

View from Washington

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2021 Annual Meeting/Educational Seminar

North Georgia Water Resources Partnership

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President Biden's Transition Policies – Rulemaking

- **Rulemakings: Regulatory Freeze Pending New Administration Review:**
 - **Executive Order 13990, Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis**
 - Policies:
 - ❖ Advance environmental justice
 - ❖ Utilize best science
 - ❖ Limit exposure to dangerous chemicals and pesticides
 - ❖ Reduce greenhouse gas emissions
 - ❖ Restore and expand nationally protected areas and monuments
 - Directive:
 - ❖ All executive departments and agencies (agencies) to immediately review Trump-era rules for consistency with policy objectives
 - ❖ Creates Social Cost of Carbon Working Group (all Federal departments and agencies to review carbon impact of decision-making)
 - ❖ Revoked several Executive Orders by President Trump regarding environmental review



President Biden's Transition Policies – Rulemaking

- **Rulemakings: Regulatory Freeze Pending New Administration Review**
 - Memorandum issued January 20, 2021, intended to allow new Federal Agency heads to evaluate rules and policies
- **Rules not yet published in the Federal Register:**
 - Immediately withdrawn
- **Rules published in the Federal Register but not yet effective:**
 - Postpone the effective date of rules by 60 days (period ended in March)
 - Option to new 30-day comment period for the participation of interested stakeholders
- **Fully promulgated rules:**
 - Requires full Administrative Procedure Act substantive and procedural requirements to withdraw a finalized rule



Biden Executive Order Review Example

- **Biden Administration expected to review the Clean Water Act Section 401 Final Rule**
 - The Environmental Protection Agency (EPA) issued the Clean Water Act (CWA) section 401 Final Rule pursuant to President Trump’s April 10, 2019 Executive Order 13868
 - President Trump’s Executive Order 13868 directed EPA to update its CWA section 401 regulations and other federal agencies to update their guidance on the EPA rule when issued
 - On Inauguration Day, President Biden revoked President Trump’s Executive Order 13868.
 - This revocation signals to Federal Agencies that:
 - ❖ This rule may now be prioritized for review; and
 - ❖ To halt updating Federal Agency rules and guidance based on the Trump-era rule.



President Biden's Transition Policies – Litigation

- **Executive Order 13990**
- For those cases where a Federal Agency is defending a rule promulgated by the Trump Administration
- **The EPA requested that the Department of Justice (DOJ) ask courts to “freeze” these suits until new leadership is set in place**
- **Numerous examples of DOJ seeking to hold litigation proceedings in abeyance or remand the issue to the agency pending new leadership directives**
 - The department Trump Administration DOJ, in controversial case, sought Summary Judgment in many proceedings to avoid a position change by the Biden Administration DOJ
 - Courts will generally frown on the Biden Administration DOJ changing positions in the middle of an active proceeding
 - There are examples of the Court rejecting the request for stay and seeking briefing on summary judgment (*Wild Virginia v. CEQ*, Case No. 3:20-cv-00045 (W.D. Va.)



President Biden's New Environmental Leadership



Environmental Protection Agency, Administrator:

- **Michael Regan – Confirmed**
- North Carolina's top environmental regulator (North Carolina Department of Environmental Quality [NCDEQ])
 - Established North Carolina's Environmental Justice and Equity Advisory board to better align social inequities, environmental protection, and community empowerment
 - History of enforcement against manufacturing facilities that discharge PFAS
- Sent more than 9 years working in the EPA's air-quality program under former presidents Bill Clinton and George W. Bush
- Spent eight years at the Environmental Defense Fund

President Biden's New Environmental Leadership



Environmental Protection Agency, Administrator:

- **Expected to focus on:**
 - Environmental Justice
 - Released a memo internally defining Environmental Justice for the EPA as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.”
 - Climate Change
 - PFAS
 - Stated that PFAS is top priority for EPA
 - On the same day of his confirmation, draft PFAS drinking water regulations were added to the Federal Register
 - Continued focus on upgrading aging, municipal water infrastructure and has begun issuing water infrastructure loans

Trump-era Policies Prioritized for Early Review under Regan

- **2021 Financial Capability Assessment for Clean Water Act Obligations:**
 - EPA published a Federal Register on January 12, 2021; however, guidance has not been published and this policy is undergoing agency review
- **Advance Notice of Proposed Rulemaking Addressing PFOA and PFOS in the Environment:**
 - Issued January 14, 2021, but not published in the federal register and undergoing agency review
- **Safe Drinking Water Act and PFAS**
 - On March 3, 2021, EPA reissued the final regulatory determinations for PFOA and PFOS under the Safe Drinking Water Act (SDWA), which will begin the process to label both PFOA and PFOS as hazardous substances under the SDWA and will allow EPA to set Maximum Contaminant Levels (“MCL”) for both compounds
- **Per fluorinated substance known PFBS Toxicity Level Withdrawn:**
 - On February 9, 2021, EPA withdrew and will continue to review the toxicity PFBS, citing EPA's initial determination that "the conclusions in assessment were compromised by political interference as well as infringement of authorship and the scientific independence of the authors' conclusions"
 - April 8, 2021, EPA released a new toxicity assessment for PFBS (replacement PFOS compound)



President Biden's New Environmental Leadership



Council on Environmental Quality, Chair:

- **Brenda Mallory – Confirmed**
- First African-American to head CEQ
- Served as:
 - A lawyer for the U.S. EPA
 - Senior counsel for the Conservation Litigation Project
 - Director of regulatory policy at the Southern Environmental Law Center

President Biden's New Environmental Leadership



Council on Environmental Quality, Chair:

- **Expected to focus on:**
- Change in National Environmental Policy Act (NEPA) policy
 - Climate Change
 - Scope of Greenhouse Gas (GHG) emissions impact assessment;
 - Calculation of a project's carbon footprint;
 - Assessment of "significance" of that carbon footprint;
 - Appropriate use of the social cost of carbon (SCC) in NEPA analysis; and
 - Mitigation of GHGs
 - Environmental Justice

The Biden-Harris Administration—Looking Ahead

- The regulatory “freeze” is expected to “thaw” and regulatory activity is expected to heat up
- The Biden Administration has a fulsome environmental agenda, and the speed of agency action will be something to monitor closely
- Rolling back Trump-era rules and policies may be time consuming and primed for challenges in the courts
- PFAS-related initiatives may be able to move more quickly as there isn’t Trump-era policies to unwind
 - EPA expected to have a big role in Biden’s infrastructure plan, which proposes billions of dollars of funding for water infrastructure; electric school buses; remediation of PFAS; as well as redevelopment of brownfield and Superfund toxic waste sites
- Currently unclear how environmental justice and increased stakeholder participation will impact agency rulemakings



Ongoing Issue Spotting and Coverage

- **Troutman Pepper COVID-19 Resource Center**

- <http://covid19.troutman.com/>

- We have assembled a COVID-19 Task Force of Troutman Pepper attorneys who are available to help companies navigate this evolving public health crisis. They represent diverse practice areas and industries, across multiple geographies.

- **Environmental Law & Policy Blog**

- <https://www.environmentallawandpolicy.com/>

- Tracking each important environmental law and policy development and offering our initial impressions as to what they could mean for the businesses to which they apply.

Questions?

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