

2021 Environmental and Energy Law Forecast

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Forecast of Federal Environmental Policy in 2021

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With President-elect Biden set to begin his term later this month, 2021 will mark a major shift in federal environmental policy, though the incoming administration will face its share of challenges as it looks to advance its new agenda. In its last year in office, the Trump administration enacted a flurry of rulemaking and executive action in an effort to lock in its environmental policy objectives beyond 2020, some of which were covered in detail in our 2020 forecast. For example, the Trump administration finalized significant changes to the National Environmental Policy Act (NEPA), enacted the Navigable Waters Protection Rule, and undertook important rulemaking efforts under the Clean Air Act. Though the Biden administration will be coming into office with different policy priorities, some of the Trump administration's recent rulemaking and policy efforts may make advancing its environmental agenda more difficult. To that end, this federal forecast provides an overview of the anticipated actions that an incoming Biden administration may take and more detailed coverage of the federal actions that will remain important in 2021.

President-elect Biden has made clear that climate change will be a major priority in the incoming administration's overall environmental policy objectives. Accordingly, Biden has announced his intention to reenter the Paris Climate Agreement on the first day of his presidency. The United States formally entered the Paris Agreement under the Obama administration on September 3, 2016 and committed to reduce greenhouse gas emissions by 26 percent to 28 percent from 2005 levels by 2025. After the Trump administration repealed and replaced the Obama-era Clean Power Plan, the United States gave notice of its intent to withdraw from the Paris Agreement on November 4, 2019, and the withdrawal formally took effect one year later on November 4, 2020. Although it is unclear whether the Biden administration will commit to the same greenhouse gas emissions reductions as originally proposed in 2016, Biden has made clear his priority to cooperate internationally on the reduction of greenhouse gas emissions.

The Biden transition team also has signaled a renewed emphasis on environmental justice. During his presidential campaign, Biden pledged to prioritize environmental justice initiatives across the federal government, including through the creation of an environmental and climate justice division within the U.S. Department of Justice (DOJ). Additionally, Biden has announced cabinet-level nominees to the Environmental Protection Agency, Department of Interior, and the Council on Environmental Quality (CEQ) that indicate the incoming administration's prioritization of addressing environmental justice concerns.

An early opportunity for the Biden administration to advance both climate change and environmental justice priorities may be through a rollback of the Trump administration's [recent overhaul](#) of NEPA's implementing regulations. Earlier this year the Trump administration [finalized new regulations](#) revamping the

environmental review process of major federal actions under NEPA, with the intention of reducing the time and resources required for a federal agency to complete a NEPA review. Among other changes, the new regulations eliminated the requirement to consider a project's cumulative impacts, a provision through which climate impacts were often considered. The Biden administration may attempt to strengthen requirements related to consideration of climate change and environmental justice impacts of major federal actions. Exactly how far the Biden administration will go to rollback the recent changes to the NEPA review process remains to be seen, however, as the transition team has signaled a competing priority of quickly advancing national infrastructure projects that could be required to move through the NEPA review process.

The Biden administration may also look to reverse the Trump administration's decision to end the use of supplemental environmental projects (SEPs) in settlement agreements as part of its focus on climate change and environmental justice initiatives. As noted in more detail in this federal forecast, the use of SEPs in settlement agreements have been favored by members of the regulated community, EPA, and community beneficiaries, and it is anticipated that the Biden administration may revive the use of SEPs, particularly as part of addressing environmental justice and climate justice concerns in certain overburdened communities.

The Biden administration is expected to target other recent rulemakings from the Trump administration for potential rollback, including, among other examples, the Affordable Clean Energy Rule, the SAFE Vehicles Rule, and rules modifying implementation of the Endangered Species Act. Procedurally, however, the Biden administration may have an easier time reversing President Trump's executive orders that touch upon the environmental sector. For example, Biden is expected to rescind [E.O. 13771](#) "Reducing Regulation and Controlling Regulatory Costs," which directs agencies to eliminate two rules for every rule added. Biden also may look to rescind [E.O. 13891](#) "Promoting the Rule of Law Through Improved Agency Guidance Documents," which directs federal agencies to develop regulations that set forth processes and procedures for issuing guidance documents. Among other requirements, the recently finalized rule implementing E.O. 13891 requires EPA to notify the public when it issues new guidance and will open public notice and comment opportunities for the issuance of what EPA determines to be significant guidance.

Other recent rules and guidance adopted by the Trump administration could continue to impact the regulatory community in 2021 and beyond. In 2020, for example, EPA finalized the Navigable Waters Protection Rule, which amended the scope of the waters of the United States (WOTUS) regulated under the Clean Water Act, following the Trump administration's repeal of the 2015 WOTUS rule. The Trump administration likewise took recent actions under the Clean Air Act, publishing final rules and guidance impacting New Source Review, Startup, Shutdown, and Malfunction, risk management planning, and other programs. EPA also issued additional rulemaking in connection with the Lautenberg Act amendments to the Toxic Substances Control Act; implemented its Unregulated Contaminant Monitoring Rule for the Fifth Monitoring Cycle (UCMR 5); and has taken additional steps to regulate certain PFAS and PFOA in drinking water and in other environmental media.

Additional items facing an uncertain future under the Biden administration include EPA's new draft guidance addressing the Supreme Court's recent decision in *County of Maui v. Hawaii Wildlife Fund* and EPA priorities under the Superfund program. EPA's *Maui* guidance places the Supreme Court's "functional equivalent" analysis into context within EPA's NPDES permit program. With the Court's holding in *Maui* still fresh, the Biden administration may take a more expansive view of what it considers a functional equivalent

of a direct discharge from a point source into navigable waters. Additionally, the Biden administration may implement different priorities under the Superfund program, under which the Trump administration had sought to promote efficiency in cleanups, including climate resiliency, environmental justice, and emerging contaminants.

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Changing Nature of Climate Change

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United States policy towards climate change has undergone several shifts over the past decade. The Obama administration's sweeping reform of carbon-based emission standards, known as the Clean Power Plan (CPP), was undone via executive order by President Trump and was subsequently replaced by the Trump administration's Affordable Clean Energy (ACE) Rule. With the upcoming inauguration of President-elect Biden, it appears that the pendulum is set to swing again.

