

## INSIGHTS

## Changes to Expect in Environmental Litigation Under Biden

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By: [Ann D. Navaro](#)

One thing is certain about 2021 – environmental and natural resources-related litigation against the federal government will continue apace and it will impact a range of private projects that require federal authorization of some sort or that rely on public natural resources and lands. What is not certain is how the Biden Administration may alter its approach to such defensive litigation to reflect its priorities. That being said, we have identified four areas for potential litigation changes to watch for in 2021.

***Potential Change #1: Reversing the De-Regulatory Efforts of the Trump Administration.***

The new Administration's early priorities will include efforts to undo many initiatives from the previous Administration. This effort will follow a well-trodden path and will likely end, and perhaps begin, in litigation – ushering in a new era of uncertainty for the regulated community as the litigation and regulatory efforts play out. For example, when the Trump Administration took office in 2016, the Administration announced its intent to reverse the Clean Power Plan (CPP)—a controversial Obama Administration initiative that was finalized in October 2015<sup>[1]</sup> but had not yet taken effect—but formal plans to rescind the CPP were not immediately undertaken because the U.S. Supreme Court stayed the effectiveness of the CPP until its legality could be fully litigated.<sup>[2]</sup> The Biden Administration will undertake similar reversal efforts targeted at an array of Trump Administration actions, potentially including those listed below, which could result in changes in government positions in current litigation or in new litigation that will complicate the regulatory landscape<sup>[3]</sup>:

- *Permit streamlining efforts* – these efforts may include re-visiting the Trump Administration's rule implementing the National Environmental Policy Act (NEPA), which is currently subject to court challenges, and the "One Federal Decision" Executive Order;
- *Clean Water Act (CWA) initiatives* – such as the Trump Administration's rule narrowing the extent of geographic jurisdiction under the CWA, which is also currently in litigation;
- *Air emissions standards* – for example, rules relaxing fuel economy and carbon dioxide emissions standards, the final rule revoking California's waiver of those emissions standards, and aircraft emissions standards;
- *Oil and gas exploration on federal lands* – the Trump Administration's oil and gas initiatives that the Biden team may re-visit include the Department of the Interior (DOI)'s decision opening the Arctic National Wildlife Refuge coastal plain to oil and gas leasing; and

- *Other natural resources and protected species initiatives* – such initiatives may include the rule exempting millions of acres in the Tongass National Forest from the 2001 Roadless Area Conservation Rule, a rule narrowing the reach of the Migratory Bird Treaty Act, presidential action taken to reduce the size of national monuments set aside under the Antiquities Act by the Obama and Clinton Administrations, Bureau of Land Management (BLM) decisions opening up additional lands to oil and gas leasing in the western United States, and changes to the regulations implementing the Endangered Species Act.

In addition to or combined with reversal efforts, the new Administration will pursue new regulatory, program, and policy initiatives. These will likely be aimed at such things as directing resources to development of renewable energy, re-visiting oil and gas leasing plans both offshore and onshore, adding scrutiny and requirements for use of federal lands, revising the approach to considering such topics as climate change and environmental justice in federal decisionmaking, adding or increasing mitigation requirements, and considering regulatory reform related to species protection.

These initiatives will no doubt be met with future litigation, as direct challenges to rulemaking or in as-applied challenges to specific project decisions, especially suits brought by (1) regulated entities that disfavor the increased time and expense required for compliance; and (2) stakeholders affected by the new initiatives who advocate for an even more stringent approach. The first group may include traditional and nontraditional energy companies—all of whom stand to face an increased regulatory burden, albeit to varying degrees. The second group might include environmental nongovernmental organizations (ENGOS), community watchdog groups, and other citizen groups or individuals. Private sector entities that could be affected by the outcome of these matters should monitor how they take shape in the courts, and may be directly involved as amicus or intervening parties, as litigation often results in shifting regulatory requirements. **Takeaway:** *The Biden Administration is likely to pursue reversal efforts and new regulatory initiatives, both of which will likely be met with future litigation of one kind or another.*

#### **Potential Change #2: Different Prioritization of Cases Against the Government.**

The litigation priorities of the Biden Administration are expected to be different from the Trump Administration's priorities, and they may be reflected in the types of new cases against the government on which the Biden Administration allocates most of its attention and resources. As noted above, likely areas of focus in general for the Biden Administration include (i) a renewables-focused infrastructure program that would greatly increase solar and wind generation, energy storage capacity, and public transit<sup>[4]</sup>; (ii) climate change and environmental justice (EJ); and (iii) defense of new mitigation policies and approaches. President-elect Biden's nominations of Brenda Mallory as White House Council on Environmental Quality (CEQ) chair and Michael Regan<sup>[5]</sup> as head of EPA are viewed as further evidence of these priorities. Indeed, in her speech on December 22, 2020, Mallory listed climate change and EJ as initiatives CEQ would pursue, if she is confirmed.<sup>[6]</sup> Accordingly, lawsuits against the U.S. that relate to these subjects are likely to be a key focus for the Biden Administration. A renewables-based infrastructure program aligns with the Administration's broader climate change agenda and its desire for the U.S. to re-join the Paris Climate Agreement.<sup>[7]</sup> Regarding EJ, during President-elect Biden's campaign, he noted communities of color have suffered adverse, disproportionate effects from the energy and environmental decisions of the Trump Administration and that those effects have been exacerbated by the pandemic.<sup>[8]</sup> As for mitigation, if there will be impacts to resources on public lands, mitigation will likely gain renewed attention from the government in furtherance of efforts emphasized in

