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## ENVIRONMENTAL LAW

### Status of EPA's Compliance With Biden's Executive Orders on the Environment

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*Special to the Legal*

Immediately upon taking office, President Joe Biden took a series of actions aimed at improving public health and protecting the environment. Biden ordered executive agencies to perform sweeping reviews of existing regulations promulgated during President Donald Trump's tenure and, for certain regulations, imposed deadlines for the proposal of new regulations. This article provides a brief overview of the progress that the EPA has made to date in complying with Biden's executive orders and provides an update to the regulated community about recent and impending rule changes.

#### NEW AND RECONSIDERED RULES

Among the EPA's earliest required actions was to address emissions from the oil and gas sector. Consistent with this directive, the EPA is moving forward with amendments to the new source performance standards (NSPS) for the crude oil and gas sector under Clean Air Act (CAA) Section 111(b) and the establishment of emission guidelines for the oil and gas sector under CAA Section 111(d). Together, these actions are expected to establish comprehensive standards addressing emissions of methane and volatile organic compounds from new and existing operations in the oil and gas sector, including the exploration and production, transmission, processing and storage segments. On Sept. 13, the EPA submitted a notice of



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proposed rulemaking to the Office of Management and Budget (OMB) of its intent to revise the NSPS standards for crude oil and gas sector, with the goal of promulgating a final rule by October 2022. See OMB, RIN: 2060-AV16. In addition, the EPA submitted a notice of proposed rulemaking to OMB on Sept. 15, to promulgate emission guidelines for the oil and gas sector. See OMB, RIN: 2060-AV15. An anticipated notice of proposed rulemaking was expected in October 2021 with a final rule in October 2022. Although the EPA has not yet released the proposed rules for public comment, they will likely go beyond the regulations and guidelines put in place by the Obama administration in 2012 and 2016 and impose stricter emission standards on the oil and gas industry.

Biden also required the EPA to reconsider the National Emission Standards for Hazardous Air Pollutants for coal- and oil-fired electric utility

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steam generating units, commonly known as the mercury and air toxic standards. In response to the U.S. Supreme Court's decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), the Trump administration determined that it was not appropriate and necessary to regulate hazardous air pollutants from coal- and oil-fired electric generating units. See 85 Fed. Reg. 31286 (May 22, 2020). On Aug. 3, the EPA submitted a notice of proposed rulemaking to OMB but did not identify a timeline for the promulgation of a final rule. See OMB, RIN: 2060-AV12. On reconsideration, Biden's EPA is likely to again find that regulating hazardous air pollutants from coal- and oil-fired electric generating units is appropriate and necessary, while

addressing the Supreme Court's concerns raised in *Michigan v. EPA*. While such a finding itself would not change existing regulations or standards, it may serve as a predicate for the eventual strengthening of emission standards.

The EPA is also in the process of reconsidering two rules related to its fuel quality standards. In September 2019, the EPA published the Safer Affordable Fuel-Efficient (SAFE) Vehicle Rule Part 1, which withdrew California's 2013 CAA waiver allowing the state to enforce its own greenhouse gas (GHG) standards for cars and light-duty trucks and its zero-emission vehicle sales mandate. See 84 Fed. Reg. 51310 (Sept. 27, 2019). On April 28, the EPA published notice in the Federal Register of its reconsideration of the withdrawal of California's preemption waiver for its GHG emission standards. See 86 Fed. Reg. 22421 (Apr. 28, 2021). The reinstatement of the California waiver would provide for more stringent vehicle emission standards and other requirements in California and other states who have adopted the more stringent standards. In addition, the EPA has published notice of its proposal to revise the federal GHG emission standards for light-duty vehicles for Model Years 2023 to 2026 to make them more stringent. See 86 Fed. Reg. 43726 (Aug. 10, 2021). The EPA's proposed revisions would increase the stringency of the standards to where they would have been under the Obama administration, although the EPA has signaled that it is considering even tighter standards for Model Year 2026. See 86 FR 43731 (Aug. 10, 2021).

## RULES ADDRESSING REGULATORY PROMULGATION

The Trump administration promulgated two rules that required the EPA to perform a benefit-cost analysis for all significant regulations under the CAA and limited the type of scientific data that the EPA could rely on in promulgating regulations. Consistent with Executive Order 13990, the EPA has reconsidered these two rules and is proposing to revert to prior policies under the Obama administration. First, on May 13, the EPA issued an interim final rule to rescind the Benefit-Cost Rule. See 86 FR 26406 (May 14, 2021).

The Benefit-Cost Rule required the EPA to conduct a benefit-cost analysis for all "significant" regulations issued under the CAA, and, in conducting the analysis, required the EPA to disaggregate economic benefits from other co-benefits and constrained the EPA's ability to consider human health benefits. See 85 Fed. Reg. 84130 (Dec. 23, 2020). The interim final rule reverts back to the pre-existing administrative process in which the EPA will publish notice in the Federal Register and allow for public comment regarding the benefits and costs of an action, the policy considerations, and any other concerns regarding the action. See 86 Fed. Reg. 26409 (May 14, 2021). This interim final rule became effective on June 14 and will remain in effect until it is replaced by the final rule that responds to any public comments.

Second, on May 24, the EPA promulgated a rule that vacated the rule titled "Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information," 86 Fed. Reg. 469 (Jan. 6), as ordered by the U.S. District Court for the District of Montana (*Environmental Defense Fund v. EPA*, No. 21-cv-00003) (D. Mon. Feb. 1, 2021). See 86 Fed. Reg. 29515 (June 2, 2021). The original rule required the EPA to give greater weight to studies where the underlying dose-response data are available in a manner sufficient for independent validation. See 86 Fed. Reg. 469 (January 6, 2021). Critics of the original rule said that it constrained the EPA's authority to rely on novel or groundbreaking science in developing new regulatory actions.

Collectively, these changes are expected to provide the EPA with additional flexibility to promulgate regulations based on harm-avoidance and new science.

## OTHER CHANGES AHEAD

In addition to the regulatory changes discussed earlier in this article, the EPA is in the process of comprehensively reviewing other Trump-era regulations and policies and is expected to reverse course in several areas. For example, on Sept. 30 the EPA issued a guidance memorandum withdrawing a prior Trump administration memorandum that

allowed states to incorporate provisions in their state implementation plans for startup, shutdown and malfunctions (SSM). The Sept. 30 memorandum reverts to a prior position under the Obama administration that state implementation plan provisions that provide exemptions from air emission limits during periods of SSM are inconsistent with the CAA. The EPA's reversion in policy could impact facilities relying on SSM exemptions to comply with permitted emission limits.

Additionally, the Biden administration is likely to return to the "once in always in" approach to regulating hazardous air pollutants, which would prohibit major sources of hazardous air pollutants from reclassifying as area sources even where their emissions have been reduced to below major source thresholds. This reversion of policy could impact facilities who reclassified as area sources in reliance on the Trump administration's rule.

## CONCLUSION

The Biden administration has been busy promulgating new regulations and guidance reversing the Trump administration's environmental decisions and is expected to continue to review and revise actions taken by the prior administration. What remains unclear is how far the Biden administration will go. Will the Biden administration simply revert to Obama-era policies and regulations or push stricter standards to meet his lofty environmental goals? The EPA is just beginning to address Biden's environmental agenda, and more regulatory changes are likely on the horizon. •

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