CEQ could also issue a memorandum to agencies at the beginning of its term in which it could: (i) notify agency officials of its intent to re-initiate a NEPA rulemaking process, (ii) direct agency heads to cease work on any updates to internal agency procedures that may have been initiated in response to the Trump-era amendments, and (iii) clarify that agencies should continue to evaluate indirect effects and cumulative effects in NEPA reviews (since the amended regulations do not expressly forbid evaluation of such effects).

9.2 Guidance on Climate Change and NEPA Reviews

CEQ is in the process of promulgating new guidelines on consideration of greenhouse gas emissions and climate change in NEPA reviews. CEQ repealed the Obama-era guidance in 2017,²¹³ and it published new draft guidance in 2019.²¹⁴ The draft guidance is not as significant a departure from the Obama-era guidance as one might expect: it acknowledges that greenhouse gas emissions are an environmental impact, that both direct and indirect GHG emissions should be quantified where it is practicable to do so, and that “comparing alternatives based on potential effects due to GHG emissions . . . can help agencies differentiate among alternatives.”²¹⁵ It also acknowledges that agencies should account for the effects of climate change on baseline environmental considerations where that analysis would not be overly speculative. However, the draft also contains a number of statements which appear aimed at limiting NEPA disclosures of

²¹³ Withdrawal of Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 82 Fed. Reg. 16576 (Apr. 5, 2017).

²¹⁴ Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 84 Fed. Reg. 30097 (June 26, 2019).

²¹⁵ *Id.* at 30098.

GHG emissions and climate change impacts. For example, on the subject of GHG quantification, the draft guidance directs agencies to quantify emissions where they are “substantial enough to warrant quantification” (presumably seeking to curtail quantification) without providing any guidance on what is meant by “substantial enough” in this context. It also contains a section on the “use of cost-benefit analysis” which discourages agencies from using the social cost of carbon (“SCC”) in NEPA reviews.

If the guidance is finalized before President Trump leaves office, a Biden administration CEQ could withdraw the guidance and either restore the Obama-era guidance or issue new guidance on the topic of climate change and NEPA reviews. Assuming the administration is also initiating a rulemaking process to restore aspects of the NEPA implementing regulations, it would make sense to hold off on the issuance of any final climate guidance until that rulemaking process is complete. However, the administration could issue draft or interim guidance in the meantime, perhaps as part of the transitional memorandum noted in Section 3.1 above.

10. HOUSING AND URBAN DEVELOPMENT

10.1 Improve Floodplain Management and Mitigating Future Flood Risk

President Trump signed Executive Order 13777 on February 24, 2017, ordering each agency to establish a Regulatory Reform Task Force to identify agency regulations to be replaced, repealed, or modified.²¹⁶ Pursuant to that Order and Executive Order 13771,²¹⁷ the Department of Housing and Urban Development (“HUD”) withdrew a proposed rule designed to improve floodplain management and enhance building standards to mitigate future flood risk in the context of climate change.²¹⁸ The proposed rule would have, among others, required HUD assisted or financed projects in areas subject to floods be elevated above the base flood elevation as determined by best available information, and would have revised HUD's Minimum Property Standards for one-to-four unit housing to increase resiliency to flooding, reduce the risk of flood

²¹⁶ Exec. Order No. 13777, 82 Fed. Reg. 12285 (Mar. 1, 2017).

²¹⁷ See *supra* Section 2.7.

²¹⁸ Floodplain Management and Protection of Wetlands; Minimum Property Standards for Flood Hazard Exposure; Building to the Federal Flood Risk Management Standards, 81 Fed. Reg. 74967 (Oct. 28, 2016). .

loss, minimize the impact of floods promote sound, sustainable, long-term planning that takes into account sea level rise.²¹⁹

Under a Biden administration, HUD could initiate a new rulemaking to re-propose the rule or to propose new standards and requirements that address floodplain management and future flood risk in the context of climate change.

