

Outlook for Environmental Issues in the Biden Administration



Following our [post-election Alert](#) outlining major anticipated themes for environmental and natural resource law and policy in the Biden Administration, B&D's Election Task Force and leaders from several of our subject-specific practice areas highlight in this article some of the likely priorities of the Biden Administration.

Since the earliest days of the U.S. EPA and U.S. environmental law, Beveridge & Diamond has helped clients engage effectively – through Democratic and Republican administrations – with U.S. and state environmental and natural resource agencies. Our numerous former state and federal environmental officials know the landscape and how to best position your company for success. We will continue to provide updates as events unfold. Please contact the authors or your usual B&D contact for more information.

Key Takeaways and Potential Action Items

Control of the Senate will be crucial to the ability of the new administration to move forward with legislation, particularly a climate bill. Regardless, the administration may seek to use the tools available through the Executive Branch to implement regulations and direct policy.

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Generally, watch for an emphasis on addressing climate impacts and pollution in communities that have disproportionately borne negative health and environmental impacts. The incoming administration will have limited time and resources to accomplish its goals and will need to make some tough decisions on how much emphasis to place on rollback of rules and how much to place on new initiatives.

With respect to Environmental Protection Agency (EPA) enforcement across multiple subject areas, we anticipate the following:

- **Increased federal presence.** The Biden EPA will reassert itself as the new sheriff in town. It will likely return the national compliance initiatives back to enforcement initiatives and emphasize the importance of a strong federal enforcement program. While EPA will not likely change its enforcement focus right away, expect an increase in the number of federal-led cases and a review of the national initiatives to determine whether they should be revised.
- **Focus on environmental justice (EJ).** EPA may emphasize environmental justice enforcement by developing geographic initiatives that focus enforcement efforts on EJ communities. The Agency could also push the Department of Justice (DOJ) to review its supplemental environmental projects (SEP) policy and revise the current prohibition on SEPs in an effort to use SEPs to more effectively address pollution impacts on communities.
- **Increased attention on the impacts of disposal of plastics.** Expect to see an effort to insert a federal role in the emerging contaminants and plastics debates that are currently playing out in Clean Water Act (CWA) citizen suits, state toxic tort, and false advertising lawsuits, and in state legislatures. Particularly as relates to plastics, the enforcement approach used in the 2019 *Formosa Plastics* case, which relied on narrative water quality standards (no floating solids, a visibility test for plastics in wastewater and storm water), could set the precedent for federal action. This may have implications for the entire plastics value chain, from base chemistry through end-of-life and product stewardship initiatives. Other consumer products may similarly find themselves in the crosshairs.
- **Return of wetlands enforcement.** Enforcement under CWA 404 declined significantly under the Trump Administration. Expect enforcement to increase under the Biden Administration.
- **Criminal enforcement will also be on the rise, particularly under the CWA.** Prosecutors have described the CWA as the “bread and butter” of environmental crimes work given the strong self-reporting scheme and the liability standard that includes knowing as well as negligent acts.
- **Continued emphasis on FIFRA enforcement.** The Biden Administration is expected to continue EPA’s focus on import and distribution of disinfectants and other antimicrobial products making unapproved claims to protect users from COVID-19 and to continue enforcement in the retail sector.

Potential Action Items for Regulated Industries

- **Avoid being blindsided by agency enforcement or citizen suits.** Review your compliance data, particularly data and other information that can be found on public databases or obtained through a Freedom of Information Request (or state equivalent).