The Obama-era CPP sought to curb greenhouse gas (GHG) emissions by regulating existing coal-fired power plants, while simultaneously incentivizing energy production from lower GHG-emitting sources, including natural gas and renewable power generation. The CPP established a regulatory scheme predicated on statewide carbon budgets and approached the issue of climate change in a more holistic manner than previous attempts.

EPA under the Trump administration took the position that the CPP represented an impermissible overreach because EPA's authority to regulate facilities under Section 111 of the Clean Air Act was more limited in scope and did not permit the Agency to go "beyond the fenceline" of regulated facilities. In contrast to the CPP, the ACE Rule gives states primary authority to regulate GHGs from coal fired power plants by establishing unit-specific standards and does not require emissions reductions across the sector as a whole. There is currently litigation pending in the U.S. Court of Appeals for the D.C. Circuit regarding the ACE Rule, but it is expected that a Biden-led EPA will decline to defend the ACE Rule in that litigation and will ask the court to return the matter to the agency so that it can draft regulations more in line with the Biden administration's stated policies.

President-elect Biden has described climate change as the "existential threat of our time" and has announced plans to spearhead a "national effort aimed at creating the jobs we need to build a modern, sustainable infrastructure now and deliver an equitable clean energy future." The Biden EPA will likely learn from the legal challenges to the CPP and will pursue a more tailored version of the CPP that demands aggressive carbon emissions limits from existing coal-fired power plants, as opposed to a sector-wide approach.

Power sector carbon emissions likely won't be the only climate-related issue the Biden administration will address at the beginning of its term. The administration is also expected to address the Trump administration's rulemaking on New Source Performance Standards for methane emissions from the oil and gas sector; automobile emissions regulations; fuel efficiency standards; and the [environmental justice issues](#) implicated throughout. The Biden administration may also try to regulate high-emitting industry sectors like manufacturing for the first time.

The Biden transition team has also made several key personnel nominations impacting climate, including former Secretary of State John Kerry, who will serve as the “special presidential envoy on climate change,” and will be the first official dedicated to climate change to sit on the National Security Council. Biden has also nominated Congresswoman Deb Haaland as Secretary of the Interior, Michael Regan as EPA Administrator, Former Governor Jennifer Granholm as Secretary of Energy, and Brenda Mallory as Chair of the Council on Environmental Quality.

New Source Review: Issues to Watch

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The Clean Air Act New Source Review (NSR) program is notoriously complex and has been subject to a long history of rulemakings, guidance, applicability determinations and court decisions that have affected the manner in which NSR applicability is determined. Intended to force pollution control upgrades when new major sources are built or existing major sources are modified, addressing NSR permitting requirements can be time-consuming and costly, including the Prevention of Significant Deterioration (PSD) program for NAAQS attainment areas (requiring ambient air quality analyses and the application of Best Available Control Technology) and the Non-Attainment New Source Review program for NAAQS nonattainment areas (requiring emissions offsets and the application of Lowest Achievable Emission Rate).

Over the course of the Trump administration, EPA undertook significant efforts to clarify key aspects of the NSR program, with the goal of streamlining and modernizing NSR while providing certainty and lessening permitting burdens for applicants. EPA promoted these efforts as consistent with the Trump administration’s goals of revitalizing manufacturing and growing the economy by removing obstacles and incentivizing investments in critical energy infrastructure. While many of these changes were welcomed by permittees, they were met with criticism from some states and environmental advocacy groups who argued that EPA’s actions weakened the NSR program. In light of these criticisms, the future of EPA’s NSR reform actions is uncertain under the Biden administration. Set forth below is a recap of recent EPA actions affecting NSR permitting and their current status.

Project Aggregation

In a final action published in the Federal Register on November 15, 2018 entitled *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Aggregation; Reconsideration*, EPA concluded its reconsideration and lifted its indefinite stay of an action first taken in January 2009 during the waning days of the Bush administration. See 83 Fed. Reg. 57324-57333. After many years, EPA finalized its Project Aggregation interpretation for determining the scope of a “project” subject to NSR applicability evaluation.

Determining the scope of a project subject to air permitting is necessary for quantifying the emission increase associated with the project, and the amount of the emission increase is key to determining whether or not the project will be subject to NSR program requirements. Specifically, under the two-step applicability analysis established by the federal NSR regulations, if a project is determined to cause a significant emission increase of a regulated NSR pollutant (Step 1), it must then quantify the net emission increase of that pollutant from projects occurring during a five-year contemporaneous period (Step 2) to determine whether the NSR significance threshold is exceeded and thus NSR requirements are triggered. If

the emission increase is not significant in Step 1, the net emission increase analysis of Step 2 is not required, and the project does not trigger NSR.

Project Aggregation concepts ensure that emission increases from nominally separate projects occurring at a source are aggregated when compared to NSR thresholds in Step 1 where appropriate, so that NSR program requirements are not circumvented via project splitting. Recognizing that determining the scope of a project is a case-by-case exercise, EPA noted that EPA's interpretations historically had been applied through project-specific letters and memoranda; EPA's 2009 action sought to instead establish clear principles of Project Aggregation through a more formalized interpretation of the NSR rules.

In the 2018 Project Aggregation action, EPA reaffirmed its 2009 action, including the following:

- First, sources and permitting authorities should aggregate projects that are “substantially related.” The factors that should be considered in evaluating whether projects are substantially related include factors indicative of the technical or economic dependence of projects. EPA specifically rejected a broader approach to aggregation that would consider as related any projects that contribute to the source's overall basic purpose.
- Second, there is a rebuttable presumption that projects occurring more than three years apart are not substantially related, and therefore should generally not be aggregated. EPA views this general rule as consistent with the notion that the farther apart projects are timed, the less likely they are to be related, since such activities would likely be part of distinct planning and capital funding cycles. Importantly, EPA did not establish a presumption that projects occurring within three years of each other should be aggregated, concluding instead that the projects' technical and economic relationships should govern the analysis.
- Third, EPA noted its observation that the source itself is responsible for defining the scope of its project, subject to the limitation that the source cannot seek to circumvent NSR by splitting a single project into multiple projects.
- Finally, EPA noted that state and local air permitting agencies with approved NSR programs are not required to adopt EPA's Project Aggregation interpretation.

