

Environmental Law

Expert Analysis

Biden Administration Will Reverse Many Trump Environmental Policies

When Joseph R. Biden, Jr. is inaugurated as the 46th President of the United States on January 20, he will reverse many of the environmental actions taken by President Donald Trump. Some of this he can and probably will do immediately, possibly on Inauguration Day; other actions will have to go through administrative processes that will take several months, at least. The Trump Administration neither secured nor repealed almost any environmental legislation even while Republicans controlled both the House and the Senate, and little it did in this area is irrevocable.

The Sabin Center for Climate Change Law's Climate Deregulation Tracker lists 164 actions the Trump Administration took to repeal or weaken climate rules, and its Silencing Science Tracker shows 327 federal attempts to restrict scientific research or disregard or distort its findings. During his campaign President-elect Biden promised to restore and strengthen environmental regulations

MICHAEL B. GERRARD is a professor at Columbia Law School and Faculty Director of the Sabin Center for Climate Change Law, and Senior Counsel to Arnold & Porter. EDWARD MCTIERNAN, a former General Counsel of the New York Department of Environmental Conservation, is a partner in Arnold & Porter.



By
**Michael B.
Gerrard**



And
**Edward
McTiernan**

and to respect and listen to scientists. For the first time climate change was discussed extensively in the presidential debates, and both Biden and Vice

During his campaign President-elect Biden promised to restore and strengthen environmental regulations and to respect and listen to scientists. For the first time climate change was discussed extensively in the presidential debates, and both Biden and Vice President-elect Kamala Harris mentioned it in their victory speeches.

President-elect Kamala Harris mentioned it in their victory speeches on Saturday.

The most aggressive environmental action would require Congressional support. The House of Representatives

is remaining in Democratic control. Control of the Senate depends on the outcome of two runoff elections to be held in Georgia on Jan. 5, 2021. If the Democratic candidates win both seats, the Senate will have a 50-50 tie and Vice President Harris will cast the deciding votes. Some legislation may be possible, but will require a unified front from all Democratic Senators or the support of some Republican Senators, creating difficult dynamics. If the Republicans capture one or both seats, Sen. Mitch McConnell (R-KY) will remain as majority leader and little progressive legislation will survive. The confirmation of Presidential nominations to the administration and the judiciary may also be fraught.

The Biden administration is expected to devote considerable resources to restoring federal primacy over policies protecting human health and the environment. This column will first discuss what the new government can do on its own, and then what would require formal rulemaking processes, and finally what can only be accomplished with Congressional action.

Executive Action

Biden has promised to rejoin the Paris Climate Agreement. This merely requires a letter to the Secretary-General

of the United Nations and then a 30-day waiting period; no further process is required. However, the United States will then need to submit an updated “nationally determined contribution” with its pledges for climate action.

As enumerated in a Sabin Center report, there are at least 15 Trump presidential executive orders and proclamations that may be quickly targeted for repeal. Most promote the use of fossil fuels or make it more difficult to issue new environmental regulations. Trump revoked several executive orders that had been issued by President Obama, and some of these may be reinstated, such as the one requiring more flood preparedness.

There is much talk that Biden will create a climate council within the White House, with stature similar to that of the Domestic Policy Council and National Economic Council, to coordinate and drive efforts across the government. He has already said he will create a new Advanced Research Projects Agency on Climate “to target affordable, game-changing technologies to help America achieve our 100% clean energy target.”

The Trump Administration began several rulemakings that have not been completed; some may yet be finalized during the lame duck period. (Some of them became necessary when the Administration took actions without adequate procedures and was told by the courts that formal rulemakings were needed.) President Biden could halt these proceedings. These include such actions as limiting EPA’s use of science in justifying regulatory action; overhauling EPA’s approach to cost-benefit analysis; relaxing energy efficiency standards for various appliances; streamlining oil and gas permitting on national forest lands; and relax-

ing the protection afforded migratory birds.

We will probably see a halt to planning to drill for oil and gas in the Outer Continental Shelf and the Arctic National Wildlife Refuge, and to open roadless areas in Tongass National Forest in Alaska to logging. There may be moratoria on leasing of federal lands for coal mining and possibly for oil and gas drilling. A Biden administration may also find creative ways to protect natural areas by using the federal Land and Water Conservation Fund, which was permanently reauthorized in August as one of the very few bipartisan environmental policies of the past four years.

Offshore wind is on the cusp of becoming a significant source of both clean energy and new jobs. The Department of the Interior’s Bureau of Ocean Energy Management has been delaying needed approvals. Under Biden these approvals will probably be considered in a more timely fashion, and the Bureau may open up additional leasing areas for offshore wind.

Several actions that never went through the rulemaking process and that will probably be rescinded include lowering the “social cost of carbon” figures, and relaxing air permitting requirements by reinterpreting “adjacent” under the New Source Review program.

Environmental justice has been a major focus of the campaign, and Harris introduced several bills on the subject in the Senate. The new administration will probably revise and reinvigorate President Clinton’s Executive Order 12898 on the subject, and work to infuse this issue into all aspects of federal decision-making.

