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Blog Post

Biden Administration is Off to a Fast Start: Day One Actions on Energy, Environmental, and Climate Issues

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President Biden moved quickly to implement his climate agenda on his first day in office, ordering numerous actions in furtherance of his administration's climate agenda that will have a dramatic impact on the energy and infrastructure sectors. Among his most highly publicized first day actions, Biden announced that the U.S. [will rejoin the Paris Climate Agreement](#). President Biden's other day one actions on climate included new Executive Orders, the repeal of certain Executive Orders and the freezing of "midnight regulations" issued by the Trump administration, along with sweeping directives to agencies that will result both in changes to how existing laws and regulations are enforced and the issuance of new regulations.¹

This post covers these day one actions and their impact on energy and infrastructure sectors, as well as other policies expected within the coming weeks.

A National Climate Policy Takes Shape

President Biden referred to a "climate in crisis" as one of the core challenges facing the nation in his [inaugural address](#) on Wednesday, consistent with his campaign commitment to move the U.S. towards a net-zero emissions economy by 2050 and a carbon pollution-free power sector by 2035. We expect an unprecedented amount of regulatory activity on climate policy as agencies develop their regulatory plans and the White House announces additional government-wide actions. President Biden's most notable first-day actions on climate policy were the following:

- **Paris Climate Agreement.** President Trump withdrew the U.S. from the

agreement on November 4, 2020, having given formal notice of withdrawal 12 months prior. President Biden issued written notification to the United Nations of the U.S.' intention to rejoin, which will become effective in 30 days. President Biden is permitted to unilaterally have the U.S. rejoin the agreement without Senate approval. To affirm participation in the agreement, President Biden will need to submit a new nationally determined contribution ("NDC") indicating the climate policies and actions to be taken by the U.S.

- **GHG Regulations.** President Biden issued an Executive Order calling for a sweeping review of federal environmental regulations "to tackle the climate crisis."² The order directs federal departments and agencies to review and, where appropriate, reverse Trump regulations, orders and guidance that conflict with this goal, including in particular the rules on methane, fuel economy standards, building efficiency standards and national emission standards for hazardous air pollutants. Agencies are required to submit an initial list of actions considered for reversal to the head of the Office of Management and Budget ("OMB") and the White House Council on Environmental Quality ("CEQ") within 30 days, and a final set of proposed actions within 90 days.

Federal agencies are also directed to consider additional regulation, including in particular:

- New Environmental Protection Agency ("EPA") regulations to establish comprehensive standards of performance and emission guidelines for methane and volatile organic compound emissions from existing operations in the oil and gas sector by September 2021; and
 - Developing a new Federal Implementation Plan for the 2008 Ozone National Ambient Air Quality Standards ("NAAQS") for California, Connecticut, New York, Pennsylvania and Texas by January 2022.
- **The Social Cost of GHGs.** President Biden directed agencies to "capture the full costs of greenhouse gas emissions as accurately as possible, including by taking global damages into account."³ To facilitate this analysis, a newly established interagency Working Group on the Social Cost of Greenhouse Gases is tasked with publishing interim social cost of carbon ("SCC"), social cost of nitrous oxide ("SCN") and social cost of methane ("SCM") estimates within 30 days, with final metrics due by January 2022. The Working Group also is tasked with identifying areas of federal decision-making, budgeting and procurement where the SCC, SCN and SCM should be applied. This likely will include, at a minimum, any actions requiring federal National Environmental Policy ("NEPA") reviews.

A Paradigm Shift for the Management of Public Lands

President Biden's first-day actions also included a number of significant measures related to the federal government's management of public lands; we expect to see significant additional actions. President Biden's selection for Secretary of the Interior, Debra Haaland, will be key in his plan to expand the federal government's ownership of land, primarily in the west. Highlights of President Biden's first-day actions regarding management of public lands and other expected actions include the following:

- **National Monuments.** Direction to the Secretary of the Interior to review the Trump administration's withdrawal of the Bears Ears and Grand Staircase-Escalante National Monuments and the Northeast Canyons and Seamounts Marine National Monument and consider whether the boundaries designated by President Obama should be re-established.
- **Arctic National Wildlife Refuge.** The issuance of a temporary moratorium on the leasing program for oil and gas activities in the Arctic National Wildlife Refuge, citing the pending litigation and a need for further evaluation of the leasing program's environmental impacts.
- **Keystone XL Pipeline.** Revocation of the Presidential permit for the Keystone XL pipeline, stating that the project does not serve the national interest of developing a clean energy economy and undermines the U.S.' climate leadership.
- **Offshore Drilling.** Reinstatement of President Obama's Executive Order 13754 and December 20, 2016 Presidential Memorandum withdrawing certain areas of the Outer Continental Shelf in the Arctic from mineral leasing under Section 12(a) of the Outer Continental Shelf Land Act (OCSLA). In 2017, President Trump issued Executive Order 13795 directing the Department of the Interior to roll back those withdrawals and pursue leasing of oil and gas development in those areas. Environmental groups were successful in their challenge to the Trump administration's Executive Order in court, and the case remains on appeal in the Court of Appeals for the Ninth Circuit. President Biden's Executive Order directs the Attorney General to take appropriate steps in the litigation to ensure the lands are again withdrawn from the oil and gas leasing program.
- **Environmental Reviews.** Repeal of Trump Executive Orders that imposed time and page limits on environmental reviews.⁴ President Biden also signaled his intention to strengthen the federal government's environmental reviews of future proposed energy and infrastructure development on public lands.
- **Suspension of Oil and Gas Leasing Authority on Public Lands.** A 60-day

suspension of the authority of Department of the Interior to issue approvals for onshore and offshore oil and gas development, including leases or permits to drill.⁵ This suspension is expected to serve as a *de facto* moratorium on new leasing or permitting on public lands and waters but will not limit existing operations under valid leases.

- **Designation of New Public Lands.** On the campaign trail, President Biden announced his intent to designate 30% of the nation's land and water as public by 2030. President Biden's "30 by 30" roadmap seeks to conserve biodiversity and mitigate the impacts of climate change. Currently, approximately 12% of the nation's land and 26% of the nation's marine areas are protected through national and state parks, wilderness areas and wildlife refuges.

Focus on Infrastructure

Although President Biden revoked certain Executive Orders issued during the Trump administration to streamline the environmental review process for infrastructure projects, much of the action with respect to infrastructure is expected in the coming weeks:

- **Revocation of Trump-era Permitting Executive Orders.** The first of the revoked Executive Orders operated such that the CEQ had the power to designate certain projects as "high priority" and therefore designate permit milestones for such projects. Another revoked Executive Order was intended to increase efficiencies in the environmental review process by requiring all federal agencies to execute a single NEPA document under the "One Federal Decision" policy. In addition, the revoked Executive Order had reduced the breadth of environmental reviews and imposed a two-year time limit on infrastructure project reviews. President Biden's revocation of these Executive Orders indicates an intention to advocate for a detailed permitting and environmental review process for new infrastructure projects, with a particular focus on applicable environmental considerations and consideration of climate change impacts.
- **"Build Back Better" Plan.** We expect that an early focus for the Biden team will be a robust regulatory and legislative package related to infrastructure. In early January, President Biden announced the first tranche of his multitrillion-dollar aid "Build Back Better" plan. The first \$1.9 trillion tranche of this investment, known as the American Rescue Plan, focuses on COVID-19 relief and support, with limited focus on investment in infrastructure outside of \$20 billion intended for transit agencies to prevent further layoffs and improve resiliency. The second

tranche is expected to be announced within one or two weeks and to include approximately \$2 trillion in funding over the next 10 years to support the implementation of President Biden's infrastructure plan. In line with President Biden's campaign statements, the "Build Back Better Plan" is expected to be closely tied to President Biden's federal climate policy initiatives discussed above as part of 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 focus on green infrastructure and associated jobs will see funding targeted at climate resiliency and greenhouse gas emission reductions. Applicable projects are expected to include investment in electric-vehicle charging networks, high-speed rail and low-carbon aviation and shipping technology. In addition to green infrastructure, President Biden promises funding for a broad range of categories of infrastructure projects, including to improve the quality of national roads, highways and bridges, update water infrastructure and improve widespread access to internet broadband networks.