11. SMALL BUSINESS ADMINISTRATION

11.1 Apply the Federal Flood Risk Management Standard to Federal Loans

On January 20, 2017, President Trump ordered all agencies to postpone the publication of new and pending regulation.²²⁰ In response, the Small Business Administration (“SBA”) withdrew a proposed rule to apply the Federal Flood Risk Management Standard (“FFRMS”) to SBA disaster loans. The proposed rule, which was submitted to OIRA for review and had not been made final and published before President Trump’s regulatory freeze, would have applied the FFRMS to SBA disaster loans that exceed \$2 million for repair or replacement of a damaged or destroyed structure.

Under a Biden administration, SBA could initiate a new rulemaking to reintroduce the same or a similar rule.

²¹⁹ *Id.*

²²⁰ Memorandum for the Heads and Acting heads of Executive Departments and Agencies, 66 Fed. Reg. 7701 (Jan. 24, 2017).

APPENDIX 1: DRAFT EXECUTIVE ORDER ON ADDRESSING THE CLIMATE CRISIS

Executive Order on Addressing the Climate Crisis

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to address and prepare the Nation for the impacts of climate change by undertaking actions to (1) address the climate crisis and avert the most catastrophic climate change scenarios by reducing greenhouse gas emissions and increasing the capacity of our nation’s carbon sinks; (2) enhance climate preparedness and resilience; (3) assist with climate change adaptation; (4) address historical environmental and public health inequities; and (5) prioritize the needs of communities and working families above corporate polluters, it is hereby ordered as follows:

Section 1. POLICY. Climate change presents a greater, more severe threat to the United States’ economy and environment than recognized at the time President Obama issued Executive Order 13653 (“Preparing the United States for the Impacts of Climate Change”). Scientific research and data show that there have been and will be further increases in average temperatures, prolonged heat waves, heavy rainstorms, permafrost thawing, ocean acidification, and sea-level rise. These and other climate impacts are already affecting our nation’s communities, natural resources, ecosystems, economy, security, and public health and welfare.

While carbon dioxide is the most abundant greenhouse gas, other greenhouse gases, including black carbon, fluorinated gases, nitrous oxide, and methane, create a warming influence on the climate that in some cases is many times more potent than that of carbon dioxide on a per-ton basis. These pollutants also have a dramatic and detrimental effect on air quality and public health.

Reducing emissions of all greenhouse gases will have an immediate beneficial impact on climate change and public health. It will also have long-term economic benefits, creating sustainable, well-paid jobs and improving the United States' international competitiveness. National climate action offers an opportunity to advance public health and economic opportunities for all Americans, including by addressing the health, economic, and environmental burdens that have disproportionately fallen on communities of color and low-income communities.

Since the rescission of EO 13653, our nation has lost precious time to address, respond to, and prepare for the existential threats climate change will bring. Tempering the worst of these impacts is essential to protecting our national security and public health and essential to achieving global leadership in climate change aversion, resilience and preparedness. The COVID-19 crisis has compounded and laid bare the disproportionate impacts of environmental pollution, climate change, and other public health threats on communities of color and low-income communities.

Mitigating and responding to the threats posed by climate change require deliberate preparation, close cooperation, meaningful engagement by stakeholders, and coordinated interagency planning across government, including, among others, by the Council on Environmental Quality, the Environmental Protection Agency, the Departments of Energy, Defense, Interior, State, and Transportation, the Federal Emergency Management Agency, the Federal Energy Regulatory Commission, and the National Oceanic and Atmospheric Administration. Cooperation with states and local and tribal governments is also essential.

Section 2. POLICY. It is the policy of the Federal Government to lead and facilitate domestic and global efforts to decelerate climate change; improve climate preparedness and resilience; help safeguard our economy, infrastructure, environment, and natural resources; address the disproportionate impacts of climate change and other environmental pollution on communities of color; and provide for the continuity of operations, services, and programs. These efforts must identify and prioritize efforts to protect our nation's most vulnerable populations.

