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Businesses Grappling with Federal Regulation May Look to States as Allies

WRITTEN BY

Misha Tseytlin | J. Houston Shaner | David P. Ross

As the Biden administration settles in, the pendulum of federal power has begun to swing back toward greater regulation. In response, regulated entities are beginning to review their range of options to engage in, challenge, or prepare for the host of new regulatory and enforcement initiatives that will shape their business practices for the next several years. While ramping up advocacy efforts, strategic planning, and internal compliance procedures, members of the regulated community interested in challenging federal regulatory activity may have an important potential ally: state attorneys general (AGs). State AGs, along with state governors and legislatures, will play key roles in shaping how far and in what domains new regulations will reach. State AGs frequently lead the charge in challenging or defending federal action in court; they help guide regulatory implementation, and they can have significant influence over enforcement. The private sector is therefore not alone in bearing the risk of new federal initiatives, as states often stand to cede their traditional regulatory authority and control over their budgets.

Two of the authors of this article, Misha Tseytlin and Dave Ross, convey these points from personal experience, having opposed regulatory efforts undertaken by the Obama administration that infringed on traditional state authorities when Misha was the Wisconsin solicitor general and Dave was the director of the Environmental Protection Unit at the Wisconsin Department of Justice. They each also had similar roles when they worked for the attorneys general of West Virginia and Wyoming, respectively. Dave also recently served as the head of the Office of Water at the U.S. Environmental Protection Agency (EPA) and understands the cooperative federalism framework from that perspective. Below, we examine how regulated parties may seek to leverage allies within state AG offices to shape federal policy through the lens of one particular field, environmental regulation.

Litigation

The state AGs have taken the lead in challenging regulations issued by the federal agencies, including EPA over the last decade, and that trend is poised to continue.

Take first the recurring battle over federal rules to define “waters of the United States,” known less formally as “WOTUS.” This term sets the primary limit of the Clean Water Act’s geographic reach. In 2015, the Obama administration enacted a sweeping new view of WOTUS through its Clean Water Rule.[i] This rule broadly extended federal authority to numerous waters far removed from traditional navigable waters that are the Clean Water Act’s core concern. The dramatic expansion of federal power enshrined in the Clean Water Rule came at the cost of the states’ traditional authority over local resource stewardship and land use. And for that reason, state AGs quickly challenged the rule in federal trial and appellate courts — and quickly saw success. In total, over 30 states and state agencies representing over 80% of the land area in the United States challenged the legality of

the Clean Water Rule, working closely with industry and other stakeholder groups whose interests were threatened by the rule.

The state AGs secured a national stay of the rule in consolidated proceedings before the U.S. Court of Appeals for the Sixth Circuit.[ii] And while the Supreme Court later undermined that stay by holding that the Sixth Circuit lacked jurisdiction over the case,[iii] the states secured sustained success in the district courts. In the U.S. District Court for the District of North Dakota, a coalition of state AGs and state agencies secured an injunction against the rule just one day before it took effect.[iv] Two separate AG-led coalitions, joined by industry intervenors, would also secure preliminary injunctions against the Clean Water Rule in many other states.[v] In total, state AGs working with the regulated community succeeded in blocking the rule across more than half of the country.

Those efforts carried over into the Trump administration. After the 2016 election, EPA first extended the applicability date of the Clean Water Rule,[vi] then repealed it altogether,[vii] and finally replaced it with the Navigable Waters Protection Rule.[viii] This new rule abandoned the Clean Water Rule's broad approach and replaced it with four clear categories of regulated waters and 12 meaningful exclusions, including ephemeral features that only flow after a rain storm. The Navigable Waters Protection Rule has been challenged by a coalition of states, state agencies, cities, and several environmental groups,[ix] while many of the same state AGs who challenged the Clean Water Rule continue to defend its replacement.[x] Presently, the Navigable Waters Protection Rule is in effect across the entire country, as efforts to stay its implementation have been rejected by the courts so far.