EPA's Project Aggregation action was challenged by the Natural Resources Defense Council via petition for judicial review in January 2019, and the challenge was consolidated with a challenge to EPA's 2009 action, which had been held in abeyance pending completion of EPA's reconsideration proceedings. According to the Court's docket, the petitions were voluntarily dismissed in June 2019.

Project Emission Accounting

EPA published its final rule entitled *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting* in the Federal Register on November 24, 2020. 85 Fed. Reg. 74890-74909. The rule further clarifies the two-step process established under the federal NSR regulations for determining whether a project would result in a significant net emission increase, and thus trigger NSR requirements. As described above, Step 1 is a determination of whether the project would cause a significant emission increase of a regulated NSR pollutant. If so, Step 2 would then require a determination of whether a significant *net* emission increase would occur, by quantifying the net emission

increases and decreases over the contemporaneous (five-year) period as compared to the significance level established for the relevant NSR pollutant.

The NSR regulations include specific procedures for quantifying the Step 1 increase depending on whether the project occurs at a new or existing source. However, EPA acknowledged longstanding confusion and uncertainty among permitting authorities and other stakeholders as to whether emission *decreases* could be taken into account in Step 1 of the process, including in the context of projects that include multiple emission sources.

This question is meaningful because projects that are determined not to be “significant” in Step 1 are not required to proceed to the net emission increase quantification of Step 2, and therefore are not subject to NSR under the federal regulations. EPA’s final rule clarified that decreases may be considered in Step 1 for projects that involve new sources, existing sources and multiple types of sources (both existing and new), and by clarifying that the phrase “sum of the difference” used in the Step 1 regulatory language includes both emissions increases and decreases.

Together with the Project Aggregation rule discussed above, the Project Emission Accounting Rule provides flexibility to applicants to define the scope of a project subject to an NSR trigger evaluation, and to identify and quantify both increases and decreases associated with that project. At proposal, environmental groups and a coalition of state attorneys general criticized the Project Emission Accounting rule. These criticisms included assertions that the rule would weaken the NSR program by allowing sources to “net out” at Step 1 of the two-step regulatory analysis in a manner that is inconsistent with the goals of the NSR program. Critics argued that the Project Emission Accounting rule removes necessary boundaries in Step 1 by allowing a project to include multiple types of emission units (new and existing), and by allowing for consideration of decreases that are not creditable or enforceable, subject only to certain recordkeeping requirements that apply if there is a “reasonable possibility” that a significant emission increase may occur (i.e. where the projected increase in emissions equals or exceeds 50% of the applicable NSR significance level).

While the Project Emission Accounting rule is now effective, the period for filing petitions for judicial review or administrative reconsideration of the rule has not yet passed as of this writing, and the rule is likely to be challenged. EPA’s stance in any such litigation or reconsideration proceeding remains to be seen. In the meantime, the practical effectiveness of the rule is limited to those states and territories where EPA is the permitting authority, or where a state or local permitting authority has been delegated authority to implement the federal NSR program rules on behalf of EPA (for example, many states have received delegated authority to implement the federal PSD program rules).

Importantly, where a state or local permitting authority has developed its own NSR permitting program that has been approved by EPA through a State Implementation Plan (“SIP”), application of the Project Emission Accounting Rule will be subject to the discretion of the state or local authority. This will be most relevant to those states that have developed SIP-approved Non-Attainment NSR programs; in the final rule, EPA determined that state programs would meet the minimum stringency requirements required by the Clean Air Act even if they choose not to revise their regulations consistent with the new Project Emission Accounting Rule. For that reason, many states, including those that objected to the rule at proposal, may reasonably be expected to maintain their current approach to the NSR two-step analysis.

Adjacency and Common Control

Under the Trump administration, EPA undertook two important actions in clarifying the circumstances under which one or more facilities may be considered to constitute a single stationary source for purposes of NSR and Title V permitting analyses. Where one or more sources are combined, their emissions are likewise combined for comparison to NSR and Title V applicability thresholds. By way of background, single source determinations rely on a three-factor test that considers whether one or more sources: 1) belong to the same industrial grouping; 2) are located on contiguous or adjacent properties; and 3) are under the common control of the same person (or persons under common control). The adjacency and common control factors of this analysis have been subject to years of uncertainty based on numerous and sometimes divergent applicability determinations, many of which have included considerations of functional interrelationships between two otherwise separate facilities. In its recent actions, EPA has now sought to limit the consideration of functional interrelationships in this context.

EPA's Acting Assistant Administrator Anne Isdal issued a memorandum to EPA's Regional Administrators on November 26, 2019 entitled *Interpreting 'Adjacent' for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas*.¹ The memo notes that while the meaning of "contiguous" has been applied consistent with its dictionary definition to require physical contact, the meaning of "adjacent" has been considered to include facilities that are not physically touching but are otherwise "nearby" to one another.

With no bright-line standard for determining the physical distance that may constitute adjacency, EPA's determinations have included examinations of whether one or more facilities are otherwise functionally related through numerous "fine-grained" analyses. Through the Isdal memo, EPA rejected the concept of functional interrelatedness as an indicator of adjacency and instead reaffirmed the reasoning of the Sixth Circuit in *Summit Petroleum v. EPA*, 690 F.3d 733 (6th Cir. 2012), in which "adjacent" was interpreted to refer only to physical proximity and not to the functional relationships between two facilities. In sum, EPA clarified that it would interpret "adjacent" to include properties that are not physically touching – including those that are separated by a right of way or other similar separation – only when they are otherwise in reasonably proximity to one another. EPA will not consider functional interrelationships to establish adjacency.