Section 3. FEDERAL RESPONSE. Federal agencies shall be responsible for developing policies and regulations that may directly or indirectly reduce greenhouse gas emissions and support atmospheric greenhouse gas removal, including, where appropriate, restoring previous regulations and policies to address climate change, and, where appropriate, promulgating new or modified regulations and policies. To this end, the heads of all agencies shall identify regulatory standards, guidance documents, policies and other instruments designed to mitigate or adapt to the impacts of climate change that have been repealed, rescinded or weakened, including pursuant to the executive orders rescinded by Section 4 of this Order; where appropriate, reinstate such instruments; and, where appropriate, strengthen such instruments. Federal agencies shall also develop new policies and regulations that can support climate mitigation, adaptation and resilience to prevent this existential threat from fully materializing, based on current science and data.

Section 4. EXECUTIVE ORDERS REVOKED. Executive Orders 13766, 13771, 13795, 13834, 13840, 13867, 13868, 13792, 13927 and 13924 are hereby revoked.

Section 5. ENVIRONMENTAL JUSTICE. (a) The Attorney General is hereby ordered to: (i) implement, to the extent possible by executive action, the Environmental Justice Act of 2019 (S. 2236); (ii) increase enforcement of environmental and civil rights laws to advance environmental justice; (iii) strategically support ongoing plaintiff-driven climate litigation against polluters; (iv) address legacy pollution in a manner that includes real and lasting remedies to make communities safe, healthy, and whole; and (v) work hand-in-hand with EPA's Office of Civil Rights to ensure that Title VI of the 1964 Civil Rights Act is enforced to bring justice to frontline communities.

(b) There is hereby established a White House Environmental Justice Advisory Council and White House Environmental Justice Interagency Council, both of which will report directly to the Chair of the White House Council on Environmental Quality (CEQ). These two councils will be charged with revising EO 12898 in order to address current and historic environmental

injustice, in collaboration with local environmental justice leaders; and developing plans for creating accountability and firm metrics on meeting the established goals.

(c) There is established an Interagency Climate Equity Task Force tasked with addressing climate inequity in frontline vulnerable communities and tribal nations, directed by the principle of investing in community self-determination.

Section 6. GENERAL PROVISIONS. (a) Nothing in this order shall be construed to impair or otherwise affect:

- (i) the authority granted by law to an executive department, agency, or the head thereof; or
- (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

APPENDIX 2: ACTIONS A BIDEN ADMINISTRATION CAN UNDERTAKE ON ITS FIRST DAY

<i>Executive Action Affected</i>	<i>Reregulatory Action</i>	<i>Citation or Explanation</i>	<i>Report Section</i>
Executive Order 13766	Revoke	82 Fed. Reg. 8657 (Jan. 30, 2017)	2.6.
Executive Order 13771	Revoke	82 Fed. Reg. 9339 (Feb. 3, 2017)	2.7
Executive Order 13777	Revoke	82 Fed. Reg. 12285 (Mar. 1, 2017)	2.7
Executive Order 13783	Revoke	82 Fed. Reg. 16093 (Mar. 31, 2017)	2.2
Executive Order 13792	Revoke	82 Fed. Reg. 20429 (Apr. 26, 2017)	2.4
Executive Order 13795	Revoke	82 Fed. Reg. 20815 (May 3, 2017)	2.3
Executive Order 13807	Revoke	82 Fed. Reg. 40463 (Aug. 15, 2017)	2.6
Executive Order 13834	Revoke	83 Fed. Reg. 23771 (May 17, 2018)	2.2
Executive Order 13840	Revoke	83 Fed. Reg. 29431 (June 22, 2018)	2.9
Executive Order 13867	Revoke	84 Fed. Reg. 15491 (Apr. 15, 2019)	2.5
Executive Order 13868	Revoke	84 Fed. Reg. 15495 (Apr. 10, 2019)	2.5
Executive Order 13924	Revoke	85 Fed. Reg. 31553 (May 19, 2020)	2.12
Executive Order 13927	Revoke	85 Fed. Reg. 35165 (June 9, 2020)	2.11
Presidential Permit of March 29, 2019	Revoke	84 Fed. Reg. 13101 (Apr. 3, 2019)	2.10
Proclamation 9681	Revoke	82 Fed. Reg. 58081 (Dec. 4, 2017)	2.4
Proclamation 9682	Revoke	82 Fed. Reg. 58089 (Dec. 4, 2017)	2.4
Withdrawing U.S. from the Paris Agreement	Rejoin the Paris Agreement	The U.S. can rejoin the Paris Agreement at any time by filing an instrument of accession with the U.N.'s Secretary General. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-110, arts. 20, 26.	2.1
Executive Order 13693	Reinstate	75 Fed. Reg. 43021 (July 22, 2010) (issued by President Obama)	2.2
OMB Guidance on EO 13771	Revoke	Memorandum: "Guidance Implementing Executive Order 13771, Titled 'Reducing Regulation and Controlling Regulatory Costs'" (April 5, 2017).	2.7