- **Be prepared for the renewed and more aggressive emphasis on environmental justice.** Be aware of the communities that surround your facilities and become familiar with the environmental issues that concern them.
- **Maintain strong relationships with the regulators and keep lines of communication open.** If you don't already have such relationships in place, it is helpful to develop them and to build trust before compliance issues arise. The change of administration will likely present numerous opportunities to refresh agency contacts. Fulfilling pledges to nominate racially and ethnically diverse leaders in his administration, President-Elect Biden has nominated Brenda Mallory and Michael Regan as Chair of the Council on Environmental Quality (CEQ) and EPA Administrator, respectively, along with Congresswoman Deb Haaland as Interior Secretary. Earlier in her career, Ms. Mallory was a lawyer at Beveridge & Diamond.
- **Consider ways in which your company can advance climate change goals.** This could include more transparency in your supply chain, the substitution of products, GHG emission reductions, or other mechanisms. It is very clear that the new administration will prioritize climate impacts and advancing this goal in a way that makes sense for your company can put you in a proactive rather than a reactive position.
- **Stay current on new developments.** The Biden Administration is expected to hit the ground running with reversals of certain existing government policies and positions and the advancement of new ones. There will be a lot to track, but it will be important to stay current to understand the trends that impact your industry.

Key Developments by Subject Area

Air and Climate Change

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Air

As an airborne disease with significant respiratory effects, COVID-19 has been particularly dangerous for individuals with chronic respiratory conditions such as asthma, emphysema, and chronic bronchitis. Certain air pollutants regulated under the Clean Air Act (CAA) can exacerbate these conditions, a fact not lost on the Biden campaign, which directly connected exposure to outdoor air pollution with COVID vulnerability. Additionally, the COVID-19 public health data have illuminated—perhaps in starker relief than at any time since enactment of the CAA—that chronic respiratory conditions are disproportionately present in low-income and minority communities, where the risk of exposure to outdoor air pollutants is often the highest.

Accordingly, the Biden Administration will likely attempt to reverse many of the Trump Administration policies seen as relaxing CAA requirements, and also to affirmatively reduce emissions of traditional air pollutants using all tools available under the CAA:

Greenhouse gas (GHG) emission standards for power plants. One of the toughest decisions the Biden EPA will face is whether to issue a Clean Power Plan-like rule for GHG emissions from the U.S. power sector. The Trump Administration replaced the Obama-era Clean Power Plan with the scaled-back

Affordable Clean Energy (ACE) Rule. While the Clean Power Plan set a goal of reducing GHG emissions by 32% below 2005 levels by 2030, EPA projects the ACE rule will reduce GHG emissions by 1.5% by 2030. The Biden EPA will likely ask the D.C. Circuit to stay litigation challenging the ACE Rule. But attempting to replace the ACE Rule with a rule that mirrors the Clean Power Plan is risky considering the Supreme Court's unprecedented stay of the Clean Power Plan in 2016 prior to review by a lower court. Since then, the Court's conservative majority has grown to 6-3.

More stringent mobile source standards. The Biden Administration is very likely to attempt to reverse the Trump Administration's rollback of fuel economy and greenhouse gas standards for light-duty vehicles, as well as the revocation of California's waiver to implement more stringent greenhouse gas standards and a zero-emission vehicle program. This will be facilitated by the fact that major automakers including Ford, Honda, BMW, and Volkswagen have already broken with the Trump EPA and entered an agreement with California to achieve fuel economy and emission targets in line with the Obama-era rule. The Biden EPA will also likely work to tighten emission standards for heavy-duty vehicles, which account for a significant fraction of the NO_x emissions that create ground-level ozone (*i.e.*, smog). Since 2018, the Trump EPA has promised to unveil a proposal to strengthen NO_x emission standards from heavy-duty trucks—a "Cleaner Trucks Initiative." The Trump EPA released an advance notice of proposed rulemaking in early 2020, but has not yet proposed an actual rule and will thus be unable to finalize a rule before the end of the Trump Administration. The Biden EPA will likely pick up the baton on this effort as one of the key mobile source regulations not directly concerning greenhouse gas emissions.