EPA addressed longstanding confusion and permitting burdens associated with "common control" analyses in its April 30, 2018 Letter from Assistant Administrator William Wehrum to Patrick McDonnell, Secretary of PADEP, relating to the construction of a biogas processing facility by Meadowbrook Energy LLC. The Meadowbrook determination considered whether the Meadowbrook biogas facility should be considered under common control with the Keystone Sanitary Landfill, where Keystone would deliver untreated landfill gas via dedicated pipeline to Meadowbrook, which would then process the gas for conversion to pipeline quality renewable natural gas product for subsequent market sale.

Recognizing the lack of a clear definition of "common control," the Meadowbrook letter cited prior determinations in which EPA had considered a range of factors for assessing whether two sources are under common control, including but not limited to shared workforces, shared management, shared administrative functions, shared equipment, shared intermediates or byproducts, shared pollution control responsibilities, and support/dependency relationships. In these determinations, EPA often found common

¹ The determination of adjacency for oil and gas facilities was addressed through a rulemaking specific to that category. *See* 80 Fed Reg. 35622 (June 3, 2016).

control based on the existence of mutually beneficial contractual arrangements whereby economically or operationally interconnected facilities exert influence over one another. Rejecting this historic multi-factor approach as resulting in a lack of clarity and inconsistent outcomes, EPA clarified in the Meadowbrook letter that the assessment of control for NSR and Title V should focus on the power or authority of one entity to dictate decisions of the other that could affect the applicability of, or compliance with, relevant air pollution control regulatory requirements. In narrowing its interpretation of common control, EPA expressly noted in the Meadowbrook letter that mutually beneficial contractual or other arrangements between two separately owned facilities may create economic or operational dependencies but should not be presumed to constitute common control.

EPA's actions in clarifying the adjacency and common control factors of single source determinations share several important features that may limit their application under the Biden administration or would allow states to apply these concepts differently. First, in each context, EPA has effected these changes informally through guidance memoranda or facility-specific determination. As such they may be a target for reversal or further clarification, although in so doing the Biden administration may need to consider any applicable restrictions of EPA's new rule: *EPA Guidance: Administrative Procedures for Issuance and Public Petitions*, 85 Fed. Reg. 66230-66240 (October 19, 2020). Second, in each action EPA has made clear that its new interpretations are not binding on state and local permitting authorities with their own EPA-approved Title V and NSR programs. Finally, in each context, EPA has made clear that its new interpretations of adjacency and common control should be applied prospectively and should not be used as a basis to revisit prior permitting determinations where no changed facts would otherwise warrant. Subsequent EPA determinations in the common control context have borne out this principle. See e.g., Letter from Cristina Fernandez to Brett Sago, Eastman Chemical, dated February 12, 2020.

Other Guidance

In addition to the actions noted above, other NSR-focused guidance has been issued by EPA, as follows:

Plantwide Applicability Limits

On August 4, 2020, EPA finalized its *Guidance on Plantwide Applicability Limitation Provisions Under the New Source Review Regulations* (the PAL Guidance). The PAL Guidance sought to reduce uncertainty and perceived risk associated with NSR PAL provisions, which were first introduced in EPA's 2002 NSR reform rule to allow for a facility-wide cap for a regulated NSR pollutant below which projects could be undertaken without NSR review. With only 70 PAL permits issued since 2003, the PAL Guidance sought to address uncertainties identified by stakeholders in the areas of PAL permit reopening, PAL expiration, PAL renewal, PAL termination, PAL monitoring requirements, and baseline actual emissions for replacement units among others. The PAL Guidance reiterates the advantages posed by PAL permits for consideration by permit applicants. While not subject to the same level of criticism as some of EPA's other NSR actions, it remains to be seen whether the PAL Guidance may spark increased utilizations of PAL permits.

Begin Actual Construction

In March 2020, EPA issued a draft guidance for public comment entitled *Interpretation of 'Begin Actual Construction' Under the New Source Review Preconstruction Permitting Regulations*. The guidance is relevant to the prohibition in the NSR regulations that no new major stationary source or major modification to which the NSR requirements apply shall begin actual construction without first securing a permit stating that the source will meet NSR requirements. The draft guidance notes that EPA's current interpretation would consider almost every on-site physical construction activity of a permanent nature to constitute the beginning of "actual construction" even where the activity does not involve construction of an emission unit.

After detailing the long history of EPA's interpretations of "begin actual construction" the draft guidance puts forth a revised interpretation that would allow a permittee to undertake physical on-site activities that may alter the site or are permanent in nature, so long as the activities do not constitute physical construction on an emissions unit, as defined in EPA's regulations. Allowed activities would include those that are necessary to accommodate an emissions unit, however all such construction is undertaken at the permittee's risk (i.e. in the event that the permit is ultimately denied or contains required design changes). EPA's draft guidance was open for public comment until May 11, 2020 and met with mixed feedback.

While industry groups largely supported the draft guidance, some concerns were expressed by environmental groups and states. As of this writing, the guidance has not yet been finalized, and therefore the fate of this guidance under the Biden administration is uncertain.

Projected Actual Emissions

Former EPA Administrator Scott Pruitt released a memorandum to EPA's regional administrators in December 2017 entitled *New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability*. The memo signaled a significant shift in EPA's approach toward NSR enforcement, focusing on the NSR applicability triggers for an existing major source undergoing modification. First, the memo clarified that in the Step 1 determination of whether a project would cause a significant emission increase of a regulated NSR pollutant, a source's quantification of "projected actual emissions" may consider, as part of the projection, its own intention to actively manage future emissions to prevent a significant emissions increase from occurring. Second, in considering whether future emission increases may be subject to exclusion based on demand growth, the memo indicated that the source must exercise its own judgment in excluding emission increases for which the project is not the predominant cause, and that EPA will not second guess such projections. Instead, the memo points to NSR's post-project monitoring, recordkeeping and reporting requirements as the appropriate means by which EPA may evaluate the source's pre-project conclusion that NSR was not triggered. Finally, the memo indicates that where projected emissions increases are less than the NSR thresholds, EPA will focus on the source's post-project actual emissions in determining whether to pursue an enforcement action.