APPENDIX 3: TABLE OF AGENCY REREGULATORY ACTIONS PROPOSED

Agency Actions			
<i>Deregulatory Effort or Action Affected</i>	<i>Reregulatory Action</i>	<i>Citation or Explanation</i>	<i>Report Section</i>
EPA			
Allowing carbon dioxide emissions from new coal-fired power plants.	Halt Ongoing Unfinished Rulemaking	Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 84 Fed. Reg. 65424 (Dec. 20, 2018)	3.2
Overhaul of EPA's approach to cost-benefit analysis under the Clean Air Act.	Halt Ongoing Unfinished Rulemaking	Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 85 Fed. Reg. 35612 (June 11, 2020)	3.5
Limiting EPA's use of science in justifying regulatory action.	Halt Ongoing Unfinished Rulemaking	Strengthening Transparency in Regulatory Science, 83 Fed. Reg. 18768, 18770 (Apr. 30, 2018)	3.7
Allowing coal ash pond operators to avoid lining ponds by showing that they are using an alternative method to prevent leaks.	Halt Ongoing Unfinished Rulemaking	Hazardous and Solid Waste Management System: Disposal of CCR; A Holistic Approach to Closure Part B: Alternate Demonstration for Unlined Surface Impoundments; Implementation of Closure, 85 Fed. Reg. 12456 (Mar. 3, 2020)	3.8
Updating requirements for water quality certification under the Clean Water Act to narrow states' and certain tribes' authority to condition and block infrastructure projects approved by the federal government.	Initiate Rulemaking to Rescind or Replace Final Rule	Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42210 (July 13, 2020)	2.5

Agency Actions			
<i>Deregulatory Effort or Action Affected</i>	<i>Reregulatory Action</i>	<i>Citation or Explanation</i>	<i>Report Section</i>
Relaxing requirements that owners and operators of refrigeration equipment have leak detection and maintenance programs for HFCs.	Initiate Rulemaking to Rescind or Replace Final Rule	Protection of Stratospheric Ozone: Revisions to the Refrigerant Management Program's Extension to Substitutes, 85 Fed. Reg. 14150 (Mar. 11, 2020)	3.4.2
Replacing the Clean Power plan with the ACE Rule.	Initiate Rulemaking to Rescind or Replace Final Rule	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)	3.1
Announcing rules relaxing the new source performance standards for methane and volatile organic compound emissions from the oil and gas sector.	Initiate Rulemaking to Rescind or Replace Final Rule	Envtl. Prot. Agency, EPA Issues Final Policy and Technical Amendments to the New Source Performance Standards for the Oil and Natural Gas Industry, Oil and Natural Gas Air Standards (last updated Aug. 13, 2020)	3.3.1
Declining to develop methane emissions guidelines for existing facilities.	Restart Halted Rulemaking	Under section 111(b) of the Clean Air Act, EPA can only issue emissions guidelines with respect to existing sources of pollution, which would be subject to new source performance standards if they were new sources. <i>See</i> 42 U.S.C. § 7411(d) Such guidelines were abandoned in Spring 2017. <i>See</i> Spring 2017 Unified Agenda of Federal Regulatory and Deregulatory Actions, 2060-AT29: Emissions Guidelines for Existing Oil and Natural Gas Sector, https://perma.cc/EMJ8-PEYT (June 14, 2017)	3.3.2

