



Trump Midnight Regulations Complicate Rollout of Biden Environmental Agenda

As the Biden Administration prepares to roll out an ambitious environmental agenda, the Trump Administration is busily securing its own legacy. What gets done, and/or undone, will depend on how the competing sides play their hands in the next few weeks.

A. Racing to the Finish Line: The Trump Administration’s Midnight Environmental Regulations and Executive Actions

Lame duck administrations historically promulgate dramatically more regulations in the final months before leaving office than any previous period of their term. Less encumbered by electoral or political considerations, outgoing administrations use this window to aggressively finalize remaining policy priorities through “midnight regulations” before the clock runs out. For a lame duck administration, midnight regulations provide an opportunity to extend a President’s influence into the future and impose costs on the incoming administration.

The policy process for midnight regulations is more opaque than typical of rulemaking because the condensed implementation timeline clashes with the requirements of the Administrative Procedures Act (APA). Notably, the APA requires federal regulations to be supported by an administrative record that documents the rationale for the policy decision(s). Typically, administrative records for regulations include cost-benefit analyses, risk evaluation, and other technical or analytical documentation that underwrite the regulatory decision.

When pressed for time, however, the robustness and quality of these analyses take a back seat to expediency, leaving the regulation vulnerable to APA challenges. The APA also requires that federal regulations provide the public with adequate notice of pending regulatory requirements, meaningful opportunity to provide comment, and time to adjust before they take effect. To save time, midnight regulations often truncate these opportunities, making them vulnerable to legal challenge under the APA. The Trump Administration’s record under the APA is chequered. Although there may be added incentives to circumvent APA requirements, the success of its midnight regulatory strategy will hinge on its adherence to the foundations of administrative law.

Among the most important environmental regulations that businesses have an interest in following in the final days of the Trump Administration are these:

- **Retaining the existing [National Ambient Air Quality Standards \(NAAQs\) for Particulate Matter \(PM\)](#).** Last updated in 2015, the PM NAAQs are among the primary regulations protecting clean air by regulating industrial activities that produce soot. The EPA is required by statute to update the NAAQs every 5 years. The EPA’s April 2020 proposal¹ received significant criticism, including for shortening the typically lengthy NAAQs review process and for excluding epidemiological evidence that would support a more stringent standard. The EPA has also proposed retaining current [NAAQs for ozone](#), which has faced similar criticisms.
- **Endangered Species Act (ESA) implementation.** The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) have jointly proposed regulations that would fundamentally change the way that new species are listed, the way in which critical habitat is designated, and the considerations under which federal agencies are required to consult with FWS or NMFS on actions that may affect listed species or their habitats. Given the scope of the proposed changes and breadth of interagency considerations, extra coordination would be required for both agencies to concurrently finalize these actions before the Biden Administration takes office.
- **Ending [penalties for accidentally killing migratory birds, for example, through industrial activities](#).** The federal government has long criminalized both intentional and incidental killings or takings under the Migratory Bird Treaty Act (MBTA).² The FWS’s proposed change would narrow the scope of MBTA protections to apply “only to actions...directed at migratory birds.”³ According to a U.S. Department of Interior, Solicitor’s Opinion M-37050 (2017), the proposed change is consistent with the Fifth Circuit Court of Appeal’s *CITGO* ruling.⁴ There, the court held that only “deliberate acts done directly and intentionally to migratory birds” fall under the MBTA’s scope.⁵ FWS says this rule provides needed regulatory certainty around the scope of criminality.⁶ Critics, including the Attorneys General of nearly a dozen states, believe the proposal would “harm the States’ sovereign, quasi-sovereign, and proprietary interests in protecting migratory birds for the benefit of their citizens and the natural resources within their boundaries.”⁷ Further complicating matters, the Southern District of New York in August vacated Solicitor’s Opinion M-37050, holding it was not a valid exercise of agency authority.⁸
- **Changing standards under the Safe Drinking Water Act for [lead, copper, and other water contaminants](#).** The EPA’s proposed revisions to the National Primary Drinking Water Regulation would leave current standards in place for copper pipes under the Safe Drinking Water Act’s (SDWA) Lead and Copper Rule (LCR).⁹ These revisions would be the largest updates to the LCR’s

¹ Review of the National Ambient Air Quality Standards for Particulate Matter, 85 Fed. Reg. 24094 (proposed April 2020) (to be codified at 40 C.F.R. pt. 50).