Review of Benefit-Cost Analysis rule. The degree to which EPA considers costs and benefits—and for whom—has long been a hotly contested issue under the CAA, and the subject of multiple Supreme Court decisions. On December 9, 2020, the Trump EPA promulgated a rule—to take effect "immediately" upon publication in the Federal Register—that would establish new procedural requirements for how EPA conducts such analyses under the CAA. Some environmental advocacy groups have criticized the rule for potentially allowing EPA to minimize the weight placed on the "co-benefits" of a rulemaking. Under the Mercury and Air Toxics Standards (MATS), for example, many of the quantifiable benefits came not from reductions in air toxics that were the "target" of the rule under section 112, but from the incidental reductions of particulate matter that would result from installing controls for air toxics. Public health advocates have also expressed concern that the rule would allow EPA to minimize non-quantifiable (*i.e.*, qualitative) benefits. Because this rule of "internal agency procedure" purports to apply to every future rulemaking under the CAA—including, presumably, rulemakings to repeal other rulemakings—it may be among the earliest targets for repeal or reconsideration by the Biden EPA.

Evaluation of New Source Review (NSR) permitting program revisions. The CAA's NSR program requires facilities to obtain potentially costly permits in advance of constructing new major stationary sources or undertaking "major modifications" to existing major sources. The Trump EPA has taken significant action to reform the NSR program, including issuance of (i) a final rule allowing facilities to consider both a proposed project's emissions increases *and* decreases when assessing NSR applicability, (ii) a final rule stating that projects need only be aggregated for NSR purposes if "substantially related," (iii) guidance stating that EPA will no longer "second guess" the pre-construction projection of a company unless there was a clear error, (iv) guidance clarifying that projects are "adjacent" such that they must be aggregated for NSR purposes only if physically proximate, and (v) a series of guidance memoranda that raise the bar for when sources are considered so related as to be under "common control" and therefore treated as a single source. It is unclear whether the Biden Administration will make reversal of the Trump Administration's NSR actions a priority.

Stay litigation over “Once In, Always In” rule. In mid-November 2020, the Trump Administration published its final rule codifying its withdrawal of the “Once In, Always In” policy. Under CAA section 112, a facility is a “major source” of hazardous air pollutants (HAPs)—and thus subject to stringent technology-based standards—if it emits either 10 tons per year of any single HAP, or 25 tons per year of all HAPs combined. Under the Once In, Always In policy, sources that subsequently reduced their HAP emissions *below* these major-source thresholds were nevertheless required to continue adhering to those major-source requirements. The Trump EPA withdrew that policy in 2018, and codified it as a rule in November 2020. Fewer than 70 facilities have reclassified from “major” to “area” source since the 2018 withdrawal, and EPA predicts that most source categories will not increase emissions. However, environmental NGOs and others have raised concerns that the new rule would nevertheless allow for significant increases in toxic air pollution, and have vowed to fight it in court. The Biden EPA will likely ask the D.C. Circuit to stay any litigation while it determines whether to reverse the rule, in whole or in part.

Review of National Ambient Air Quality Standards. The EPA must review National Ambient Air Quality Standards (NAAQS) every five years, with an eye toward the latest science on public health and environmental protections. Among other things, the Biden EPA Administrator will be required to review whether the NAAQS for ground-level ozone is “requisite to protect the public health” with “an adequate margin of safety.” 42 U.S.C. § 7409(b). Although setting the NAAQS is an overwhelmingly science-driven process, the EPA Administrator has significant discretion when evaluating that science, determining the class of individuals encompassed with the “public health,” and in risk assessment to determine the “adequate” margin of safety. The new EPA Administrator—and the statutory Clean Air Scientific Advisory Committee advising him—will, at minimum, have the opportunity to review the NAAQS for ground-level ozone, and may attempt to reconsider the Trump EPA’s December 2020 decision to not revise the PM_{2.5} NAAQS. In doing so, they will likely face significant pressure to err on the side of caution when reviewing the latest science, to remember the respiratory consequences of COVID-19, and, ultimately, to tighten these NAAQS.

More scrutiny of state implementation plans (SIPs). Although the CAA gives states the primary authority to implement the NAAQS through SIPs, the Act reserves to EPA significant authority to review the adequacy of those SIPs and to impose federal regulations on sources where the SIP does not meet minimum federal requirements. The Biden campaign’s environmental justice platform states that President-Elect Biden will “recommend” that states develop SIPs that “prioritize emissions reductions within disadvantaged communities,” using a data-driven tool created by a new White House Environmental Justice Advisory Council.

