

Environmental Law in Trump's Second Term

By Michael B. Gerrard

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Donald Trump's victory in the Nov. 5, 2024 election and Republican control of both the Senate and the House (if that happens) will mean a reversal of much of the environmental progress under the Biden administration, just as the 2016 election reversed large parts of the Obama environmental legacy. However, rapid advances in the technology and economics of clean energy have created a momentum that can be slowed but not stopped. States can adopt their own stronger standards despite what happens in Washington, with a few exceptions, and can use their procurement power and their pension funds' investment clout to effect change.

This column discusses some of the key effects of the election on environmental law.

Core Environmental Laws and Agencies

The fundamental U.S. environmental statutes were all enacted between 1970 and 1990. Widening partisan divides have blocked any major new laws since then except for the Inflation Reduction Act (IRA), discussed below. Due in large part to the filibuster rule that requires 60 votes in the Senate for substantive legislation, none of these laws has ever been repealed.

The first Trump administration ("Trump 1.0") could not weaken the statutes, but it weakened the regulations under the National Environmental Policy Act (NEPA), the Clean Air Act, the Clean Water Act, and the Endangered Species Act.

The Biden administration reversed almost all of these actions. The Supreme Court in *Sackett v. EPA*, 598 U.S. 651 (2023), effectively annulled Biden's Waters of the United States rule under the Clean Water Act and narrowed the applicability of the statute.

Several of the other actions are still pending in court, and the Supreme Court may restrict the scope of NEPA in *Seven County Infrastructure Coalition v. Eagle County*, which is being argued on December 10. The second Trump Administration ("Trump 2.0") can be expected to again weaken the regulations under all these laws, and to roll back their enforcement.

Several other key statutes concern hazardous and toxic substances – the Comprehensive Environmental Response, Compensation and Liability Act; the Resource Conservation and Recovery Act; the Toxic Substances Control Act; the Federal Insecticide, Fungicide and Rodenticide Act; and the Emergency Planning and Community Right-to-Know Act. Regulations under these laws were not much affected under Trump 1.0, and they do not seem to be major targets of Trump 2.0 either.

One possible exception could be the regulation of a class of chemicals known as PFAS. Recent



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actions by the Environmental Protection Agency (EPA) would impose large costs on many entities (including public water suppliers) to clean up these chemicals, and there is mounting industry pressure to relax these rules.

During Trump 1.0 only 31 percent of major changes in regulations that were challenged in court survived, mostly because the Administrative Procedure Act and other procedural rules were not followed. Trump 2.0 may be more careful, though following the rules will take considerably more time.

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The Heritage Foundation’s Project 2025 has been widely seen as blueprint for Trump 2.0. Donald Trump has disavowed it, but many of the people in his circle – including Vice President Elect J.D. Vance – have supported it, and many still believe that it is a good indication of the likely actions of the next administration. Project 2025 called for slashing EPA’s budget, and some prominent Trump advisors are proposing that EPA headquarters be relocated to Texas or Florida as a way of disrupting the bureaucracy. (During Trump 1.0, the Bureau of Land Management headquarters was relocated to Colorado; Biden reversed that.) Project 2025 says its “goal is to assemble an army aligned, vetted, trained, and prepared conservatives to go to work on Day One to deconstruct the Administrative State.”

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Project 2025 calls for eliminating the use of the social cost of carbon, a tool employed to reflect

climate impacts in government decisions. It also calls for altering risk analysis methods to downplay some risks, and for stopping some environmental research.

Another organization that appears to be influential with Trump’s advisers is the America First Policy Institute. Its proposals are less specific but are generally aligned with those of Project 2025.

Sources of Greenhouse Gas (GHG) Emissions

GHG emissions are the principal cause of anthropogenic climate change. The largest sources of GHGs in the U.S. are motor vehicles and coal-fired power plants.

EPA sets standards for GHG emissions from motor vehicles. The National Highway Traffic Safety Administration (NHTSA) sets the fuel economy standards. Under both Presidents Obama and Biden (with a halt by President Trump in between) both of these kinds of standards were strengthened, leading to progressively cleaner cars. Regulations adopted late in the Biden administration are even stronger.

Federal law also allows California to set its own even more stringent standards if EPA grants a waiver, and if it does, other states may adopt those. States that have traditionally followed the California standards amount to around 40 percent of the market for passenger cars. California has adopted rules that would over time phase out internal combustion engine cars and require that all new cars starting with the 2035 model year be zero emission. EPA has granted the needed waiver. Several states have adopted laws requiring all new cars to be zero emission by 2035, but this depends on the California waiver; without it, state laws inconsistent with the federal standards are preempted.

