



The Water Report™

Water Rights, Water Quality & Water Solutions in the West

BRAVE NEW WORLD

WHAT A NEW ADMINISTRATION MEANS IN THE WORLD OF WATER QUALITY

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Introduction

The Trump Administration prioritized and promulgated numerous regulatory policies aimed at promoting energy and other infrastructure development, including Executive Orders, agency rulemakings, and individual project-level decisions. The Trump Administration also touted its desire to focus on rolling back regulations, including with such policies as the “2 for 1” order — an Executive Order requiring agencies to revoke two regulations for every new rule issued.

With the very recent inauguration of President Biden, there is a high expectation and strong indication that the new Administration will pursue countermeasures aimed at pulling back the Trump Administration’s actions. Yet, the Biden Administration faces a number of immediate, high-priority issues that compete with this expectation, including: addressing the pandemic and related vaccine rollout; immigration; and the economy.

With respect to environmental regulations, the Biden Administration has highlighted climate change and environmental justice as the pillars of its platform. This article discusses the water quality-related regulatory actions expected from the Biden Administration and when they might occur. It also describes how the water quality regulatory programs may be impacted by the expected climate change and environmental justice program changes.

Regulatory Framework

Before turning to the substance of the regulatory actions that might be taken by the Biden Administration in the water quality context, it is worth considering the changes that the Trump Administration made to regulatory development and how that might impact the actions taken by the Biden Administration.

First, pursuant to Executive Order 13891 issued in October 2019, the Trump Administration required each agency to establish new standards for the development and issuance of guidance documents. The federal Environmental Protection Agency (EPA) adopted a regulation, effective in November 2020, implementing the Executive Order. Under these new regulations, significant guidance documents are subject to a 30-day public comment period. The agency must prepare a response to comments document. These requirements also apply to agency actions to modify or withdraw an active guidance document, or when the agency reinstates a previously rescinded guidance document. *See* 40 CFR § 2.501 *et seq.*

Second, early in Trump’s term of office, both the federal Justice Department and EPA issued directives prohibiting settlements of litigation that result in funneling money to third parties. Additionally, under EPA’s directive, agency lawyers must seek concurrence from regulated entities before entering into settlements.

Biden Agenda

Dose-Response Data

Impediments

Congressional Review Act

WOTUS & Section 401

WOTUS Process

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Finally, in early January 2021, EPA finalized a rule regarding the use of scientific data and information in rulemaking. *See* 40 CFR Part 30, effective January 6, 2021. The final rule provides that EPA will give greater consideration to studies where the underlying dose-response data (which evaluate the connection between the degree of exposure to a given constituent to changes in health or species) are available in a manner sufficient for independent validation. When proposing significant regulatory action, the rule requires EPA to clearly identify and make publicly available the science relied upon in the development to the rule.

All of these changes to the regulatory and guidance development framework may serve as impediments to quick action by the Biden Administration to repeal or revise substantive water quality actions undertaken by the Trump Administration.

Addressing Water Quality Regulatory Actions Taken by the Trump Administration

There are a number of regulatory actions taken by the Trump Administration that the Biden Administration is likely to have a desire to reverse. For rules that were finalized and became effective on or after August 21, 2020, the Biden Administration has the ability to nullify them pursuant to the Congressional Review Act (CRA). Such action requires a Joint Resolution to be passed by both chambers of Congress, and signed by the President. The action must be taken within the first 60 days of the 117th Congress. For rules that were proposed, or finalized but not effective as of January 20, 2021, the Biden Administration has the ability to suspend and revise them. Finally, for rules that were finalized and effective but have been challenged in court, the Biden Administration has the choice to either: 1) stay such litigation and seek to address or revise it as part of a settlement agreement; or 2) allow the cases to proceed and let the courts resolve the issue.

The two rules that have received the greatest attention are the Navigable Waters Protection Rule, which is the Trump Administration's replacement of the Waters of the United States (WOTUS) Rule and the Clean Water Act (CWA) Section 401 Rule.

With respect to the Navigable Waters Protection Rule, it was issued in April 2020 and became effective in June 2020, well outside the reach of repeal through the CRA. Instead, in order to change this rule, the Biden Administration would need to follow the notice and comment process required by the Administrative Procedure Act and provide reasoned support for the modification or withdrawal. The rule replaced the WOTUS Rule enacted under the Obama Administration. RE: WOTUS, *see*: Moon, *TWR* #138; Glick & Atencio, *TWR* #149; Kolanz, *TWR* #160; Glick *TWR* #175; Sensiba & Gerard, *TWR* #179; Eisenberg et al., *TWR* #196; and Roose, *TWR* #200.