Update interstate air pollution transport limits. The President-elect’s home state, Delaware, is one of the states most affected by upwind air pollution from other states. Although the CAA gives upwind states the first opportunity to control their interstate pollution, EPA has historically disapproved those plans as insufficient, and instead imposed a holistic, regional approach—largely focused on the power sector, where emission reductions have been cheapest. A recent series of D.C. Circuit decisions may require EPA to strengthen existing interstate transport limits. With power plant emissions on the decline, a Biden EPA may look at source categories beyond the power sector to achieve those additional reductions.

Climate Change

President-Elect Biden has named climate change one of his top four priorities, and climate change will feature prominently in his administration. Biden has announced that the U.S. will re-join the Paris Climate Agreement on “day one” of his administration. He has also named John Kerry as Climate Envoy and Gina

McCarthy as senior White House Adviser to lead the Biden Administration's international and domestic climate efforts.

The Biden platform includes aggressive climate initiatives. During the campaign, Biden announced an aggressive climate agenda led by the federal government. He has developed a \$2 billion plan that seeks to eliminate carbon emissions from the electric sector by 2023, impose stricter gas mileage standards, fund investment to weatherize millions of homes and commercial buildings, upgrade the nation's transportation system, including the electrification of railroads, and support for sustainable agriculture. A number of the Biden platform initiatives are connected to his climate agenda. They include:

- Achieving "net zero" GHG emissions by 2050
- Promoting advanced biofuels
- Creating new appliance and building efficiency standards
- Requiring federal permitting to consider GHG emissions
- Requiring public companies to disclose GHG emissions
- Setting new methane limits
- Assuring refrigerants have lower global warming potential
- Doubling offshore wind by 2050
- Accelerating development of carbon capture and storage technology
- Creating new fuel economy standards
- Buying zero-emission vehicles (ZEVs) for federal government use
- Supporting development of 500,000 new charging stations for ZEVs

EPA may seek to implement its climate change goals even without the support of Congress. The Biden Administration has expressed interest in taking regulatory steps to implement many of the above policies. For example, the administration will likely evaluate the following kinds of actions:

- Re-enter the Paris Agreement and set more aggressive emissions reduction targets for the U.S.
- Adopt regulations implementing the Kigali amendments to the Montreal Protocol by limiting HFC use and production
- Engage internationally on agreements governing GHG emissions from shipping, aircraft, and other sources
- Use the CAA to develop or tighten GHG emissions for key sectors, including power generation, oil & gas, and transportation

- Adopt additional CAA regulations to restrict the use and production of other gasses with high global warming potentials
- Reinstate, and perhaps tighten, Obama-era methane requirements on the oil and gas industry
- Tighten energy efficiency requirements
- Lean on the Federal Energy Regulatory Commission (FERC) and Department of Energy (DOE) to take further action on carbon pricing within energy markets
- Mandate more stringent climate risk disclosures through the SEC
- Support state efforts to encourage clean energy and price carbon emissions
- Streamline federal permitting processes for renewable energy projects and federal lands leasing for offshore wind and other renewable energy development
- Develop programs to encourage GHG sequestration and emissions reductions from land-based sectors such as forestry and agriculture
- Restructure to include a new Research and Development Agency to oversee significantly increased investments in R&D for clean energy, as well as a Climate Conservation Corps.

Legislation may be possible to address bipartisan issues. The Biden Administration could work to develop broader legislation to regulate GHG emissions, such as a national price on carbon. Perhaps more realistically in a divided Congress, Biden could push for a significant, bipartisan infrastructure bill that could include a range of investments aimed at improving climate change resiliency and fostering low-emitting technologies.

Water

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NPDES Permit (CWA 402) Program

EPA is likely to issue new NPDES “functional equivalent” guidance to replace the current draft. Expect EPA to issue new guidance on the factors to consider and how to apply them in determining if a discharge may require NPDES permitting under the Supreme Court’s *Maui* test. Transit time and distance traveled are key concepts post-*Maui*; expect a Biden EPA to interpret those concepts broadly. However, most states have delegated NPDES authority and would not necessarily be bound by federal guidance. Anticipate continued citizen suit activity once EPA guidance issues and depending on what happens in the remanded *Maui* case and the *Dynergy* case argued November 2020. The *Kinder Morgan* case settled in October 2020 after being remanded to apply *Maui*.