Both the stronger fuel economy standards and the California waiver are being challenged in court. Trump is likely to direct EPA and NHTSA to freeze or weaken the standards and to revoke the California waiver, as he did during his first term. These actions, too, will be fought in court.

The automakers are free to make as many electric cars as they want and are already spending billions of dollars on new or modified factories to increase their output, but whether they are compelled to do so depends on the outcome of these court cases. The subsidies for electric vehicles in the IRA, an important factor in the pace of the transition, are also at risk under Trump.

One might think that Elon Musk, who will be very influential in Trump's second term, would fight for strong federal incentives. However, his Tesla was able to build up a strong market share without these rules; the rules now also help his competitors like General Motors and Ford, and Musk may not want to press for actions that would also help them.

Trump will also ease the approval process for liquified natural gas (LNG) export terminals, but so many have already been approved it is questionable whether more will be needed.

No one is building new coal-fired power plants in the U.S. any more, but there are around 225 still operating in the U.S. They are now the second largest source of GHGs and also major emitters of unhealthy air pollutants such as fine particulates. Democratic administrations have for decades tried to accelerate their cleanup and closure. Under President Clinton, EPA imposed standards on mercury and other emissions. In 2015 the Obama administration issued a set of regulations called the Clean Power Plan, designed to shift electricity generation toward cleaner sources, but the Supreme Court abruptly stayed it in 2016, and then the EPA under Trump repealed it. Nonetheless, in 2022 the court ruled that the plan was beyond EPA's powers in *West Virginia v. EPA*, 597 U.S. 647 (2022), which declared the "major questions doctrine," a centerpiece of the court's campaign to weaken the administrative state.

In 2024 EPA issued a new rule that requires the eventual closure of these plants unless they install carbon capture and sequestration, a very expensive proposition. This too is being challenged in court, and is very likely to be repealed by Trump.

Clean Energy

A clean energy economy requires the construction of a massive number of new wind and solar farms, and the associated storage and transmission, and possibly also nuclear. This is needed to replace all the old coal plants and most of the natural gas plants, and to provide the added power required for electrification of vehicles, buildings, and industry, the growth of data centers for artificial intelligence and cryptocurrency, more air conditioning to cope with a warmer world, and other new loads. In 2022 Congress passed the IRA, which is providing hundreds of millions of dollars – some estimates go over one trillion – in subsidies and tax breaks for clean energy. The IRA, coupled with rapidly falling costs, has spurred a large upsurge in new projects.

The IRA passed without a single Republican vote. The tally in the Senate was 50-50, with Vice President Kamala Harris breaking the tie. Trump has said he will repeal it. However, most of the IRA money for clean energy is going to Congressional districts represented in the House by Republicans. This obviously did not sway many voters in those districts on election day, but on Aug. 6, 18 Republican members of the House wrote to Speaker Mike Johnson urging that the parts of the IRA that benefit their districts be preserved. Moreover, polling indicates that renewable energy enjoys widespread public support. Thus Trump's ability to secure repeal of the relevant parts of the IRA is in question, though a cap on the tax credits seems likely. However, the Internal Revenue Service under Trump could make it difficult to utilize the tax credits.

The fate of the IRA will be an issue in 2025 with the scheduled expiration of parts of the Tax Cuts and Jobs Act of 2017, also known as the Trump tax cuts bill. Trump will presumably want to extend

these tax cuts (which mostly benefit the wealthy), and Congress will be looking for ways to pay for this. Slashing IRA subsidies could be part of this.

Wind and solar projects located on federal land or waters (which includes all offshore wind) require federal approval. Trump has often expressed antagonism to wind, in particular, and federal approvals for new wind projects that have not already received their final permits are likely to stall. Wind and solar projects on private or state-owned land generally do not require federal approvals.

Project 2025 opposes federal override of state control over the siting of electric transmission lines, and declares that “much of the transmission build-out (including its attendant costs) is being driven by renewable developers seeking market share.”

Nuclear energy, once a pariah in some circles, is now enjoying growing bipartisan support in view of the surging demand for electricity. The Bipartisan Infrastructure Law of 2021, the IRA of 2022, and the CHIPS and Science Act of 2022 all provide subsidies for nuclear. In July 2024 President Biden signed the ADVANCE Act, which encourages the construction of new reactors. The vote was 88-2 in the Senate and 393-13 in the House. Much hope is being placed especially in small modular reactors, but their commercial deployment is still years (maybe decades) away. Meanwhile, there has been little progress in developing long-term disposal options for the spent fuel from nuclear reactors, though Project 2025 calls for restarting the licensing process for the Yucca Mountain disposal facility.