States also took the lead in resisting novel regulations of GHGs from power plants. The centerpiece of the Obama environmental agenda was the Clean Power Plan, a new rule requiring states to shift generation to renewable energy through an agency-created cap-and-trade regime.[xi] The Clean Power Plan thus represented a sea change not only for the electric utility industry, but also for the state regulators that had traditionally governed their resource allocation.

As with the Clean Water Rule, state AGs were at the vanguard of challenges to the Clean Power Plan. They led the briefing before the U.S. Court of Appeals for the District of Columbia Circuit,[xii] and before that court could even issue a decision, the Supreme Court stayed the Clean Power Plan in *West Virginia v. EPA* at the state AGs' request.[xiii] This stay remained in place until the Trump-era EPA repealed and replaced the Clean Power Plan.[xiv] That replacement rule eventually fell to its own legal challenge in the D.C. Circuit, led by a different coalition of state AGs.[xv]

During the Biden administration, EPA and other agencies likely will issue many far-reaching regulations. Members of the regulated community concerned with any such actions may look to state AGs as important allies and leaders in litigation efforts opposing various aspects of those regulations. The regulated community concerned with federal overreach by the new administration likely will return to the tactics deployed against Obama-era regulations in advancing arguments that those regulations strayed beyond statutory authority or were procedurally flawed. These tactics include working directly with state AGs to develop case strategy, litigation positions, and venue choices.

Regulatory Implementation and Enforcement

The regulated community also may keep in mind the role of states in shaping policy before litigation ensues and seek to work with states to help shape regulatory developments at the federal level. Michael Regan, the nominee to serve as the next EPA administrator, has committed to working with the states before implementing major regulatory changes that may affect state economies. Whether and how that commitment is implemented remains to be seen, but state AGs are key regulatory partners with EPA, impacting the implementation of many federal programs.

1. *Climate Policy*

The new administration has made no secret that climate policy is one of its top priorities, with a sweeping review of environmental rules under that framework issued before the end of Inauguration Day.[xvi] This top-down drive will percolate into a variety of regulatory programs administered by or directly impacting the states.

Returning to WOTUS, for example, a new EPA regime might reassert authority over ephemeral streams using climate change as a regulatory driver, justifying expanded jurisdiction over landscape changes driven by extreme precipitation or drought. Or it might conclude that isolated wetlands have a "significant nexus" to other waters because of their flood control benefits, reintroducing the significant nexus test from the 2015 Clean Water Rule to justify expanding jurisdiction further up the watershed. In either instance, the states have managed or co-managed the proximate policy drivers of drought, water supply, and flood control, and they have constitutional authority over land use decisions. They therefore will have strong views on the scope of federal Clean Water Act jurisdiction and the need for WOTUS as a climate policy tool.

In the same vein, expansive climate policy is also likely to drive greater federal regulation. The new administration might well revive the Clean Power Plan in some new and perhaps even more ambitious form. Any new rule might once again push the burden onto states to develop complex, costly plans to rework the electric grid *in toto*. EPA may even have a more direct route through state implementation plans or "SIPs" under the Clean Air Act. These SIPs are developed by states to meet air quality standards for traditionally regulated pollutants like lead. EPA must review and approve these plans and can issue overriding federal plans when finding fault with a state submission, though it significantly deferred to the expertise of the states under the Trump administration. The Biden administration will likely revert to the policies and priorities of the Obama administration, leading to increases in SIP approval backlogs and more federally issued plans. In certain circumstances, the agency might force greater controls into these state and federal plans as a surrogate for regulating GHGs directly.

Climate initiatives will also feather into other bread and butter regulatory programs, such as water quality standard setting and approvals. For example, EPA may look to scrutinize temperature impacts when reviewing and approving state water quality standards and whether those standards are ensuring the long-term water quality attainment objectives of the Clean Water Act. EPA may also look to the total maximum daily loads or "TMDL" program to address heat loadings in impaired waterbodies. These TMDLs can require strict new limits on discharges authorized by state-issued permits.