The federal government is expected to increase its focus on the impacts of plastic waste. To date, most activity seeking to further regulate (essentially prohibit) plastics in wastewater has been by citizen suits and at the state level, in Texas most prominently. California has taken the lead to date on regulating micro-plastics in storm water that is used as a drinking water source. A Biden EPA is likely to take a close look at the pending NGO petition that seeks new and significantly broadened CWA treatment standards for the organic chemicals and plastics sectors, and some NGOs have also petitioned for

rulemaking under the CAA. If the Trump EPA acts soon to deny the petitions, and that denial is challenged in court (a likely scenario), then the Biden EPA will be forced to decide whether to defend or withdraw the denial. Industry will want to watch this to prevent a closed door negotiation between EPA and the NGOs to embark on a complicated and lengthy rulemaking effort without input from the regulated sector. Pressure also may increase on states and EPA to evaluate the impact of plastics on waterbodies and to identify those segments impaired by plastic pollution. The result of this type of analysis could be added NPDES permit requirements and limits.

Wetlands (CWA 404) Program

Stay of WOTUS/Navigable Waters Protection Rule litigation and potential revisions. The litigation pending in several courts over the Trump Administration's Navigable Waters Protection Rule is among the most high profile set of environmental cases. The Biden Administration will want to take time to evaluate its options both substantively and as to the multi-court proceedings pending in several federal district courts.

Review of Recently Proposed Nationwide Permits. In September, the U.S. Army Corps of Engineers proposed a new slate of nationwide permits (NWP) for reissuance. The Corps typically undertakes the NWP reissuance process every five years so that its new NWPs take effect upon the expiration of the previous NWPs. This time, however, the Corps released its proposal 16 months before the current NWPs are set to expire in January 2022. The regulated community has largely applauded the proposal for its efforts to further streamline the Section 404 permitting process, while the environmental community has vigorously opposed it for the same reasons. It remains to be seen if these proposed NWPs will become final before January 20th and the beginning of the Biden Administration. Even if they become final, the Biden Administration may seek to revise them by resurrecting conditions that currently apply under the 2017 NWPs. If the Army Corps is unable to finalize the new NWPs before the Biden Administration arrives, a key question is whether they will be pulled back for further review and revision, allowing the 2017 NWPs to live out their effective life while the Corps works to propose a revised set of new NWPs to take effect in 2022. Regardless of the approach ultimately taken, entities that rely on NWPs should pay close attention as this important issue comes into clearer view. But they also should not lose sight of the possibility for even more change coming as a result of the ongoing litigation over NWP 12 (utility rights-of-way crossing WOTUS).

Stay of pending litigation of Water Quality Certifications (CWA 401) rule and potential revisions. States have primary responsibility for CWA 401 water quality certifications that are required in connection with permits issued under CWA 402 and 404. The Trump Administration rule that limits the amount of time and some scope of state action was designed to improve project development approval timeframes, but is unpopular with many states and NGOs. Expect a Biden EPA to stay the pending litigation over this rule and re-assess how to back off the bright-line approach adopted by the Trump EPA while still trying to tackle some well-understood problems with the prior approach, where 401 certifications could be used to stop or significantly delay projects in ways that, to many, seemed unreasonable.

Safe Drinking Water Act

Proceed with lead and copper rulemaking. The Biden Administration will have a strong interest in protecting drinking water and developing a strong rule that protects communities.

Watch infrastructure initiatives to see what resources are made available for drinking water and wastewater system improvements. Drinking water initiatives are likely to garner more EPA, state and overall political support for public funding since so many waste water infrastructure consent decrees already obligate many communities to spend billions to upgrade sewer pipes and wastewater treatment plants. Expect ongoing efforts to modernize those consent decrees to continue, though this is likely to become more difficult under a Biden EPA and DOJ.