A related CWA action is EPA's recently issued guidance (January 14, 2021) interpreting the United States Supreme Court's decision in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020). *County of Maui* examined the question of whether groundwater is regulated under the CWA and outlined seven non-exclusive factors for consideration in determining whether a discharge of a pollutant from a point source that reaches groundwater is the "functional equivalent" of a direct discharge to a water of the United States. EPA's guidance applies *Maui* to existing federal and state NPDES permitting programs to aid in determining whether a permit is required under several scenarios. RE: *County of Maui*, *see*: Robb & Leas, *TWR* #170; Robb, *TWRs* #177 & #188; and Water Briefs, this issue.

The CWA Section 401 rule became effective in September 2020, and is now the subject of three federal district court challenges. Although the Section 401 regulations had not been revised in decades, pre-dating the CWA itself, the changes have been challenged by some states and environmental groups. The challenges assert that the changes narrow the authority of states to regulate projects approved through federal permitting or funding decisions. The rule reiterates the one-year time period for state action provided by the CWA, and limits the scope of such state review to water quality impacts, consistent with the language in the Act. Notably, because the 401 Rule became effective after August 21, 2020, it could be repealed through the CRA process. It has been reported, however, that approximately 1,000 rules are also eligible for repeal through the CRA process, so the new Administration and Congressional leadership will be pressed to prioritize which rule nullifications it will bring to a vote. Further, due to the 50-50 split in the Senate, Democrats cannot afford to lose a single Senator on any vote for nullification under the CRA. Some Democrats have expressed an aversion to using the CRA and have weighed in that it may be more appropriate for rules to be reviewed by the courts. Thus, where, as here, litigation is pending, the Administration may opt to address the rule through the court process.

Another action taken during Trump's term was the revision — and perceived relaxation — of the effluent limitations guidelines (ELGs) for steam electric generating facilities. That regulation has also been challenged. Additionally, the United States Court of Appeals for the Fifth Circuit remanded the ELGs for two of the wastewater streams (legacy wastewater and residual combustion leachate) to EPA. *Southwestern Electric Power Company v. EPA*, 920 F.3d 999 (5th Cir. 2019). Thus, revisiting the steam electric ELGs is likely to be high on the Biden Administration's radar.

