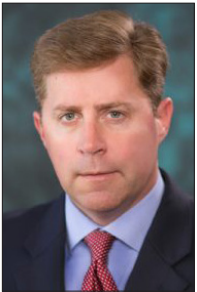


Environmental Law: Potential environmental policies in a new presidential administration



By **GEORGE S. VAN NEST**

With the presidential election concluded and a new Biden administration on the horizon in 2021, it's useful to look ahead to potential environmental policies that may be implemented. Although environmental policy changes from administration to administration, the switch from one party to the other carries the potential for dramatic change and national impacts.

While the Trump administration generally reduced regulation, promoted energy development and opposed international climate change agreements, the Biden administration is likely to take the opposite approach.

Although environmental policy and focus will likely change dramatically, the focus on climate change is probably going to cap that list under the new administration in 2021. President-elect Biden has made a number of comments that signal a new direction. Initially he has indicated that addressing climate change is one of his top priorities and has proposed to sign an executive order on his first day that will put the United States toward a net-zero emissions level by 2050. He has appointed former Secretary of State John Kerry as "climate envoy" to interact with international leaders and re-enter the Paris climate accord. Biden has also said that he will meet with world leaders with high levels of carbon emissions during the first 100 days of his administration to push for more carbon reduction. Noticeably absent from the discussion is what the costs will be to U.S. consumers, businesses and residents or how it will impact U.S. energy independence.

Legislation in a new Congress appears uncertain at best, with control of the Senate pending the Georgia Senate run-offs and a relatively narrow level of House control by Democrats. Hence, it is likely that a Biden administration will attempt to do most of its climate action via executive actions, regulation and executive order. Notably, the Biden transition team is receiving recommendations from former Obama administration climate change experts, include an extensive report captioned Climate 21 Project. The recommendations focus on presidential- controlled actions that

can be taken in rapid fashion. Among other components of the plan are integrating climate change into federal department and agency decision-making, such as procurement, vehicle purchases and U.S. buildings and facilities.

According to the Biden Plan for a Clean Energy Revolution, the new administration will attempt to take numerous steps, including: reducing greenhouse gas emissions from transportation sources using the federal Clean Air Act and development of stringent new fuel economy standards for vehicles; setting aggressive methane emissions limits for new and existing oil and gas operations; adopting appliance and building efficiency standards; mandating that federal permitting decisions consider greenhouse gas emissions and climate change and compelling public companies to disclose climate change impacts in their operations and supply chains.

The U.S. Environmental Protection Agency (EPA) has focused on working with states, local governments and tribes during the Trump administration under a policy termed "cooperative federalism" whereby EPA let the states take the lead and not mandate federal policy preferences. With a Biden administration, it is likely that a switch to the other party will lead to a more federal-led enforcement approach. Consequently, this is likely to cause increased federal civil and criminal enforcement actions across the environmental regulatory spectrum. Additionally, the dramatic change from a cooperative federal-state approach under the current administration to an EPA-led enforcement strategy is likely to cause significant friction across the country as states that have had discretion on enforcement either lose direct control or are forced through regulatory delegation to be more enforcement focused.

A change in presidential administration will also lead to potential redirection for a number of key environmental regulations and related litigation of high-profile regulatory matters. Although it would be impossible to list all federal environmental regulations under scrutiny, the following highlight a few key areas that are likely to be considered in a Biden administration. National Environmental Policy Act (NEPA) reforms adopted in July 2020 could be revisited in new regulations or legal challenges to them could be conceded. Clean Air Act (CAA) fuel economy standards implemented in the last four years, which relaxed Obama

administration targets, could be a focus of new regulation. Similarly, Biden has been critical of relaxed aircraft emission standards set under the Trump administration. As reported on in this column previously, regulations addressing the Clean Water Act (CWA) Navigable Waters Protection Rule which became effective in June 2020 could be re-visited to re-assert federal jurisdiction over adjacent streams and wetlands. Another key rule which modified the Endangered Species Act (ESA) to require consideration of economic impact on listing endangered species could be open to review.

In the energy and climate change area, it seems likely that a Biden EPA would seek to revise the Affordable Clean Energy Rule, which replaced the Obama Clean Power Plan with a program that allowed individual states more discretion to set standards. In addition, EPA's oil and gas methane rule, which was finalized in September 2020, could be the subject of repeal proceedings by a new EPA direction.

One area that received slight coverage leading up to the election was fracking, when Biden suggested he would ban fracking on federal lands. Although that led to a focused campaign issue in Pennsylvania and other Marcellus Shale rich states, that policy is now leading to concern on behalf of western states where a large portion of the federal oil and gas leases are present.

Overall, the energy boom and reduced energy prices that the U.S. experienced under the Trump administration are likely to change as the new administration goes back to policy focus areas similar to the Obama administration of climate change, international accords and stringent energy standards. Unfortunately, there was relatively little discussion of detailed environmental policy during the presidential campaign. Climate change, energy policy and federal environmental policy are on the verge of dramatic changes in 2021, so hopefully the national media will focus on many of the policy changes and national impacts that will come from the new administration.

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