Like EPA's other NSR actions described above, EPA clarified in this context that SIP-approved state and local NSR regulations continue to have primacy in their jurisdictions. Further, a Biden EPA may be expected to exercise its enforcement discretion differently than described in this memo.

Conclusion

As described herein, EPA has been very active over the past several years in clarifying longstanding issues in the NSR program requirements. Stakeholder groups have expressed diverging views on these actions, and their practical effect on permit applicants and prospective projects may not be fully realized if reversed or abandoned by the EPA under the Biden administration or are not adopted by states.

Trump's EPA Makes a Late Push to Revive the Startup, Shutdown, and Malfunction Exemption, but Will It Get Out of the Starting Gate?

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The underpinnings of the so-called the startup, shutdown, and malfunction (SSM) exemption date back to the Clean Air Act (CAA) amendments of 1970, when it was widely believed that emission limits intended to apply during “normal” operations could not also be met during SSM periods using the same emission control strategies. At that time, SSM periods were thought to be different from normal operating scenarios. On this basis, many states incorporated into their original CAA implementation plans, known as “SIPs,” provisions for more lenient treatment of excess emissions during SSM periods, including some that exempted such emissions from legal control altogether. EPA approved the original SIPs in the early 1970s.

Not more than a decade later, EPA started interpreting normal operations in the ordinary sense, distinguishing between predictable modes of operation including startup, shutdown, and maintenance, as compared to malfunctions, which are supposed to be limited to unpredictable and unforeseen events that cannot reasonably be prevented. The Agency began communicating to state permitting authorities that exemptions for excess emissions during SSM periods are inconsistent with the CAA, and in the years that followed, a small number of SIPs were determined to be deficient on this basis. But EPA did not undertake a broad effort to require the removal of impermissible SSM provisions from a larger number of SIPs until 2015, when the Agency responded to a rulemaking petition filed by Sierra Club (and other related legal proceedings) to address the SIPs that still included blanket exemptions for excess emissions during SSM periods and similarly lenient provisions. That 2015 response by EPA is commonly referred to as the SSM SIP Call.

While ultimately nuanced, the SSM SIP Call essentially memorialized EPA's then-current policy on the legality of SSM provisions and issued a call to action to nearly 40 states to revise their SIPs consistent with such policy, including by removing automatic exemptions from emission limits and impermissible discretionary provisions, such as those that effectively bar EPA enforcement or the filing of citizen suits, as well as certain affirmative defense provisions. Affected states were given 18 months to revise their SIPs, and some did, resulting in state regulatory changes that filtered down to the facility air permit level in many cases. Others filed legal challenges to the SSM SIP Call with the D.C. Circuit Court of Appeals, but by the time the cases were ready for oral argument, the Trump administration had assumed control of EPA and the Court granted EPA's request to put the cases on hold while the Agency reconsidered its SSM policy from the ground up.

With timing being everything, Trump's EPA issued on October 9, 2020, a new policy memorandum entitled “Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans” (the “2020 SSM Policy Memo”). The 2020 SSM Policy Memo is identified as superseding and replacing certain policy statements in the 2015 SSM SIP Call action, and concludes that SSM provisions in SIPs, even automatic exemptions and so-called “director's discretion” provisions, *are permissible* in many cases, although it does not (because it legally cannot absent a separate rulemaking) upend the specific determinations from 2015 that certain SIPs are inconsistent with the CAA. Still, EPA makes clear that it plans to review each SIP call remaining from the 2015 action, and all future proposed SIP actions, in light of the Agency's new policy.

Only time will tell what will happen to the Agency's new SSM policy, as even the best-laid plans can go awry with a new administration taking office in matter of days. But because EPA's position on SSM provisions is policy-based, and was not codified through a formal rulemaking process, it can be reversed just as easily, with the issuance of yet another policy memorandum. For this reason, it is reasonable to expect that the 2020 SSM Policy will be undone by the incoming Biden administration.

Are Changes to EPA's Risk Management Program "Ripe for the Picking" in the Early Days of the Biden Administration?

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In the waning days of the Obama administration on January 13, 2017, EPA published its substantive final rule amendments to the Risk Management Program (RMP) regulations at 40 C.F.R. Part 68. The final rule came in response to Executive Order 13650, which ordered federal agencies to take actions to improve chemical facility safety and security. The amendments to the RMP regulations applied to any facility holding more than a threshold quantity of a "regulated substance," and included facilities in the chemical manufacturing, oil and gas extraction, agricultural, petroleum refining, and food and beverage sectors among others. The 2017 RMP Amendments made significant enhancements to the RMP program's accident prevention, emergency response, and data availability provisions including obligations for certain facilities to conduct root cause analyses in response to certain release events and to perform third-party audits after an RMP reportable accident; enhanced coordination between regulated facilities and local emergency response agencies; and mandatory public meetings with local communities impacted by RMP reportable accidents.

Almost immediately upon taking office, the Trump administration temporarily delayed the effective date of the 2017 RMP Amendments before signing a final rule on June 9, 2017 delaying the effective date of the RMP rule amendments until February 19, 2019. After having delayed the effective date of the 2017 RMP Amendments, EPA formally modified the rule through publication of the RMP Reconsideration Rule on December 19, 2019. The 2019 RMP Reconsideration Rule modified the 2017 RMP Amendments by removing what the Trump administration deemed burdensome, costly, and unnecessary amendments while maintaining appropriate protections and ensuring first responders have access to all the necessary safety information. Most significantly, the 2019 RMP Reconsideration Rule rescinded all major accident prevention program provisions of the 2017 RMP Amendments (i.e., third party audits, safer technology and alternatives analyses, incident investigation root cause analysis), and most other minor changes to the prevention program. The 2019 RMP Reconsideration Rule also rescinded the public information availability provisions of the 2017 RMP Amendments.

Based on this recent history, it seems highly likely that the incoming Biden administration will take a hard look at the RMP program and consider undoing the recent rollback of RMP requirements promulgated under the Trump administration. Although further change to the RMP program may be inevitable, this type of push/pull can have significant ramifications to the regulated community who would be tasked with complying with shifting legal requirements. While management of change is a central feature of accident prevention as it relates to ever-changing processes, chemicals, equipment, and related hazards, it is not normally one found within the confines of an established regulatory framework such as RMP.