Biden Agenda	<p>Although the expectation may be that the Biden Administration will use the CRA to repeal and replace regulations effective on or after August 21, 2020, or suspend and revise the rules not effective as of January 20, 2021, replacement policies and rules cannot be implemented quickly. The requirements of the Administrative Procedure Act, coupled with the changes described above made to the regulatory and guidance development processes, make it difficult for the Biden Administration to move quickly. Additionally, given the certainty that any new regulation is likely to be challenged, the Biden Administration will need to develop a sufficient record to counter that developed for the Trump Administration's regulation before it will be in a position to issue a new regulation. Accordingly, the Biden Administration may be more inclined to agree to a stay of these regulations and negotiate some sort of resolution with interested parties through the litigation proceedings. Although this is also likely to be a longer process, it may be a more productive means to address these actions in the long run.</p>
APA Processes	
New Initiatives	<p>Potential New Water Quality Policies from the Biden Administration</p> <p>Due to the length of time it may take to unwind these existing rulemakings, the Biden administration will need to balance its resources between unwinding Trump-era policies and working on its own new initiatives. Some of the possible new initiatives the Biden Administration may undertake include the following.</p>
Temperature Standards & Dams	<p>Federal Licensing and Permitting Activities</p> <p>In addition to a desire to address the specific regulatory actions discussed above, another topic likely to be of interest to the Biden team is advancing efforts to apply and enforce water quality standards for temperature. This has been a significant issue in the western United States, where dams are more prevalent. The dams are important for flood relief, water supply, and hydropower projects. Most dams have been in place for decades. However, dams — in certain circumstances — may cause temperature changes due to water storage. The issues associated with temperature standards are also bound up in climate change. Because warmer water is being experienced more generally as the climate warms, the temperature changes associated with dams have a greater impact.</p>
Environmental Baseline	<p>This issue is also wrapped up in the controversy over the Trump Administration's revisions to the National Environmental Policy Act (NEPA) regulations and the Section 401 regulation. Under NEPA, there has long been a question about what is considered the environmental baseline for a project from which to assess the impacts of a given federal action. When it comes to large infrastructure projects, like dams, the infrastructure has often been in place for decades. So, regarding NEPA review for a federal permit pertaining to the operation of the dam, the question arises: is the existence of the dam part of the baseline or part of the action to be assessed? FERC, in its licensing responsibilities for hydropower projects, has a long-standing position that NEPA environmental baseline is current conditions, and not a speculative effort of recreating prevailing conditions prior to initial dam construction. FERC's view on this issue has been upheld on judicial review repeatedly. <i>See, e.g., American Rivers v. FERC</i>, 187 F.3d 1007, <i>amended and rehearing denied</i>, 201 F.3d 1186 (9th Cir. 1999); <i>Conservation Law Foundation v. FERC</i>, 216 F.3d 41 (D.C. Cir. 2000). However, the revisions to NEPA, which included an attempt to address this question, are being challenged in court. RE: NEPA, <i>see</i>: Kade et al., <i>TWR</i> #198.</p>
Judicial Review	<p>Under Section 401, as noted above, EPA's regulatory revisions limit state review to water quality impacts, and specifically impacts resulting from any point source discharge associated with the project. The temperature impacts associated with dams are not associated with the wastewater discharge for those projects. However, states have imposed temperature-related conditions in their 401 certifications for federally operated dams. <i>See</i> https://ecology.wa.gov/Regulations-Permits/Permits-certifications/401-Water-quality-certification. Those conditions have been challenged. <i>Id.</i> During the Trump Administration, EPA issued a total maximum daily load (TMDL) for temperature in certain rivers in Washington and Oregon (<i>TMDL for Temperature in the Columbia and Lower Snake Rivers</i>, May 18, 2020; <i>see</i>: www.epa.gov/columbiariver/tmdl-temperature-columbia-and-lower-snake-rivers). Many of these issues are bound up in that TMDL as well. State plans to implement the TMDL will likely be controversial.</p>
Water Quality Impacts	
TMDLs	

Regulatory Rules Freeze

On January 20, President Biden's Administration issued a Memorandum for the heads of executive departments and federal agencies entitled "Regulatory Freeze Pending Review." On behalf of the President, Ronald Klain (Biden's Chief of Staff) informed the various administration officials to "propose or issue no rule in any manner — including by sending a rule to the Office of the Federal Register (the "OFR") — until a department or agency head appointed or designated by the President after noon on January 20, 2021, reviews and approves the rule." Other steps were spelled out in the Memorandum "[I]n order to ensure that the President's appointees or designees have the opportunity to review any new or pending rules". Also included was the following admonition: "Should actions be identified that were undertaken before noon on January 20, 2021, to frustrate the purpose underlying this memorandum, I may modify or extend this memorandum, pursuant to the direction of the President, to request that agency heads consider taking steps to address those actions."

For info: Memorandum available at: www.whitehouse.gov >> Briefing Room >> Presidential Actions - Page 5

Biden Agenda

Drinking Water

Lead & Copper

PFAS

Aging Infrastructure

Enforcement Increase?

Environmental Justice

Climate Change Focus

Coastal Zone Impacts

Justice Initiatives

Given this backdrop, it is possible the Biden Administration will be interested in furthering the implementation of TMDLs and other plans for how to address temperature, particularly in the West. The Biden Administration will also need to continue to navigate how implementation of these plans fits within the NEPA review process, TMDL development and implementation, and the 401 certification process.

Drinking Water and Water/Wastewater Infrastructure

As discussed in more detail below, it is likely that Biden's environmental agenda will be driven by the twin pillars of environmental justice and climate change. In that vein, the Biden Administration is likely to continue the Trump Administration's focus on Safe Drinking Water Act (SDWA)-related regulations and to promote improved drinking water quality and modernized drinking water and wastewater infrastructure. Minority, low income, or otherwise disadvantaged communities will receive particular scrutiny. Under the SDWA efforts, we will likely see an early push to revise and issue the Lead and Copper Rule and focus on updating and adding additional regulation of drinking water constituents.

Similarly, developing a comprehensive regulatory program focused on per- and polyfluoroalkyl substances (PFAS) and related constituents is likely to be high on the Biden priority list. Given that this was also a concern and focus of the Trump Administration, this topic may also be an easier and quicker initiative to advance. RE: PFAS, *see*: Kray, *TWR* #182; McKnight, *TWR* #195.