Moving forward, Biden has pledged to advance a massive infrastructure program that would greatly increase

such items as solar and wind generation; energy storage capacity; energy efficient buildings; electric vehicle charging infrastructure; and public transit. Large appropriations from Congress are necessary to realize this full vision. Some may come as part of a COVID-19 stimulus package, but a divided Congress may make that prospect unlikely. Otherwise the new administration will work to advance these priorities within its available resources.

President Biden will be able to appoint a Democratic chair to the Federal Energy Regulatory Commission, who we expect to be accompanied by two Democratic and two Republican commissioners during the President’s first term, giving the Commission a Democratic majority that may be inclined to encourage renewable energy and the transmission infrastructure it needs, to act less favorably toward fossil fuels, and to allow carbon pricing in wholesale electricity markets.

Rulemakings

Several Trump actions made it all the way through the rulemaking process, and reversing them will require going through that process again. High on this list are Trump rules rolling back Obama-era fuel economy and greenhouse gas standards for light duty cars and trucks covering Model Years 2022 through 2026, and blocking California’s authority to adopt its own more stringent standards and thus the ability of other states to opt into California’s standards. New rulemaking will take some time. In the interim, several automakers have reached an independent agreement with California and a number of states voluntarily to achieve more stringent greenhouse gas limits on their nationwide fleets. This

agreement could potentially form the basis for an interim solution. Longer term, we may see yet stronger standards extending past Model Year 2026 for light duty vehicles, and additional options to encourage electric and other zero emissions vehicles. The Trump administration also has issued an advance proposal for more stringent conventional pollutant standards for heavy duty trucks and engines, and California is also adopting more stringent such standards. We can expect further action on this vehicle segment.

The Trump Administration weakened the regulations implementing three important statutes—the National Environmental Policy Act, the Clean Water Act (the “Waters of the United States” rule), and the Endangered Species Act. These will probably be reopened. Meanwhile, the Department of Justice may ask the courts to hold the litigation challenging the new Trump rules in abeyance.

Other rules that may be reversed are those weakening states’ authority under the Clean Water Act to condition or block federally-approved infrastructure projects; relaxing restrictions on leakage of methane and volatile organic compounds from the oil and gas sector; relaxing requirements regarding hydrofluorocarbon leakage from refrigerators; repealing Bureau of Land Management planning rules; and preventing retirement fund managers from considering social and environmental objectives.

Environmental and energy enforcement declined under the Trump administration and will probably increase again. In addition, there is likely to be more federal support for, and coordination with, state enforcement activities under the new administration.

Several Obama rulemakings that Trump halted may be resumed. These

include energy conservation standards for manufactured housing; more rules on methane leakage; bans on the insecticide chlorpyrifos and on certain uses of methylene chloride, trichloroethylene, and asbestos; application of flood standards to certain disaster loans; and lower National Ambient Air Quality standards for fine particulate matter (PM_{2.5}).

The Clean Power Plan, which chiefly aimed to reduce the use of coal to generate electricity, was a centerpiece of President Obama’s climate plan. It was stayed by the Supreme Court in February 2016. The litigation challenging it was never decided. The Trump Administration repealed it and replaced it with the far weaker Affordable Clean Energy Rule, which is now being litigated. The Biden administration could reintroduce the Clean Power Plan, but its legal vulnerabilities will likely induce the administration to look for alternative ways of achieving the same objectives.

Legislation

Over the last several months most polls predicted the election would lead to a strong Democratic majority in the Senate. That led to thoughts of abolishing the 60-vote legislative filibuster rule and allowing major legislation to proceed; granting statehood to the District of Columbia and Puerto Rico; and possibly expanding the Supreme Court to overcome the new 6-3 conservative majority. The election did not give the Democrats a majority in the Senate, though it is possible the Georgia runoff will yield an even split. Even if it does, contentious legislation may not survive, as achieving 50 votes on difficult issues would be challenging. Congress has not enacted a major new environmental law since 1990; the partisan divide has been too great. It

also is uncertain whether Congress will approve the \$2 trillion infrastructure plan Biden proposed during his campaign as a way to help reach his goal of a carbon-free power sector by 2035 and net-zero emissions economy wide by 2050. Legislation would also be needed to achieve at least two important planks of the Biden climate plan—a nationwide clean energy standard and an end to fossil fuel subsidies.

However, there is bipartisan momentum for bills on water resources development, drinking water protection, natural areas conservation, surface transportation programs, and energy research and development. Carbon capture and sequestration also enjoys bipartisan support.

One type of bill that could be imagined under President Biden (though not under President Trump) is an economy-wide carbon tax. Several such bills have been introduced; none has advanced, but some of them have garnered quiet support on both sides of the aisle, and among some (but not all) environmental and industry groups. The bills vary in the amount of the tax, the uses of the proceeds, whether they also provide regulatory relief, and other aspects. It remains to be seen whether President Biden (who did not talk about carbon taxes during this campaign) would be inclined to support this idea, and if so, whether he could push it through as the best climate legislation that can be achieved in the current political environment.