Agency Actions			
<i>Deregulatory Effort or Action Affected</i>	<i>Reregulatory Action</i>	<i>Citation or Explanation</i>	<i>Report Section</i>
Declining to enforce the 2015 HFC rule.	Informal Agency Action ²²¹	Protection of Stratospheric Ozone: Notification of Guidance and a Stakeholder Meeting Concerning the Significant New Alternatives Policy (SNAP) Program, 83 Fed. Reg. 18431 (Apr. 27, 2018)	3.4.1
Revising key Clean Air Act definitions in a way that could relax permitting requirements across a number of industries.	Informal Agency Action	Envtl. Protection Agency, Memorandum: Interpreting “Adjacent” for New Source Review and Title V Source Determinations in All Industries Other than Oil and Gas (2019), https://www.epa.gov/sites/production/files/2019-12/documents/adjacent_guidance.pdf .	3.6
DOI			
Proposing revisions to the 2016 Coal, Oil, and Gas Valuation Rule to encourage domestic energy production.	Halt Ongoing Unfinished Rulemaking	Office of Nat. Res. Revenue, 2020 Valuation Reform and Civil Penalty Rule (Aug. 7, 2020), https://www.onrr.gov/Laws_R_D/2020ProposedValRule.pdf	4.2
Removing protections for sage-grouse habitat.	Initiate Rulemaking to Rescind or Replace Final Rule	Bureau of Land Management, Sage-Grouse Conservation Plan Amendments Supported by Affected States’ Governors (Mar. 15, 2019), https://perma.cc/R45E-PNSG . BLM issues and amends land use plans through a notice and comment process set out in its regulations. <i>See</i> 43 CFR § 1610.1 et seq.	4.1.1
Repealing BLM’s Planning 2.0 rule.	Initiate Rulemaking to Rescind or Replace Final Rule	Resource Management Planning, 81 Fed. Reg. 89580 (Dec. 12, 2016) Note that a new rule must address CRA’s prohibition on reinstating a rule “in substantially the same form” as the repealed rule without intervening legislation. <i>See</i> 5 U.S.C. § 801(b)(2)	4.5

²²¹ “Informal Agency Action,” as used in this table, generally refers to actions an agency can undertake without engaging in notice-and-comment rulemaking pursuant to the Administrative Procedure Act. *See* 5 U.S.C. § 553.

Agency Actions			
<i>Deregulatory Effort or Action Affected</i>	<i>Reregulatory Action</i>	<i>Citation or Explanation</i>	<i>Report Section</i>
Issuing rules amending the ESA's implementing regulations to weaken protections for species and make development easier despite adverse impacts.	Initiate Rulemaking to Rescind or Replace Final Rules	Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45020 (Aug. 27, 2019); Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976 (Aug. 27, 2019); Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44753 (Aug. 27, 2019)	4.6
Establishing a Sage-Grouse Review Team to enable energy development on sage-grouse habitat.	Informal Agency Action	Secretarial Order 3353 (June 7, 2017), https://perma.cc/GKY7-B2JJ .	4.1.1
Expanding oil and gas leasing program within the Coastal Plain of the Arctic National Wildlife Refuge.	Informal Agency Action	See BLM, Coastal Plain Oil and Gas Leasing EIS, BLM National NEPA Register, https://eplanning.blm.gov/eplanning-ui/project/102555/510 (last updated June 8, 2020) Section 20001(c) of the Tax Cuts and Jobs Act of 2017 (P.L. 115-97) requires the Secretary of the Interior to conduct at least two lease sales, each covering at least 400,000 acres, in the Coastal Plain within ten years of the date of enactment of the Act.	4.1.2
Issuing Secretarial Order 3348, ending federal coal leasing review and moratorium.	Informal Agency Action	Secretarial Order 3348 (Mar. 29, 2017), https://www.doi.gov/sites/doi.gov/files/uploads/so_3348_coal_moratorium.pdf	4.1.3