the Obama Administration but abandoned in the Trump Administration. Requirements may be challenged by the regulated community and mitigation plans may be subject to litigation if the level of protection that those plans provide is viewed as insufficient to adequately protect natural resources, species, and the environment. It remains to be seen what, if any, actual steps the Biden Administration takes to achieve these various goals. **Takeaway:** *The Biden Administration's top priorities in defending the government against new litigation may be cases relating to renewable infrastructure, climate change, EJ, or mitigation.*

**Potential Change #3: Use of Pending Litigation to Implement the New Administration's Policies.**

The Biden Administration may also attempt to use already-filed lawsuits to further the Administration's agenda. An example of a new administration using pending litigation to further its aims occurred in litigation over BLM's Waste Prevention Rule (the "Venting and Flaring Rule"), an Obama DOI initiative. That rule had been challenged in federal district court in Wyoming, but had not yet reached merits briefing when President Trump took office in 2016. The Wyoming challenge was stayed while the Trump Administration rolled back the rule in September 2018, but in July 2020, the U.S. District Court for the Northern District of California invalidated the rollback.<sup>[9]</sup> In response to that invalidation, which then left the Obama-era rule in effect, the Wyoming case re-started and the Trump Administration used that litigation to "confess error," urging the court to overturn the Obama Venting and Flaring Rule.<sup>[10]</sup> On October 8, 2020, the Wyoming district court overturned the Obama-era rule—thus achieving the Trump Administration's original de-regulatory goal. On December 21 and December 22, 2020, various parties, not including the federal government, filed notices of appeal and cross-appeal to the U.S. Court of Appeals for the Tenth Circuit. The case was docketed there on December 22, 2020 as *State of Wyoming, et. al v. DOI* (No. 20-8073, 10<sup>th</sup> Cir. 2020).

Like the example described above, the Biden Administration could attempt a similar tactic—rolling back Trump Administration rules through pending litigation—although that effort becomes more difficult in cases that have already seen briefing. Potential Trump-era priorities and approaches being defended in current litigation that could see a shift in the Biden Administration include cases (1) involving the scope of NEPA in reviews of proposed federal action; (2) implicating greenhouse gas (GHG) emissions and climate change considerations under NEPA; and (3) involving oil or gas projects on federal land or requiring federal approvals.

An example of a controversial project in pending litigation is the Dakota Access Pipeline (DAPL). Litigation over DAPL began in the Obama Administration and remains ongoing in the U.S. District Court for the District of Columbia (D.D.C.) and in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit). On July 6, 2020, the D.D.C. vacated a federal easement that allowed construction of the pipeline under Lake Oahe. The D.D.C. issued an injunction order requiring the pipeline to be shut down and emptied of oil by August 5, 2020, so an environmental impact assessment could be undertaken. On appeal, the D.C. Circuit stayed the injunction order on July 14, 2020, but the court denied challenges to the D.D.C.'s vacatur of the easement. On August 5, 2020, the D.C. Circuit continued the stay of the DAPL injunction order and litigation continues.<sup>[11]</sup> Now that the easement has been vacated, opponents of the project may argue that the Biden Administration should settle or resolve the DAPL litigation by implementing the vacatur and compelling removal of the pipeline. However, given the posture of the litigation, the fact that the agency is conducting a full Environmental Impact Statement of the easement decision, and given the equities involved, it remains uncertain how this long-running dispute will be resolved.

President-elect Biden's nomination of Deb Haaland to be the next Secretary of DOI may influence the government's continued engagement on the DAPL project. While DOI has no direct oversight role on the project, she is viewed as sympathetic toward tribal interests opposing the project because she attended 2016 protests<sup>[12]</sup> when President Obama's Secretary of the Interior, Sally Jewell, advocated on behalf of the tribes opposed to DAPL.

**Takeaway:** Pending cases the Biden Administration may get involved in to try to further its policy agenda could include DAPL or other cases involving the scope of NEPA, GHG or climate change considerations under NEPA, or oil and gas projects involving federal lands or approvals.