What to Expect from the Renewable Fuel Standards Program in 2021

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As the Trump administration raced to roll back or weaken Obama-era regulations and guidance in the latter half of 2020, it opted to punt on the politically charged decision of setting standards for the Renewable Fuel Standards (RFS) program for the 2021 calendar year. The RFS program is codified at Section 211(o) of the Clean Air Act (Act) and establishes minimum volume requirements for four separate categories of renewable fuels: (1) total renewable fuels; (2) advanced biofuels; (3) biomass-based diesel; and (4) cellulosic biofuels. The volume requirements for total renewable fuels, advanced biofuels, and cellulosic biofuels increase each year through 2022, whereas the volume requirements for biomass-based diesel increased each year through 2012. After these years, EPA is responsible for establishing the annual volume requirement through rulemaking.

To ensure that the annual volume requirements are met, EPA is required by the Act to publish annual percentage standards by November 30 of each year. Such standards are to remain in effect for the following compliance year. The annual percentage standards are used by refiners and importers of transportation fuel to determine their individual renewable volume obligation.

In a widely expected move (or more accurately, non-move), EPA missed the November 30, 2020 deadline to establish the RFS standards for 2021 (except for biomass-based diesel where EPA established the 2021 standard in 2019). EPA had sent a proposed RFS rule to the White House Office of Management of Budget (OMB) in mid-May 2020, but the rule has not been released by OMB for public comment. EPA's Administrator, Andrew Wheeler, noted that the 2021 standards had been largely drafted before the COVID-19 pandemic. The pandemic drastically affected gasoline and ethanol consumption in 2020 and makes EPA's job of setting RFS standards exceedingly difficult. The challenging task will instead be left to the incoming Biden administration.

In addition to establishing the 2021 annual volume requirements, the Biden administration also will be left with the decision on whether to grant requests made by small refiners for exemptions from the annual volume requirements. During his campaign, Biden criticized the small refinery exemption and signaled that his administration would significantly limit the number of exemptions.

HAZARDOUS SUBSTANCES and REMEDIATION

Biden Administration Poised to Implement TSCA Requirements

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A number of Toxic Substances Control Act initiatives bear watching in 2021.

First, the incoming Biden administration will be charged with implementing key components of the 2016 TSCA amendments and could use that authority to expand EPA's view as to whether an existing chemical presents an unreasonable risk of injury to health or the environment. As of the date of this publication, EPA had completed seven of the risk evaluations for the "first ten" high priority substances and has indicated that two more will be completed before Inauguration Day. The Biden administration may look for opportunities to reopen one more of these risk evaluations and employ a revised approach (such as looking at other uses, exposure routes, and sensitive subpopulations) which could alter the initial conclusions.

For example, in July, a coalition of environmental groups and unions filed a petition in the 9th Circuit Court of Appeals challenging EPA's final risk evaluation for methylene chloride. The Biden administration could use this petition as a vehicle to revisit that risk evaluation. Similarly, in September EPA issued final scopes of risk evaluations for the "next twenty" high priority substances. The Biden administration could reexamine these scopes and ultimately approach the risk evaluation process for these chemical substances in a fundamentally different way that increases the likelihood of finding uses that present unreasonable risks.

The Biden administration will also have the opportunity to influence the outcome of several other pending, planned or court-directed TSCA actions in 2021. First, EPA recently released a new proposed TSCA fee rule, which will govern the fees manufacturers, importers, and certain processors are required to pay to fund EPA's costs to implement TSCA. The proposed rule includes new exemptions for certain manufacturers and importers that are analogous to the current Chemical Data Rule (CDR) exemptions.

EPA is also scheduled to address a number of other TSCA rules in the near future, including:

- (1) a rule governing a one-time reporting event of per- and polyfluoroalkyl substances (PFAS) manufactured or imported after January 1, 2011;
- (2) a rule revising the process by which EPA reviews and makes determinations on premanufacture notices for new chemicals; and
- (3) new rules on submitting and supporting confidential business information claims.

Finally, at the very end of 2020, a federal court in the Northern District of California ordered EPA to revise the CDR with respect to asbestos, and "address" certain exemptions, exclusions and the reporting threshold. This and the noted rulemakings will afford a full TSCA plate for the new EPA Administrator.

Federal Regulation and Legislation of PFAS Expected to Accelerate in 2021

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In 2020, the Environmental Protection Agency (EPA) took several significant actions to address per- and polyfluoroalkyl substances (PFAS) contamination across various mediums that will likely continue to evolve in 2021.

In March of 2020, EPA published a preliminary determination to regulate two forms of the chemical, perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), under the Safe Drinking Water Act. It is anticipated that EPA will publish and ultimately promulgate a Maximum Contaminant Level and final National Primary Drinking Water Regulation for PFOA and PFOS in 2021.

2021 will also see the implementation of some form of EPA's interim strategy for PFAS in federally issued National Pollutant Discharge Elimination System (NPDES) Permits which was published at the end of November 2020. The strategy includes recommendations to incorporate permit requirements for PFAS monitoring and best management practices, as well as the use of the NPDES Permit Writers' Clearinghouse platform to share PFAS-specific knowledge.

In June of 2020, EPA published a final rule incorporating the addition of 172-PFAS to the list of toxic chemicals covered by the Toxics Release Inventory (TRI) under the Emergency Planning and Community Right-to-Know Act. The first reporting deadline for PFAS under the TRI is July 1, 2021. Also, while the means by which this will occur are still unclear, it is anticipated that the Biden administration will press forward with designating PFAS as a hazardous substance under Section 102(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Most recently, EPA released the interim guidance on the destruction and disposal of PFAS. Notably the interim guidance discusses the thermal treatment of PFAS containing waste which has been the subject of numerous lawsuits over the past year. EPA is accepting comments on the interim guidance up until February 22, 2021 and further action on these issues is to be expected.