² 16 U.S.C.A. § 703; *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 488 (5th Cir. 2015).

³ Regulations Governing Take of Migratory Birds, 85 Fed. Reg. 5915 (proposed Feb. 3, 2020) (to be codified at 50 C.F.R. pt. 10).

⁴ *CITGO Petroleum Corp.*, 801 F.3d at 488–89.

⁵ *Id.*

⁶ U.S. Dep’t of Fish & Wildlife Service, U.S. Fish and Wildlife Service Solicits Public Input on Proposed Rule and Environmental Impact Statement for Migratory Bird Treaty Act (Jan. 30, 2020), https://www.fws.gov/news/ShowNews.cfm?ref=u.s.-fish-and-wildlife-service-solicits-public-input-on-proposed-rule-and-amp_ID=36517.

⁷ Attorneys General of the States of New York, *et.al.*, Comments on Proposed Rule to Limit the Scope of the Migratory Bird Treaty Act’s Prohibitions to “Actions Directed at Migratory Birds,” 85 Fed. Reg. 5915 (Feb. 3, 2020) (March 19, 2020), <https://oag.ca.gov/system/files/attachments/press-docs/State%20Comments%20MBTA%203.19.20.pdf>.

⁸ *Nat. Res. Def. Council, Inc. v. U.S. Dep’t of the Interior*, 2020 WL 4605235, at *1 (S.D.N.Y. Aug. 11, 2020).

⁹ National Primary Drinking Water Regulations: Proposed Lead and Copper Rule Revisions, 84 Fed. Reg. 61684 (proposed Nov. 13, 2019) (to be codified at 40 C.F.R. pts. 141, 142).

drinking water guidelines since its 1991 adoption.¹⁰ Critics, including the Attorneys General of nearly a dozen states, maintain that the rule will “fail to protect public health to the extent feasible, as required by the SWDA,”¹¹ because of the adverse neurological and other impacts of lead in drinking water, particularly on children. They also criticize the proposal for its disparate impact on low-income communities of color in places like Flint, Michigan, which have traditionally been exposed to higher levels of lead in water systems.¹² Separately, the EPA also released a preliminary decision to introduce national primary drinking water regulations for two per- and polyfluoroalkyl substances (PFAS) under the SWDA.¹³ PFAS are synthetic chemicals found in a range of products that are claimed to cause serious health conditions.¹⁴ However, some critics want the rule to include more PFAS than regulated under this proposal.¹⁵

- **Revamping how cost-benefit analysis is used for regulatory decision making.** Multiple statutes governing the EPA require the use of cost-benefit analysis to support regulatory changes. These analyses are heavily scrutinized by stakeholders because of their role in framing policy options. In response to industry concerns that regulatory costs are undervalued, and benefits are overvalued, the EPA proposed a new regulation in June of 2020¹⁶. In particular, the proposal sought to alter the way that co-benefits, or benefits attributed to surrogate pollutants, can be accounted for as benefits of reducing targeted pollutants in Clean Air Act rules.
- **Expediting [certain permits](#) under the Clean Water Act, including for oil and gas pipelines and surface coal mining.** In September 2020, the U.S. Army Corps of Engineers proposed a rule to reissue existing Nationwide Permits (NWP) and to issue five new NWP under Section 404 of the Clean Water Act.¹⁷ Notably, the modification would alter NWP 12, which is a simplified approval system for construction of utilities that have a minimal impact on streams and wetlands.¹⁸ The rule would divide the current activities that fall under NWP 12 into three separate NWP.¹⁹ A reimagined NWP 12 would authorize only oil and natural gas pipeline activities, while two new NWP would authorize activities around utility lines for electricity, telecommunications, water, sewage, and other substances. The Corps maintains that these changes will “simplify and clarify” NWP and “reduce burdens on the regulated public.”²⁰ The proposal comes after the District Court of Montana partially vacated NWP 12, preventing its use for permitting oil and gas pipelines “like Keystone XL.”²¹