Strengthening Environmental Regulation and Enforcement

President Biden has begun to take actions to reform the Trump administration's environmental regulatory agenda and place an increased focus on enforcement of environmental programs. These included a number of day one orders and directives to agencies:

- **NEPA.** In June 2019, the Trump administration replaced the Obama-era Guidance on Consideration of Greenhouse Gas Emissions in NEPA reviews, significantly curtailing the requirement for federal agencies to consider climate change in their decision-making processes. President Biden announced the repeal of the 2019 guidance and directed CEQ to review and revise the Obama-era Guidance. In addition, in July 2020, CEQ rolled out the first comprehensive overhaul to the NEPA implementing regulations seeking to streamline the environmental review process. Notably, the revised regulations shorten the time for review and eliminate the requirement to evaluate cumulative impacts, which was seen by environmental groups as a way for federal agencies to avoid considering climate change. Although it will take time to implement in light of the ongoing litigation over the rules by states and environmental and health advocacy groups, it is anticipated that President Biden will reverse the July 2020 reforms and strengthen NEPA's protections.

- **Methane and Other GHG Emissions.** As noted above, President Biden already has announced steps to implement revised federal regulations on methane. In 2019, the Trump administration replaced the 2015 Clean Power Plan, a set of regulations intended to limit carbon dioxide emissions from existing power generation facilities, with the Affordable Clean Energy Rule (“ACE Rule”). Under the 2015 Clean Power Plan, nationwide carbon dioxide emissions would be reduced by approximately 30% from 2005 levels by 2030 with a flexible interim goal. On July 8, 2019, the EPA issued a series of rules repealing the Clean Power Plan and replacing it with the ACE Rule, which softens emission reduction requirements and provides states with more latitude to develop emission reduction strategies. On January 19, 2021, the D.C. Circuit struck down the ACE Rule, and remanded it to the EPA, holding that it was promulgated on “the erroneous legal premise” that the Clean Air Act expressly foreclosed promulgation of the Clean Power Plan, such that the Trump administration’s only option was a complete repeal. While President Biden has so far not commented on the specific course he will take on remand, it is expected he will move forward with new rules that will both borrow from and expand upon the 2015 Clean Power Plan. In addition, President Biden’s Environment and Climate Order directed immediate reconsideration of the Trump administration’s rule amending the Clean Air Act’s Subpart OOOOa, which establishes controls for emissions of methane from new, modified or reconstructed sources in the oil and natural gas sector (known as the Reconsideration Rule).
- **Navigable Waters Protection Rule.** President Biden revoked the Trump Executive Order directing the EPA to review the Waters of the United States Rule, under which the EPA and the Army Corps of Engineers promulgated the Navigable Waters Protection Rule as a replacement. The Navigable Waters Protection Rule took effect on June 22, 2020, in every state except Colorado (where it was subject to a stay halting implementation of the rule within Colorado as of June 19, 2020). The new rule narrows the definition of “waters of the United States” subject to regulation under the federal Clean Water Act by creating four categories of federally related waters and 12 categories of non-jurisdictional waters, such as features that only contain water in direct response to rainfall, groundwater, many ditches, prior converted cropland and waste treatment systems. The Navigable Waters Protection Rule has been subject to significant litigation by states, public interest groups and trade associations. Although the Biden administration has not yet announced its planned course, the EPA likely will change its litigation position and move forward with promulgating a rollback or replacement similar to the Waters of the United States Rule.

- **Environmental Justice.** Fulfilling another campaign promise, the Environment and Climate Executive Order notes that the Biden administration will advance environmental justice in federal decision-making. President Biden [also issued an Executive Order](#) on racial equity, outlining certain actions the federal government will take to advance diversity and inclusion.