1. *Environmental Justice*

Beyond review of existing laws like the current WOTUS rule, the Biden administration has also signaled its intent to mandate a government-wide push for greater "environmental justice" (EJ) across all programs. The scope of

the initiative and its crossover to regulatory program implementation remains to be seen, but the White House has already created two new “councils” to promote it.[xvii] And whatever its dimensions, EJ’s elevation as a leading policy objective will affect states and the regulated community.

For example, an EJ emphasis might help empower states by increasing opportunities for grants or federal financing of local projects, particularly where those projects satisfy the climate change policy objectives as well. It may also focus federal resources in the Superfund and related contaminated site remediation programs. Yet it might infringe on state autonomy in other ways. It might push many states administering Safe Drinking Water Act programs to speed up replacement of lead service lines in EJ-sensitive communities. But doing so may impose significant financial costs that might then be passed on as higher rates to those very same communities. So too could the additional costs of EJ-driven permitting decisions be passed on to electric or gas utility consumers who are meant to be protected by EJ policies. State public service commissions or other state regulators may have policies and programs in place to help these communities by targeting affordability concerns, and new federal initiatives will need to be coordinated across local, state, and federal government.

EJ policies might also elevate environmental and cultural protections for Indian tribes and tribal resources, potentially displacing or modifying state authority in certain regulatory areas. For example, EPA oversees state decisions to set water quality standards, including those for waters that might be used by tribal members, and it can develop its own recommended national criteria for water quality based on activities important to tribal cultures and economies (*e.g.,* fish harvesting and consumption). EPA can also object to Clean Water Act permitting decisions based on impacts to downstream water quality on tribal lands. Indian tribes and tribal authorities may be empowered by these developments, while private regulated entities might find their interests aligned with the states in many of these regulatory decisions.

1. *Emerging Contaminants*

Emerging contaminants are likely to be another major priority for the Biden administration. We expect particular focus on per- and polyfluoroalkyl substances (PFAS), chains of fluorinated carbon atoms that resist chemical or physical degradation in the natural environment. Though PFAS were also a priority of the Trump administration as evidenced by its development and implementation of the national PFAS Action Plan, the new administration is likely to move forward with designating some PFAS as “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), popularly known as the Superfund law. There are many types of PFAS, and for decades some of these compounds have been used in a large variety of manufacturing processes and consumer goods. Their ubiquity, combined with a CERCLA designation, will likely increase the number of Superfund sites across the country, expanding the number of site owners or operators with clean-up costs and remedial obligations. Moving these sites to the Superfund program will, in some instances, transfer them from state to federal control or may force states to reprioritize or shift resources under their own site remediation programs.

Any PFAS hazardous substance designation may also impact existing Superfund sites. The settlement agreements governing cleanup or cost sharing at these sites often include “re-opener” provisions that allow EPA to take further actions based on new conditions or information unknown to EPA. The new designations or additional sampling results might trigger these clauses and invite new litigation. Reopening these agreements will likely complicate, and in some cases ultimately may slow down, the overall pace of site remediation. States and

local communities have an interest in expeditious cleanup, as it returns degraded or orphaned sites to productive use and helps address longstanding environmental justice concerns for many communities across the country.

EPA is also expected to move forward with Safe Drinking Water Act, Clean Water Act, and other regulatory developments signaled in the PFAS Action Plan. Each of these initiatives alters the federal-state regulatory relationship, either imposing new obligations on state programs, displacing state authority, or potentially creating conflicting standards that will need resolution to ensure the regulatory certainty that is so vital to the regulated community and state, local and tribal governments.

1. *Regulatory Enforcement*

Finally, the federal-state relationship is also likely to change in the enforcement arena. Enforcement priorities and methods change across presidential administrations. For example, after year-over-year declines in criminal enforcement under the Obama administration, criminal enforcement increased each year under the Trump administration.[xviii] On the civil side, the Obama administration emphasized civil penalties and high case volume, while the Trump administration focused on compliance assistance and voluntary audits and self-disclosures.