Fossil fuels

Trump has adopted the “drill baby drill” mantra. He has also promised to cut energy prices in half, mostly by greatly increasing production of oil and natural gas. However, current production levels under President Biden are the highest ever seen in the U.S., and higher than any other country in the world. This is mostly due to fracking, which has become the largest source of primary energy in the U.S. (47 per cent in 2023). However, fracking is economical only if the prices of oil and natural

gas are high enough; a drastic decline in prices would drive down production. Trump will probably open up more federal lands and waters for oil and gas drilling, including the Arctic National Wildlife Refuge. He would also relax restrictions caused by NEPA, the Endangered Species Act, and other laws, but whether this will dramatically increase production is open to question.

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The IRA imposed a fee on methane leakage from oil and gas production. Methane is a powerful GHG, and this fee is the first nationwide carbon tax in the U.S. Some in industry are pressing for its repeal, and Trump is likely to be sympathetic.

Project 2025 calls for the elimination of energy efficiency standards for appliances. It would be difficult without Congress to strike the existing standards, as they were adopted through formal rulemakings, but new or stronger ones are not likely during Trump 2.0.

Environmental, Social and Governance (ESG)

Republicans have been generally hostile to ESG initiatives. Project 2025 calls for the Federal Trade Commission to target corporations’ cooperation on ESG as anticompetitive conduct.

In March 2024 the Securities and Exchange Commission issued a major regulation on climate disclosures. The SEC voluntarily put the rule on hold pending resolution of the multiple lawsuits challenging it. Trump 2.0 is almost certain to rescind this regulation. The impacts of this are reduced by two California laws, now being phased in and discussed in a previous column, that require climate disclosures – even greater than those under the SEC rule – by companies that do business in California, which is most large U.S. companies. These laws are now in litigation.

The Biden administration adopted the Justice40 Initiative, under which at least 40 percent of the benefits of certain federal programs would go to disadvantaged communities. Trump 2.0 will

almost certainly eliminate Justice40 and many other environmental justice programs.

Congressional Review Act (CRA)

The CRA allows the House and the Senate, by simple majority votes, with a presidential signature, to annul regulations that were enacted within a certain period of time before the votes. With Republican control of both chambers, Trump 2.0 may use the CRA to revoke a number of recent rules including those concerning lead pipe removal; hydrofluorocarbon reduction; and emissions requirements after reclassification of certain sources.

Seventeen EPA rules have been under review by the White House Office of Information and Regulatory Affairs. Any rules adopted between now and Jan. 20 are also vulnerable.

International Agreements

Trump withdrew the U.S. from the Paris Climate Agreement; Biden rejoined; and Trump will no doubt pull out again. He might also go further and, as urged by Project 2025, pull the U.S. from the United Nations Framework Convention on Climate Change, which the Senate ratified in 1992 and is the foundation for the Paris agreement. Any of this would deny the U.S. a seat at the global climate bargaining tables and cede climate leadership to China, which, despite now being the world's largest GHG emitter, is by far the leader in building wind, solar and electric vehicles, and dominates their supply chains.

In the ongoing climate negotiations, the developing countries have been demanding "loss and damage" – compensation for the injuries they have suffered as a result of climate change. The U.S. has long been a target of these demands. It is inconceivable that Trump and a Republican Congress would provide funds for this purpose.

Negotiations on a treaty to reduce the use and disposal of plastics have been ongoing for

several years. Trump 2.0 is unlikely to support a strong treaty.

State and Local Action

States cannot impose their own standards on motor vehicles without federal approval, but in most other respects states are free to set stronger environmental standards than Washington. Some of these standards can have impacts beyond the borders of the states. For example, renewable portfolio standards, which require electric utilities to buy a certain percentage of their power from clean sources, lead to more clean energy in states that lack such standards (such as Idaho) that want to sell their power to states that do (such as California). States can also adopt appliance energy efficiency standards for appliances that are not subject to federal standards.

On Nov. 5 the voters of Washington state rejected, by a 62-39 margin, a ballot measure that would have overturned the state's cap-and-invest program. New York is now in the process of adopting a similar program.

States and cities can use their procurement power to require low emissions production of the cement, steel, and other commodities, as well as motor vehicles and appliances, that they buy in large quantities. Large pension funds such as those of California and New York are pressing corporations to take climate-friendly actions.

Blue states and cities, together with environmental groups, will – as they did during Trump's first term – vigorously litigate against Trump's actions on the environment. It is certain that the next four years will be rocky indeed, with plenty of work for lawyers on both sides.

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