¹⁰ U.S. Env'tl. Prot. Agency, *Drinking Water Requirements for States and Public Water Systems: Lead and Copper Rule*, <https://www.epa.gov/dwreginfo/lead-and-copper-rule>.

¹¹ Attorneys General of the States of California, et.al., *Comments regarding Notice of Proposed Rulemaking, Proposed Rule, National Primary Drinking Water Regulations: Proposed Lead and Copper Rule Revisions*, 84 Fed. Reg. 61684 (Nov. 13, 2019), RIN 2040-AF15, docket identification number EPA-HQ-OW2017-0300-0001. (Feb. 12, 2020), <https://oag.ca.gov/system/files/attachments/pressdocs/LCR%20Multistate%20Comments%20Feb%202012.pdf>.

¹² *Id.*

¹³ *Announcement of Preliminary Regulatory Determinations for Contaminants on the Fourth Drinking Water Contaminant Candidate List*, 85 Fed. Reg. 14098 (proposed March 10, 2020) (to be codified at 40 C.F.R. pt. 141).

¹⁴ U.S. Food & Drug Admin., *Per and Polyfluoroalkyl Substances (PFAS)* (Oct. 20, 2020), <https://www.fda.gov/food/chemicals/and-polyfluoroalkyl-substances-pfas>.

¹⁵ Attorneys General of the States of California, et.al, *Comments on Preliminary Regulatory Determinations for Contaminants on the Fourth Drinking Water Contaminant Candidate List*, 85 Fed. Reg. 14098 (Mar. 10, 2020) (June 10, 2020), https://oag.ca.gov/system/files/attachments/press-docs/Attachment%201_AGs%20Comment.pdf.

¹⁶ *Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process*, 85 FR 35612 (proposed June 11, 2020) (to be codified at 40 CFR 83).

¹⁷ *Proposal To Reissue and Modify Nationwide Permits*, 85 Fed. Reg. 57298 (proposed Sept. 15, 2020) (to be codified at 33 C.F.R. Ch. II).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *N. Plains Res. Council v. U.S. Army Corps of Engineers*, 460 F. Supp. 3d 1030, 1034, 1049 (D. Mont. 2020).

- **Revising [New Source Performance Standards](#) for power plant carbon emissions under the Clean Air Act.** In late 2018, the EPA proposed to revise Obama-era performance standards for greenhouse gas emissions from new, modified and reconstructed coal fired power plants.²² The changes would overturn the EPA’s prior decision that partial carbon capture and storage technology (CCS) was the best system of emission reduction.²³ The EPA maintains that the switch is necessary due to the “high costs and limited geographic availability” of CCS.²⁴ But comments from Attorneys General of more than a third of states and several cities, including New York, Los Angeles, and Chicago, criticize the swap as based on “vague generalizations, illogical conclusions, unwarranted (and often even unacknowledged) changes in position, and distortions of the factual record.”²⁵

B. Holding Back the Night: The Biden Administration’s Likely Attempts to Re-Set the Clock

During their initial months in office, much of the work of incoming administrations involves undoing the previous administration’s policies. One of President-elect Biden’s first acts as President will be to issue an Executive Order halting publication of any regulations completed by the Trump Administration that have not yet been delivered to the Federal Register. Because regulations do not legally take effect until published in the Federal Register,²⁶ the publication backlog resulting from the rush of last minute regulations is likely to prevent many of the Trump Administration’s midnight rules and actions from crossing the finish line. The APA also requires that the effective date of new regulations be delayed for a standard period of 60 days. If a Trump Administration rule has been published in the Federal Register but is not already “in effect” by January 20, the effective date of these rules can be delayed further with the stroke of a pen, buying time to strategize regarding its repeal or replacement.