Under the Biden administration, it is likely that more investigations will be initiated, particularly on the civil side, and industry or sector-specific targeting and marketing will likely return to prominence. It is also likely that more cases will be referred for prosecution by the Department of Justice (DOJ), and higher penalties will be demanded. Thus, the number of entities engaged in an enforcement context with the federal government will increase, but it is equally likely that the number of cases reaching final resolution will slow as EPA and DOJ grapple with competing priorities and resource management constraints.

The use of supplemental environmental projects or “SEPs” — canceled as a case resolution tool under the Trump DOJ — will return to prominence, as that policy has already been reinstated under the Biden DOJ. Given the twin policy goals of climate change and environmental justice, it is likely that DOJ will seek to broaden the use of SEPs beyond the more traditional statutory or media-specific focus in order to deploy more funding to those initiatives.

Historically, federal enforcement displaces state enforcement, either because the federal government demands primacy or because states defer to the federal lead and reallocate their enforcement and compliance assistance resources to other priorities. Many states for that second reason may not mind a more active federal role. Others, however, prefer to manage enforcement within their borders under their delegated federal authorities or under other state programs. One concern for those states is that more active federal involvement and elongated negotiations may alter state relationships with the regulated community, or with the federal government. More active federal enforcement also tends to increase federal audits and oversight of state programs, creating further opportunity to erode the federal-state relationship.

The regulated community and the environment are typically better served by efficient government focused on compliance assistance and preventative measures, with targeted enforcement used to level the regulatory playing field across industry sector groups. Enforcement driven by policy choices and metrics tends to create tension with the regulated community. As the Biden administration ramps up its enforcement engines, members of the regulated community likely will engage with state partners, including state AGs, to encourage state primacy and enhanced coordination between state and federal regulatory efforts.

For additional guidance on how to engage with state AG offices at the intersection of federal and state law on environmental and natural resources issues, or for any other topic raised by this article, please do not hesitate to contact Dave Ross, Misha Tseytlin, or Houston Shaner.

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[i] *See generally* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,053 (June 29, 2015).

[ii] *Ohio v. U.S. Army Corps of Eng'rs (In re EPA & Dep't of Def. Final Rule)*, 803 F.3d 804 (6th Cir. 2015), *vacated*, 713 F. App'x 489 (6th Cir. 2018) (mem.).

[iii] *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 634 (2018).

[iv] *See generally* Mem. Op. & Order, *North Dakota v. U.S. EPA*, No. 3:15-cv-59 (D.N.D. Aug. 27, 2015).

[v] *See generally* Order, *Texas v. U.S. EPA*, No. 3:15-cv-162 (S.D. Tex. Sept. 12, 2018); Order, *Georgia v. Wheeler*, No. 2:15-cv-79 (S.D. Ga. June 8, 2018).

[vi] *See generally* Definition of "Waters of the United States" – Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018).

[vii] *See generally* Definition of "Waters of the United States" – Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019).

[viii] *See generally* The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020).

[ix] *See, e.g.*, *Colorado v. Wheeler*, No. 1:20-cv-01461 (D. Colo. filed May 22, 2020).

[x] *See, e.g.*, Order Den. Mot. for Prelim. Relief, *California v. Wheeler*, No. 3:20-cv-3005 at 6, 15 (June 19, 2020) (denying preliminary relief against the Navigable Waters Protection Rule after considering arguments from federal defendants and state intervenor-defendants).

[xi] *See generally* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electricity Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015).

[xii] *See, e.g.*, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. filed Oct. 23, 2015).

[xiii] *West Virginia v. EPA*, 136 S. Ct. 1000 (Feb. 9, 2016) (mem.).

[xiv] *See generally* 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).

[xv] *See Am. Lung Ass'n v. EPA*, 985 F.3d 914, 995 (D.C. Cir. 2021).

[xvi] Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, WhiteHouse.gov (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/.

[xvii] *See* Fact Sheet: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government, WhiteHouse.gov (Jan. 27, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/27/fact-sheet-president-biden-takes-executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restore-scientific-integrity-across-federal-government/.

[xviii] *See* EPA Annual Enforcement Results for Fiscal Year 2020, https://www.epa.gov/enforcement/enforcement-annual-results-fiscal-year-2020.

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