Revoking President Trump's Executive Orders

President Biden's day one actions included revocation of the following Executive Orders on environmental and energy matters:

- **EO 13766, "Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects."** One of President Trump's first Executive Orders, signed on January 24, 2017, aimed to fast-track review of "high priority infrastructure projects" by allowing the Chairman of CEQ to designate a project an infrastructure project as "high priority."
- **EO 13771, "Reducing Regulation and Controlling Regulatory Costs."** Signed on January 30, 2017, EO 13771 directed all agencies to repeal at least two existing regulations for each new regulation issued.
- **EO 13783, "Promoting Energy Independence and Economic Growth."** Signed on March 28, 2017, this Executive Order had the goal to "promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation," directing federal agencies to review rules and "agency actions" that impede U.S. energy production.
- **EO 13795, "America First Off-shore Energy Strategy."** Implemented on April 28, 2017, to "encourage energy exploration and production," this Executive Order directed the Department of the Interior to reassess limitations and regulations on offshore oil and gas development. As a result, Secretary Ryan Zinke issued Secretarial Order 3350 directing the Bureau of Ocean Management and Bureau of Safety and Environmental Enforcement to undertake actions concerning leasing, regulatory rollback efforts and permitting in furtherance of EO 13795.
- **EO 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects."** This Executive Order required establishment of a single lead agency to coordinate environmental reviews and permitting of infrastructure projects more generally, known as "One Federal Decision." Specifically, EO 13807 directed CEQ to create a list of actions aimed at reducing the timeline for environmental review. This Order also limited

the number of pages an Environmental Impact Statement can have to 150 pages, but allowed up to 300 pages for “complex” matters.

- **EO 13868, “Promoting Energy Infrastructure and Economic Growth.”** Signed on April 10, 2019, and directed at increasing energy projects, this Executive Order directed the EPA to review and revise state review of underlying issuances of water quality certifications for pipeline projects under 401 of the Clean Water Act. EO 13868 ultimately made it more difficult for states to block oil and gas pipeline projects by restricting the scope of review and enforcing shorter timelines.
- **EO 13920, “Securing the United States Bulk-Power System.”** Ordered on May 4, 2020, it declared that threats to the bulk-power system by foreign adversaries constitute a national emergency and prohibited certain transactions with those adversaries. President Biden suspended this Executive Order for 90 days.

Regulatory Freeze on Midnight Regulations

White House Chief of Staff Ronald A. Klain, at President Biden’s direction, called on heads of departments and agencies to delay so-called “midnight regulations,” issued in the waning days of the Trump administration. The [Regulatory Freeze Pending Review memorandum](#) (“Regulatory Freeze Memo”) requests that federal agencies immediately (i) refrain from proposing or issuing any rule, (ii) withdraw, prior to publication, any as-yet unpublished rule sent to the Office of the Federal Register, and, (iii) for any rule that has been published in the Federal Register, but that is not yet effective, consider delaying the effective date for 60 days from the date of the memo, while providing, in the interim and to the extent permissible, opportunities (A) for interested parties to offer additional comments or (B) for agencies to consider pending petitions for reconsideration.

The Regulatory Freeze Memo applies to final rules, as well as to certain publications ordinarily issued in the course of rulemaking, including notices of inquiry or proposed rulemaking, along with agency statements that “set forth a policy . . . or an interpretation” of statutory or regulatory matters.

The Regulatory Freeze Memo excepts from delay certain rules that (i) address “emergency situations or other urgent circumstances” (as determined by the Director of the Office of Management and Budget (OMB Director)) or (ii) are subject to statutory or judicially imposed deadlines. In addition, any affected rule must be reviewed by a Biden-appointed or -designated official, with the exception of certain rules already published in the Federal Register, which either (A) may proceed after

the prescribed delay if they do not raise “substantial questions of fact, law, or policy,” or (B) may be subject to further actions following consultation with the OMB Director. Chief of Staff Klain states that he may take action to modify or extend the requirements of the Regulatory Freeze Memo in response to any subsequently discovered actions taken prior to President Biden’s term that “frustrate the purpose” of the memo.

Looking Ahead

As President Biden promised during the campaign, his administration moved quickly out of the blocks on Day One on key energy, environmental and climate issues that will impact the energy and infrastructure sectors. In view of his significant promises on energy, environmental and climate issues, there will be much more to come, and undoubtedly a host of legal challenges. We intend to cover these developments in future posts.

1. Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (the “Environment and Climate Executive Order”), available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/>; Regulatory Freeze Pending Review, available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/>.↩

2. Environment and Climate Executive Order.↩

3. Environment and Climate Executive Order, § 5.↩

4. Environment and Climate Executive Order, § 7(b) (revoking Executive Order 13807).↩

5. Department of the Interior Order No. 3395: Temporary Suspension of Delegated Authority, January 20, 2021.↩

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