Agency Actions			
<i>Deregulatory Effort or Action Affected</i>	<i>Reregulatory Action</i>	<i>Citation or Explanation</i>	<i>Report Section</i>
Issuing Secretarial Order 3350 directing the Bureau of Ocean Energy Management (“BOEM”) to develop a new five-year OCS leasing plan.	Informal Agency Action	Secretarial Order 3350 (May 1, 2017), https://perma.cc/8QN8-37GC .	4.1.4
Issuing Secretarial Order 3360 rescinding the DOI Manuals on Climate Change Policy and Landscape-Scale Mitigation Policy, the BLM Mitigation Manual, and the BLM Mitigation Handbook.	Informal Agency Action	Secretarial Order 3360 (Dec. 22, 2017), https://perma.cc/XT94-YN43 .	4.3
Revoking Director’s Order #100 affirming that resource stewardship is a preeminent duty of the NPS.	Informal Agency Action	Nat’l Parks. Ser5., Dir. Order #100, Resource Stewardship for the 21st Century (2016) at 1.1.	4.4
DOE			
Proposing rule to categorically exclude “export of natural gas and associated transportation by marine vessel” from the department’s NEPA procedures.	Halt Ongoing Unfinished Rulemaking	National Environmental Policy Act Implementing Procedures, 85 Fed. Reg. 25340 (May 1, 2020)	5.1.

Agency Actions			
<i>Deregulatory Effort or Action Affected</i>	<i>Reregulatory Action</i>	<i>Citation or Explanation</i>	<i>Report Section</i>
Proposing rule to define a new product class under EPCA that would include dishwashers with cycle times of less than one hour.	Halt Ongoing Unfinished Rulemaking	Energy Conservation Program: Energy Conservation Standards for Dishwashers, Grant of Petition for Rulemaking, 84 Fed. Reg. 33869 (July 16, 2019)	5.3
Proposing rule to “streamline” the process by which an appliance manufacturer can obtain a temporary, interim waiver from test procedure requirements.	Halt Ongoing Unfinished Rulemaking	Test Procedure Interim Waiver Process, Notice of proposed rulemaking; request for comment, 84 Fed. Reg. 18414 (May 1, 2019)	5.5
Promulgating final rule providing for automated approval of applications for “small-scale” exports of natural gas to countries with which the U.S. has not entered into a free trade agreement and with which trade is not prohibited by U.S. law or policy.	Initiate Rulemaking to Rescind or Replace Final Rule	Final Rule: Small-Scale Natural Gas Exports, 83 Fed. Reg. 35106 (July 25, 2018)	5.1
Narrowing definitions of general service lamps to lighten efficiency requirements.	Initiate Rulemaking to Rescind or Replace Final Rule	Energy Conservation Program: Definition for General Service Lamps, Final rules; withdrawal, 84 Fed. Reg. 46661 (Sept. 5, 2019)	5.2
Loosening efficiency standards for incandescent bulbs.	Initiate Rulemaking to Rescind or Replace Final Rule	Energy Conservation Program: Energy Conservation Standards for General Service Incandescent Lamps, Final determination, 84 Fed. Reg. 71626 (Dec. 27, 2019)	5.2

Agency Actions			
<i>Deregulatory Effort or Action Affected</i>	<i>Reregulatory Action</i>	<i>Citation or Explanation</i>	<i>Report Section</i>
Amending DOE's "process rule," which governs the process of updating standards for each product covered by EPCA's appliance energy conservation standards.	Initiate Rulemaking to Rescind or Replace Final Rule	Energy Conservation Program for Appliance Standards: Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, Final rule, 85 Fed. Reg. 8626 (Feb. 14, 2020)	5.6
Abandoning June 2016 proposed rule that sought to establish energy conservation standards for manufactured housing, as required by the EISA.	Restart Halted Rulemaking	Energy Conservation Standards for Manufactured Housing, Notice of proposed rulemaking and public meeting, 81 Fed. Reg. 39756 (Jun. 17, 2016)	5.4
DOT			
Allowing bulk transport of liquified natural gas in rail tank cars.	Initiate Rulemaking to Rescind or Replace Final Rule	Hazardous Materials: Liquefied Natural Gas by Rail, 85 Fed. Reg. 44994 (July 24, 2020)	2.6
Removing greenhouse gas reporting requirements and performance standards for state and regional highway planning.	Initiate Rulemaking to Rescind or Replace Final Rule	National Performance Management Measures; Assessing Performance of the National Highway System, Freight Movement on the Interstate System, and Congestion Mitigation and Air Quality Improvement Program, 83 Fed. Reg. 24920 (May 31, 2018)	6.1