EPA is likely to take a more aggressive approach to regulating PFAS and lead in drinking water. The Biden Administration will likely engage more vigorously to designate PFOA and PFOS (at a minimum) as hazardous substances, set enforceable limits for PFOA and PFOS in the Safe Drinking Water Act, prioritize substitutes through procurement, and accelerate toxicity studies and research on PFAS. Biden also plans to accelerate the process to test for and address the presence of lead in drinking water.

Waste and Contaminated Properties/Superfund

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Resource Conservation and Recovery Act (RCRA)

Significant changes to the RCRA program are generally not expected. Changes in presidential administrations – even between political parties – typically do not yield substantive changes in the RCRA program or how the program is administered. And we do not expect significant changes in direction for the RCRA program under the Biden Administration, other than perhaps an uptick in federal enforcement consistent with the general expectation that the Biden EPA will be more aggressive on enforcement overall. However, with respect to enforcement of certain RCRA programs – particularly the RCRA Organic Air Emission Standards (40 CFR Parts 264 and 265, Subparts AA, BB and CC) – the Trump EPA was fairly aggressive, and that enforcement focus is likely to continue under the new administration.

Trump rules unlikely to be reversed. While there are a few RCRA rulemakings in the pre-rule and proposal stages to transition to the Biden EPA (largely limited to coal combustion residuals), the last few years have been unusually active for RCRA rulemakings, which is perhaps one reason to expect few new RCRA regulatory initiatives in the first years of the Biden Administration and a return to a more typical pace of regulatory changes. The Hazardous Waste Generator Improvements Rule, the Hazardous Waste Export-Import Revisions, the Management Standards for Hazardous Waste Pharmaceuticals, the Aerosol Can Universal Waste Rule, and EPA's Response to Vacatur of Certain Provisions of the Definition of Solid Waste Rule were among the flurry of more recent RCRA rulemakings, with some of these final rules coming at the end of the Obama Administration and others during the Trump Administration. We do not foresee any efforts by the Biden EPA to revisit any of these rules.

EPA is likely to increase regulatory activity on coal ash. The Biden EPA is expected to be active, and active early on, in the regulation of coal combustion residuals (CCR) – or coal ash – under the existing regulations for CCR at 40 CFR Part 257, Subpart D. These regulations – the first federal standards for the disposal of CCR in landfills and surface impoundments – were promulgated by the Obama EPA, but continued to be, and remain, an active area of regulatory revisions for the Trump EPA. The Biden EPA will take over a pre-rule initiative for legacy CCR impoundments (i.e., inactive CCR surface impoundments at inactive utilities) and may inherit the proposed rule for a federal CCR program and certain CCR rule revisions currently in the final stages of rulemaking. If Biden perceives that Trump weakened, or is proposing to weaken, these landmark Obama-era rules, then we could see the Biden EPA rolling back some of the prior administration's efforts. The Trump EPA has approved two states to administer their own

CCR program, and on December 3, 2020, proposed to approve a partial CCR state permit program for Texas. The Biden EPA is certain to receive additional applications from states seeking CCR permit program authority. States may find the EPA review and approval process more stringent under the Biden Administration if the state's CCR program does not mirror the federal program.

Active regulation efforts could include PFAS, plastics, and product stewardship. Aside from coal ash regulation, the top waste-related priorities for the Biden Administration are likely to concern PFAS, plastics, and product stewardship. EPA has been petitioned to regulate some or all PFAS as hazardous waste under RCRA Subtitle C, and that effort is expected to increase in earnest once the Biden EPA is in place. In addition to RCRA regulation of the generation, transportation, treatment, storage, and disposal of PFAS waste, a hazardous waste listing under RCRA would automatically render PFAS chemicals as "hazardous substances" under CERCLA.

CERCLA

The Biden platform was silent on the Superfund program. However, we would expect a Biden Administration to do the following, at a minimum, once the new administration has settled in and key senior officials have been confirmed:

Request an increase in funding. The Biden administration will likely press Congress for larger annual appropriations. Some have raised a return of the tax, which expired in the 1990's, but that is not likely.