Finally, EPA under the Biden administration is expected to accelerate the regulation and study of PFAS compounds in general, including their use, reporting, release and health effects. Coupled with these efforts, bi-partisan concern over human exposure to PFAS could result in legislation related to PFAS, even in a divided Congress.

Superfund Program Likely to Receive Fresh Scrutiny in 2021

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Since taking office in 2017, the Trump administration's U.S. EPA leadership consistently named the Superfund site remediation program as a priority, convening the [Superfund Task Force](#), [listing](#) priority sites with the highest potential for redevelopment or reuse, and [delisting](#) or partially delisting an increasing number of sites from the National Priority List during the term.

Like programs across the agency, the Superfund program is likely to see significant directional changes under the new Biden administration, with new EPA Administrator Michael Regan, formerly the Secretary of North Carolina's DEQ and an Environmental Defense Fund regional director, taking charge. Though the Superfund program is often immune to the drastic policy and enforcement shifts that may be experienced in some other environmental programs, stricter scrutiny, nevertheless, may be felt at some sites where the cleanup is federally-driven. New federal initiatives and areas to watch include:

- Reestablishing climate change resilience as a goal and review criteria for the establishment of remedies;
- Directly and indirectly including environmental justice concerns and initiatives among the factors driving remedial and removal action decisions;
- Increasing attention to perfluorinated chemicals and other emerging contaminants, as federal maximum contaminant levels are likely established for these constituents and states move to adopt their own standards; and
- Opening additional opportunities for third party participation, particularly in light of the United States Supreme Court's 2020 decision in *Atlantic Richfield v. Christian* (discussed in the [MGKF Litigation Blog here](#)) which may have opened doors for third party, state court lawsuits seeking additional remedial work at Superfund sites but may also require enhanced EPA coordination to achieve effective relief.

Change may come slower in the Superfund program, but broader policy changes from the EPA across other programs will provide clues for shifting priorities in the Superfund arena.

WATER:

Back on the Merry-Go-Round: Efforts to Expand Federal Clean Water Act Jurisdiction Expected in 2021

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During 2020, the Trump administration completed its efforts to narrow the scope of a 2015 rule intended to define the extent of Waters of the United States subject to federal Clean Water Act (CWA) jurisdiction, but it is likely that the incoming Biden administration will take steps to revert back to the 2015 rule. In April 2020, the Trump administration published a final version of its “Navigable Waters Protection Rule”, which set out four categories of waters that would be federally regulated, and 12 categories of non-jurisdictional waters, including ephemeral waters, groundwater, most ditches, prior converted cropland, and waste treatment systems. A number of environmental organizations and a group of states and cities appealed the rule, which went into effect in June, in various jurisdictions, but only a federal judge in Colorado suspended implementation of the rule in that state.

Shortly after publication of the Navigable Waters Protection Rule, the Supreme Court issued a decision in [*County of Maui v. Hawaii Wildlife Fund*](#) and held that a CWA permit was required for point sources that discharge pollutants to groundwater if that discharge is the “functional equivalent of a direct discharge” to navigable waters. The Court declined to define “functional equivalent”, but instead provided seven factors that should be evaluated in any given situation, the most important being transit time and distance. In December, the Trump administration released its own draft guidance on how to apply the *Maui* decision going forward, adding another factor: pollutant composition and concentration at the time it enters the navigable water as compared to the initial discharge. The draft guidance was published in the Federal Register for public comment, and comments are due by January 11, 2021.

The incoming Biden administration is expected to take steps to undo the Trump administration’s efforts to narrow the scope of CWA permitting. In the near term, it is likely that Biden’s Department of Justice will seek a stay of the pending litigation over the Navigable Waters Protection Rule, to allow the administration to evaluate its substantive and procedural options to revise the rule. Furthermore, it is expected that EPA will withdraw the recently published guidance on applying the *Maui* decision and eventually replace it with guidance that reads the Supreme Court’s decision more broadly. Any of these actions will likely result in lawsuits filed by the same groups that opposed the 2015 rule. Some of those lawsuits enjoined enforcement of the 2015 rule in certain jurisdictions, which resulted in a patchwork framework where the applicable federal rule depended upon the particular state.

Choppy Waters Ahead - NPDES Permitting for Discharges through Groundwater

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The U.S. Supreme Court, in its groundbreaking decision last year in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), ruled that the Clean Water Act (CWA) requires a permit for a point source discharge through groundwater to navigable waters under certain circumstances and it established

a new standard likely to see significant interpretation by regulatory authorities, permit writers, and courts in the year ahead.

In the *Maui* case, the Court held that a permit issued under the CWA National Pollutant Discharge Elimination System (NPDES) program is required for a discharge originating from a point source that is conveyed to navigable waters by a nonpoint source such as groundwater “if the addition of the pollutants through groundwater is the **functional equivalent** of a direct discharge from the point source into navigable waters.” *Id.* at 1468. In its ruling, the Court focused on both the statutory intent and the statutory language that the pollutant must be “from” a point source. It held that the intent of the CWA was to provide federal regulation of sources of pollutants to navigable waters, while preserving longstanding state regulatory authority over groundwater and other non-point sources of pollution. Whether pollutants arriving at navigable waters after traveling through groundwater, or other indirect pathways, are deemed to be “from a point source” and require an NPDES permit, the Court ruled, will depend upon how similar to (or different from) they are to a direct discharge to navigable waters.

Recognizing the potential difficulty in applying this new, somewhat amorphous, standard, the Court in *Maui* provided a non-exclusive list of seven factors that may be relevant in making permitting determinations. Those factors include: (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, and (7) the degree to which the pollution has maintained its specific identity at the point of discharge. The Court noted that these factors may need to be weighted differently in different cases and that other factors may also apply depending upon the circumstances.