There is also likely to be increased emphasis on the regulation of toxic constituents in wastewater, and drinking water standards for such toxics and for other emerging contaminants.

Finally, the Biden Administration is expected to focus on efforts to improve aging wastewater and drinking water infrastructure. This is another initiative that was a focus of the Trump Administration, which may make this an easier effort to advance early in the new president's term. Determining the funding needs in these areas, appropriating funds, and overhauling the criteria used for grant and loan issuance to prioritize environmental justice communities are all likely actions to be taken early in the Administration.

Enforcement

Under the Trump Administration, environmental groups have claimed that there was a relaxation of enforcement across all environmental programs. Based on this perception and the messaging from these groups, enforcement is expected to increase under the Biden Administration and it is likely that an effort will be made to bring a high-profile enforcement case early in the term. A return to sector- or topic-specific enforcement initiatives is expected. In the water area, it is likely that the focus will be on the wetland program, the agriculture sector, and the utility sector. There could also be enforcement relating to SDWA violations, focused on certain priority contaminants and significant noncompliance over extended periods of time. The enforcement in the context of the SDWA, and on agricultural operations, will likely be tied to the environmental justice goals of the new Administration.

Environmental justice may also drive changes in the penalty calculations for enforcement actions. Actions causing adverse impacts to environmental justice communities may receive greater penalties. There may also be increased emphasis on use of supplemental environmental projects to address such adverse environmental impacts.

Climate Change and Water Quality

As mentioned earlier in this article, climate change is a central pillar of the Biden Administration's environmental platform. Most of the actions are expected to focus on: promotion of renewable energy; increased regulation of power sources relying on fossil fuel; and development of job creation and job training programs in the renewable energy sector. These latter initiatives will likely be coupled with environmental justice initiatives to bring more opportunity to environmental justice communities.

Another aspect of climate change, in addition to reducing the creation of greenhouse gases and promoting renewable energy, is addressing the impacts of the effects of climate change. Coastal resiliency and actions to address expected sea level rise, flooding, and other natural disasters, particularly in environmental justice communities, will be a focal point. With respect to water regulatory programs, this means a likely greater emphasis on the Coastal Zone Management Act (CZMA) and its implementation. The elements required to be included in state coastal zone programs, and the evaluations required as part of the CZMA consistency process, could be revised as part of this process. Additionally, a significant infrastructure spend, including an increase in grant and loan programs, is expected to target coastal zone management programs.

Environmental Justice and Water Quality

This article has already touched on several areas where the environmental justice goals of the Biden Administration are likely to involve efforts for water-related regulatory changes. More broadly, it is expected that a series of executive orders will be issued expanding the federal government's environmental justice initiatives. EPA is likely to follow suit with new guidance and direction, as well as an overhaul of the offices within EPA with environmental justice responsibilities. Such changes are more readily implementable, as there is no federal environmental justice statute to implement or regulation to enforce. Rather, federal environmental justice initiatives were undertaken pursuant to Executive Order 12898 issued in 1994 during the Clinton Administration.

Biden Agenda

Public Outreach

Civil Rights

Additional Monitoring

Michael Regan, President Biden's pick to head the EPA, enacted a series of policies in North Carolina to expand public outreach requirements associated with permitting actions and to establish triggers for enhanced environmental justice reviews for such projects. This was done under the authority of Title VI of the Civil Rights Act. Accordingly, we may see a similar approach taken by EPA early in the new Administration's term. Such actions could be taken through reorganization of EPA's environmental justice program and issuance of guidance documents and policies, citing Title VI as the governing authority.

More significantly, it is also likely that EPA will issue a policy or decision reversing its *Select Steel* decision. *St. Francis Prayer Ctr. v. Michigan Department of Environmental Quality*, EPA File No. 5R-98-R5 (Oct. 3, 1998). That decision dates back to 1998, where EPA accepted a Title VI complaint regarding a Michigan environmental agency's decision to issue an air permit for a steel recycling facility in a predominantly African American neighborhood in Flint, Michigan. EPA ruled that there was no violation of civil rights because there was no violation of the air emission standards established under the Clean Air Act. It is expected that EPA may attempt to rescind the *Select Steel* decision, such that compliance with regulatory standards will no longer be a shield or defense against environmental justice claims. Although *Select Steel* was focused on air emissions, rescission of this decision will have implications across all media.