#### **Potential Change #4: A Decrease in Citizen Suits?**

A general increase in litigation is anticipated under the Biden Administration in 2021<sup>[13]</sup> but, generally speaking, fewer citizen suits tend to be filed when the public has confidence that the sitting administration will vigorously enforce its laws and regulations and compel compliance.

<sup>[14]</sup> That being said, even if ENGOs and community-based organizations believe the incoming Administration will pursue enforcement initiatives to some degree, these groups may consider the extent of those initiatives to be insufficient, which could lead to litigation. Furthermore, certain types of citizen suits may be more likely to be brought as they may be perceived by potential litigants as providing the federal agencies with a non-regulatory vehicle for creating new policies or taking action via settlement of the case. **Takeaway:** Certain types of citizen suits may continue to be brought even after the Biden Administration takes office, and it remains to be seen whether environmental and community action groups will assume a less litigious posture relative to the Biden Administration than they assumed toward the Trump Administration.

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<sup>[1]</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64661 (Oct. 23, 2015), <https://www.federalregister.gov/documents/2015/10/23/2015-22842/carbon-pollution-emission-guidelines-for-existing-stationary-sources-electric-utility-generating>.

<sup>[2]</sup> Tracking deregulation in the Trump era, The Brookings Institute (updated Dec. 21, 2020), <https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/>.

<sup>[3]</sup> Karen A. Winters, Allen A. Kacenjar, Jr., Carolyn L. McIntosh, and Kendra S. Sherman, *Looking Ahead to 2021 – Implications of a Change in Administration on Environmental Policy*, National Law Review (Dec. 7, 2020) (listing various potential changes), <https://www.natlawreview.com/article/looking-ahead-to-2021-implications-change-administration-environmental-policy>.

<sup>[4]</sup> Michael B. Gerrard and Edward McTiernan, *Biden Administration Will Reverse Many Trump Environmental Policies*, Law.com (Nov. 10, 2020), <https://www.law.com/newyorklawjournal/2020/11/10/biden-administration-will-reverse-many-trump-environmental-policies/>.

<sup>[5]</sup> Brady Dennis, Steven Mufson and Juliet Eilperin, *Biden picks top North Carolina environmental official to run EPA*, Wash. Post, Dec. 17, 2020, <https://www.washingtonpost.com/climate-environment/2020/12/17/biden-epa-regan/>.

<sup>[6]</sup> Brenda Mallory on the transition, Southern Environmental Law Center (Dec. 22, 2020), <https://www.southernenvironment.org/news-and-press/news-feed/brenda-mallory-on-the-transition>.

[7] *The Biden Plan for a Clean Energy Revolution and Environmental Justice*, JoeBiden.com, <https://joebiden.com/climate-plan/>.

[8] *The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity*, JoeBiden.com, <https://joebiden.com/environmental-justice-plan/>.

[9] Timothy Gardner, *Trump administration eases rule on methane leaks on public land*, Reuters, Sept. 18, 2020, <https://www.reuters.com/article/us-usa-interior-methane/trump-administration-eases-rule-on-methane-leaks-on-public-land-idUSKCN1LY2N7>.

[10] Juan Carlos Rodriguez, *US Says Obama-Era Methane Rule Is Illegal*, Law360 (Aug. 19, 2020), <https://www.law360.com/articles/1302639?copied=1> (“The federal government said it ‘confesses error’ regarding the rule and that it must be vacated because it ‘contains several legal deficiencies.’”).

[11] *U.S. court allows Dakota Access oil pipeline to stay open, but permit status unclear*, Reuters, Aug. 5, 2020, <https://www.reuters.com/article/us-usa-pipeline-dakota-access/u-s-court-allows-dakota-access-oil-pipeline-to-stay-open-but-permit-status-unclear-idUSKCN2512X8>.

[12] Juliet Eilperin, Dino Grandoni and Brady Dennis, *With historic picks, Biden puts environmental justice front and center*, Wash. Post, Dec. 17, 2020, <https://www.washingtonpost.com/climate-environment/2020/12/17/deb-haaland-interior-secretary-biden/> (noting Haaland “bolstered her national profile in 2016 by going to the Standing Rock Sioux’s reservation in North and South Dakota to join tribal leaders in opposition to the construction of the Dakota Access pipeline” and that she brought tortillas and green-chili stew to the site).

[13] Patrick Smith, *What a Biden Administration Means for Big Law*, Law.com (Nov. 9, 2020), <https://www.law.com/americanlawyer/2020/11/09/change-is-coming-what-a-biden-administration-means-for-big-law/>.

[14] Kirsten L. Nathanson, David Chung, and Daniel Leff, *Practitioner Insights: Citizen Suits Under Trump—What to Expect*, Bloomberg Law (Mar. 14, 2017), <https://news.bloomberglaw.com/environment-and-energy/practitioner-insights-citizen-suits-under-trump-what-to-expect> (“Citizen lawsuit enforcement naturally increases during periods of relatively less stringent regulation.”).