Agency Actions			
<i>Deregulatory Effort or Action Affected</i>	<i>Reregulatory Action</i>	<i>Citation or Explanation</i>	<i>Report Section</i>
Withdrawing proposed rule that would have implemented the EISA requirement to establish a national tire fuel efficiency consumer information program for replacement tires designed for use on motor vehicles.	Restart Halted Rulemaking	<i>Tire Fuel Efficiency Consumer Information--Part 2</i> , REGINFO.GOV, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201610&RIN=2127-AK76	6.2
Indefinitely delaying the effective date for rule increasing penalties on automakers that don't meet fuel efficiency standards.	Restart Halted Rulemaking	Civil Penalties, 82 Fed. Reg. 32139 (July 12, 2017)	6.3
EPA & DOT Jointly			
Promulgating "Part One" and "Part Two" of the SAFE Rule, revoking California's CAA waiver, declaring any state tailpipe regulation on GHGs preempted by EPCA, and relaxing fuel efficiency standards for light-duty vehicles.	Initiate Rulemaking to Rescind or Replace Final Rule	The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51310 (Sept. 27, 2019); The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24174 (Apr. 30, 2020)	7.1-2
Forest Service			
Proposing amendments to NEPA regulations aimed at speeding up environmental reviews.	Halt Ongoing Unfinished Rulemaking	National Environmental Policy Act (NEPA) Compliance, 85 Fed. Reg. 27544 (June 13, 2019)	8.1

Agency Actions			
<i>Deregulatory Effort or Action Affected</i>	<i>Reregulatory Action</i>	<i>Citation or Explanation</i>	<i>Report Section</i>
Seeking comment on how to modify existing regulations to streamline and expedite the oil and gas permitting on national forest lands.	Halt Ongoing Unfinished Rulemaking	Oil and Gas Resources, 83 Fed. Reg. 46458 (Sept. 13, 2018)	8.2
Proposing to exempt the Tongass National Forest from the Service's 2001 Roadless Area Conservation Rule.	Halt Ongoing Unfinished Rulemaking	Special Areas; Roadless Area Conservation; National Forest System Lands in Alaska, 84 Fed. Reg. 55522 (Oct. 17, 2019)	8.3
CEQ			
Issuing final rule amending the NEPA implementing regulations to truncate environmental analysis, limit disclosures to the public, and expedite federal approvals for major projects.	Initiate Rulemaking to Rescind or Replace Final Rule	Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304 (July 16, 2020)	9.1
Drafting new guidelines that put limits on consideration of greenhouse gas emissions and climate change in NEPA reviews.	Informal Agency Action	Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 84 Fed. Reg. 30097 (June 26, 2019)	9.2.
HUD			
Withdrawing proposed rule designed to improve floodplain management and enhance building standards to mitigate future climate-driven flood risk.	Restart Halted Rulemaking	Floodplain Management and Protection of Wetlands; Minimum Property Standards for Flood Hazard Exposure; Building to the Federal Flood Risk Management Standards, 81 Fed. Reg. 74967 (Oct. 28, 2016)	10.1

Agency Actions			
<i>Deregulatory Effort or Action Affected</i>	<i>Reregulatory Action</i>	<i>Citation or Explanation</i>	<i>Report Section</i>
SBA			
Withdrawing proposed rule to apply the Federal Flood Risk Management Standard (“FFRMS”) to SBA disaster loans.	Restart Halted Rulemaking	Small Business Administration, Semiannual Regulatory Agenda, 81 Fed. Reg. 94823, 94826 (Dec. 23, 2016) (describing proposed rule)	11.1
DOL			
Requiring retirement plan managers to only select investments based on financial considerations, explicitly stating that “plan assets may not be enlisted in pursuit of other social or environmental objectives.”	Initiate Rulemaking to Rescind or Replace Final Rule	Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 39113, 39116 (June 30, 2020)	2.6
NOAA			
Declining to extend charter for Advisory Committee for the Sustained National Climate Assessment.	Informal Agency Action	40 C.F.R. Part 102-3.5 <i>et seq.</i>	2.8