Additional monitoring requirements are also expected to be required as part of the environmental justice initiatives. On the water side, there may be more frequent monitoring of effluent and stormwater discharges; additional ambient monitoring to assess water quality; and requirement to make such monitoring results available to the community.

Conclusion

By the time this article is published, we will likely have actual knowledge of the immediate steps the Biden Administration will take on the issues outlined above. While all of the predictions made here may not come to fruition, it is certain that there will be a number of significant changes to the water quality regulatory landscape over the next four years.

FOR ADDITIONAL INFORMATION:

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Biden Executive Orders

BEARING ON WATER & ENVIRONMENT

Executive Order 14008:

Tackling the Climate Crisis at Home and Abroad

- Elevates climate change as national-security, foreign-policy priority
- Pauses new oil and gas leasing on US lands/waters
- Establishes National Climate Task Force
- Establishes presidential climate envoy on National Security Council
- Commits to clean infrastructure projects
- Commits to development of emission reduction target
- Commits to environmental Justice

Executive Order 13990:

Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis

[I]t is, therefore, the policy of my Administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.

To that end, this order directs all executive departments and agencies (agencies) to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives...

Executive Order 13992

Revocation of Certain Executive Orders Concerning Federal Regulation

[I]t is the policy of my Administration to use available tools to confront the urgent challenges facing the Nation, including the coronavirus disease 2019 (COVID-19) pandemic, economic recovery, racial justice, and climate change. To tackle these challenges effectively, executive departments and agencies (agencies) must be equipped with the flexibility to use robust regulatory action to address national priorities. This order revokes harmful policies and directives that threaten to frustrate the Federal Government's ability to confront these problems, and empowers agencies to use appropriate regulatory tools to achieve these goals...

For info: White House Website for Presidential Actions: www.whitehouse.gov/briefing-room/presidential-actions/

Biden Agenda

Resources

Biden-Harris Platform: *Plan for a Clean Energy Revolution and Environmental Justice*, see: <https://joebiden.com/climate-plan/>

Biden-Harris Platform: *Plan to Secure Environmental Justice and Equitable Opportunity*, see: <https://joebiden.com/environmental-justice-plan/>

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

Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629 (Feb. 16, 1994)

Executive Order 13771, *Reducing Regulation and Controlling Regulatory Costs* (Jan. 30, 2017)

Executive Order 13891, *Promoting the Rule of Law Through Improved Agency Guidance Documents*, 84 Fed. Reg. 55235 (Oct. 15, 2019)

Navigable Waters Protection Rule: *Definition of "Waters of the United States"* - 85 Fed. Reg. 22250 (April 21, 2020)

Steam Electric Reconsideration Rule, 85 Fed. Reg. 64650 (Oct. 13, 2020)

Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information, 86 Federal Register 469 (Jan. 6, 2021)

TMDL for Temperature in the Columbia and Lower Snake Rivers, May 18, 2020, see: www.epa.gov/columbiariver/tmdl-temperature-columbia-and-lower-snake-rivers

US Department of Justice Memorandum for All Component Heads and United States Attorneys, *Prohibition on Settlement Payments to Third Parties*, June 5, 2017

US EPA Administrator Scott Pruitt Memo to EPA Managers: *Adhering to the Fundamental Principles of Due Process, Rule of Law, and Cooperative Federalism in Consent Decrees and Settlement Agreements*, Oct. 16, 2017

US EPA Directive *Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements*, Oct. 16, 2017

US EPA Guidance; *Administrative Procedures for Issuance and Public Petitions*, 85 Fed. Reg. 66230, Oct. 19, 2020

US EPA Guidance Memorandum, *Applying the Supreme Court's County of Maui v. Hawaii Wildlife Fund Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program*, Jan. 14, 2021. EPA website: www.epa.gov/npdes/releases-point-source-groundwater

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Chuck Sensiba provides strategic counsel and legal representation to public utility districts, and governmental entities, investor-owned utilities, water districts, and independent power producers and covers the full spectrum of complex licensing, natural resources, and environmental issues related to hydropower development. He has broad experience in matters under the FPA, NEPA, ESA, CWA, NHPA, Federal Land Policy and Management Act and CZMA, and other environmental and natural resource programs. Chuck serves on the Board of Directors for NHA.