Regulatory agencies are now beginning to interpret and apply the new standard and the functional equivalent factors. On December 10, 2020, EPA published in the Federal Register, with a 30-day public comment period, a [draft guidance](#) document on how to apply the *Maui* decision’s functional equivalent analysis within the existing permitting framework to discharges reaching navigable waters through groundwater. The draft guidance, intended to clarify the analysis for the regulated community and permit writers, reviews basic permitting principles and adds a new factor to consider, but does not provide much additional detail with regard to the seven functional equivalent factors. It does note, however, that what happens to a discharged pollutant over the time and distance traveled to the navigable waters is critical to the functional equivalent analysis and that the science (e.g., characteristics of the pollutant itself and the nature of the subsurface aquifer and hydrogeology) informs those factors. It adds that there must be an actual, not potential, discharge from a point source and that not all discharges to groundwater that reach navigable waters will be the functional equivalent of a direct discharge.

The new factor to consider in the functional equivalent analysis, identified by EPA in the draft guidance, is the design and performance of the system or facility from which the pollutant is released. EPA states that this type of information is important, relevant, and routinely considered by permitting agencies. Further, it adds that the design and performance of a system or facility can affect or inform all of the other *Maui* factors. For example, a facility may be designed to slow the transit time of a pollutant or increase the distance it must travel to a navigable water. Likewise, the design may “promote dilution, adsorption or dispersion of the pollutant, thereby affecting the extent to which the pollutant is chemically changed, the amount of pollutant entering the water of the United States relative to the amount of the pollutant that

leaves the point source, and the degree to which the pollutant has maintained its specific identity at the point it reaches a water of the United States.” (Draft Guidance, p.7)

The close of EPA’s public comment period on the draft guidance on January 11, 2021 will occur prior to the inauguration of President-Elect Biden. Whether the Trump Administration intends to finalize the draft guidance before it leaves office remains an open question. We do anticipate, however, that a Biden Administration will likely revisit this guidance and interpretation as it begins to implement its own regulatory priorities.

We also expect to see, in the year ahead, further refinement of the functional equivalent analysis through state level permitting guidance, as well as court decisions applying the standard in individual cases. In the interim, facilities with existing discharges to groundwater that may reach navigable waters should consider evaluating available information regarding their discharge against the *Maui* functional equivalent factors to assess potential risk that the permitting agency may now require a permit even if one was not previously required by the agency.

EPA’s Unregulated Contaminant Monitoring Rule 5 to Include an Expanded List of PFAS Constituents and Additional Public Water Systems

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The Safe Drinking Water Act (SDWA), as amended in 1996, requires that EPA establish a program to monitor specified unregulated contaminants every five years from Public Water Systems (PWS). The monitoring effort historically consisted of data collection from large PWS systems (serving > 10,000 people) and representative small PWS serving less than or equal to 10,000 people. EPA published the first Unregulated Contaminant Monitoring Rule (UCMR) in 1999. Twenty-plus years later, EPA is gearing up for its 5th cycle of unregulated contaminant monitoring under the pending UCMR 5. The data collected through UCMR 5 will be stored in the National Contaminant Occurrence Database and will be used to support the EPA Administrator’s determination as to whether regulation of previously unregulated contaminants is warranted. The selection of contaminants in the pending UCMR 5 cycle is based on a review of the Contaminant Candidate List (CCL), which is a list of contaminants that are not currently regulated by EPA under the national drinking water regulations.

As part of the pending UCMR 5 rulemakings, EPA is set to propose monitoring for over 20 different types of Per- and Polyfluoroalkyl Substances (PFAS). The proposed UCMR 5 rulemaking was originally scheduled for publication in 2020, however due to delays, we now anticipate it to be early 2021. Following a public comment period, the final UCMR 5 rulemaking is scheduled to be released by the end of 2021. Once finalized, the UCMR 5 monitoring period will cover the years 2022 through 2026. The inclusion of an expanded list of PFAS in the UCMR 5 would fulfill a key commitment in EPA’s 2019 PFAS Action Plan by proposing the collection of more drinking water occurrence data for a broader group of PFAS, utilizing newer analytical methods at lower minimum reporting levels than previously possible.

Also of importance to the UCMR 5 rulemaking efforts, the SDWA amendments under P.L. 115–270, known as America’s Water Infrastructure Act of 2018 (AWIA), will now expand unregulated contaminant monitoring requirements to include all public water systems serving 3,300-10,000 individuals. This requirement will

take effect on October 23, 2021 (three years after the enactment of AWIA). This amendment to the SDWA could result in approximately 5,000 additional PWS being brought into the UCMR 5 monitoring program.

SEPs Set for Comeback in Federal Settlements

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In March 2020, the Assistant Attorney General at the United States Department of Justice Environment and Natural Resources Division (ENRD) issued a guidance memo that effectively ended the practice allowing defendants to provide environmental goods or services, otherwise known as Supplemental Environmental Projects (SEPs) as part of civil settlements. The guidance argued that the practice of allowing SEPs violated federal law and may be unconstitutional because they amounted to a reallocation of monies owed to the federal government without Congressional approval. Shortly thereafter, EPA indicated that based on the ENRD guidance the agency would no longer include SEPs in administrative settlement agreements, except for diesel emission reduction projects in settlement of Clean Air Act violations (which had been previously authorized by Congress).

Critics of the ENRD guidance argued that SEPs have been an effective tool to remedy environmental harm and protect affected local communities, in particular environmental justice communities, in ways that could not be achieved through penalties alone. Moreover, 2015 EPA guidance effectively addressed any legal concerns by requiring a sufficient nexus between the underlying violation and the SEP. In October 2020, the Conservation Law Foundation filed a lawsuit in Massachusetts District Court arguing that the shift by ENRD violated the Administrative Procedures Act.

As described in more detail in other areas of this forecast, [environmental justice](#) is expected to play a key role in the Biden Administration's approach to federal environmental regulation and enforcement. Accordingly, it is likely that one of the first acts of Biden's ENRD appointees will be to rescind or revise the March 2020 memo to allow for SEPs to once again be used as part of civil settlements with ENRD. In addition, EPA will likely revert to its 2015 guidance to allow the use of SEPs for administrative settlements and may even revise the guidance to allow for more flexibility for their use. Accordingly, companies facing federal enforcement actions can expect SEPs to play a role in settlement discussions.

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