Expect the Biden Administration also to make its mark on regulatory policy by quickly repealing Executive Orders issued by the Trump Administration. These could include the controversial “[One in, Two Out](#)” Executive Order and the Executive Orders on [Agency Guidance](#) and “[Promoting Energy Independence and Economic Growth](#),” to name a few. The incoming Administration will also establish its own policies governing the regulatory policy process through Executive Action that will guide the implementation of its policy agenda.²⁷

C. Tools and Strategies for Managing the Regulatory Churn

For stakeholders, the sudden flood of regulatory activity at the end of one administration and the beginning of another creates uncertainty and is difficult to navigate. Luckily, there are some tools that help make the process slightly less opaque.

²² Review of Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 83 Fed. Reg. 65424 (proposed Dec. 2018) (to be codified at 40 C.F.R. pt. 60).

²³ *Id.*

²⁴ *Id.*

²⁵ Attorneys General of the States of California, et.al, Comments on the Environmental Protection Agency’s Proposed Review of Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 83 Fed. Reg. 65,424 (Dec. 20, 2018) (Mar. 18, 2019) https://oag.ca.gov/system/files/attachments/press_releases/Comments%20of%20California%20Attorney%20General%20et%20al.pdf.

²⁶ 5 U.S.C. § 552(a)(1)(D) (2006).

²⁷ Depending on whether Georgia’s January 5 Senatorial runoff election results in a Democratic Senate majority, the Congressional Review Act (CRA) may be a Congressional vehicle to repeal Trump Administration regulations.

First, it is important to understand the public facing tools of regulatory planning and review. Federal agencies are required on a bi-annual basis to publish a forward looking list of rules that they plan to undertake in the coming year in the [Semi-Annual Unified Regulatory Agenda](#).

Second, on a more granular level, www.reginfo.gov provides the public with information about regulations currently under review by the White House Office of Information and Regulatory Affairs. Any rule currently under review will likely be prioritized for completion prior to January 20.

Finally, remember that if midnight regulations survive the gauntlet and remain in effect into the next administration, they will likely be vulnerable to legal challenge on procedural grounds. Knowing, for example, that deviations from APA requirements require a good cause justification²⁸ and which rules require regulatory analyses, accounting for paperwork burdens, or considering the impact on small business, can help inform litigation or advocacy strategies to influence their outcomes.

Conclusion

Regardless of the success or failure of the Trump Administration's midnight regulatory strategy and the Biden Administration's agenda for dismantling it, there will be a dramatic increase in regulatory activity in the year ahead. For energy and environmental policy, change will happen slowly through the regulatory process, which is designed with stakeholder participation in mind. For stakeholders managing their exposure in these uncertain times, understanding where the advocacy touch points are and how to pull the levers of administrative law are essential.

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Marten Law is one of the nation's premier environmental practices, advising clients on regulatory compliance, public lands issues, project siting, and environmental remediation issues. Its lawyers have represented clients in several of the largest environmental litigation cases in the country: including the 2010 Deepwater Horizon and 1989 Exxon Valdez oil spills and multi-billion Superfund cleanups. Its lawyers have held senior positions in environmental agencies, and collaborated on development projects in the mining, oil and gas, solar, and wind industries. It has also represented, in environmental matters, some of the country's largest manufacturing, transportation, e-commerce, forestry, technology, real estate development, agriculture and financial companies in complex regulatory, permitting, enforcement and administrative matters throughout the United States.

We look forward to helping our clients and friends navigate what will undoubtedly be a fast changing post-election landscape. Watch this space.

²⁸ 5 U.S.C. §553(b)(B)

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