Renewed emphasis on environmental justice. Superfund has community involvement built into the decision making, but expect a greater emphasis on environmental justice and a focus on sites located in communities that bear a disproportionate health and environmental impact. This could include an increase of Technical Assistance Grant funding to local groups.

Increased consideration of climate. The Biden Administration will consider climate in all programs and CERCLA is no exception. Expect increased consideration of climate change issues and co-benefits in the selection and implementation of Superfund remedies.

Designate some PFAS as hazardous substances. Continue current efforts to propose PFOA and PFOS for listing as hazardous substances

Chemicals

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EPA's implementation of the Toxic Substances Control Act (TSCA) may see a significant shift during a Biden administration, including the following:

Revising final risk evaluations. EPA completed all ten initial risk evaluations under TSCA § 6(b) before the Inauguration (except for legacy uses of asbestos). EPA may seek to reopen those risk evaluations to supplement them in a variety of ways that could affect its determinations of whether those substances present an unreasonable risk under the conditions of use, and thus the eventual risk management rules for those substances.

Changing approaches for ongoing risk evaluations. In addition to finalizing risk evaluations for the initial ten substances, EPA has initiated risk evaluations for 20 high-priority substances and three manufacturer-requested substances. A Biden Administration EPA is likely to approach risk evaluations differently than has the Trump EPA, notably with respect to the systematic review process and reliance on OSHA requirements for worker protection. Expect greater emphasis on risks to populations in environmental justice communities. Also, the Biden Administration may finalize a draft proposed rule in the Regulatory Agenda to add chemical-specific reporting rules for substances on the TSCA Work Plan which are or may become high-priority substances to bolster the information available to EPA for its prioritization and risk evaluation activities.

Taking risk management actions shortly after making risk determinations. EPA has already determined that six initial substances – methylene chloride, 1-bromopropane, HBCD, carbon tetrachloride, trichloroethylene, and perchloroethylene – present an unreasonable risk under multiple conditions of use. Under TSCA § 6(c), it has one year to propose rules restricting those substances and two years to finalize those rules, and similarly for five other substances once it makes final risk determinations for them. Under the Biden Administration, EPA may take actions short of rulemaking well before adopting a final rule, including issuing public health advisories and recommending ways to reduce exposure. It may also use its § 6(d) authority to make proposed rules immediately effective. In extreme cases, under § 7 it might seek a court order declaring a substance an imminent hazard (such as in an environmental justice community) and obtaining temporary or permanent relief.

Requiring manufacturers to conduct testing to support prioritization and risk evaluations or premanufacture notices (PMNs). Under § 4(a), EPA has little-used authority to issue orders requiring manufacturers to fill data gaps for substances either under consideration for identification as high-priority substances, for which it is conducting risk evaluations, or which it is reviewing under § 5. EPA is already considering the next set of 20 candidates for designation as high-priority substances, due as early as December 2021. Notably, EPA did issue nine test orders on January 14, 2021. Under the Biden Administration, EPA is likely to issue such orders or negotiate testing consent orders. For PMNs, expect more section 5(e) orders with testing requirements.

Increasing scrutiny of new chemicals. Almost two-thirds of the PMNs submitted in fiscal years 2019 and 2020 for which review is complete have received determinations that the substances are not likely to present an unreasonable risk, although some of those substances have become subject to significant new use rules (SNURs). About one-third have received determinations that the substances may present an unreasonable risk, leading to section 5(e) orders and probably SNURs. Under the Biden Administration, those ratios may shift, possibly even flip, as EPA places less reliance on OSHA requirements to protect workers and changes made by PMN submitters to their PMNs at EPA's request. Expect work to continue on a draft proposed rule included in the Regulatory Agenda to increase the quality of information initially submitted in new chemicals notices and improve EPA's processes to reduce unnecessary rework in the risk assessment.

Pesticides

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Agriculture and Crop Protection

Review some pesticide regulatory actions. Although the Biden platform did not specifically address pesticides, the President-elect is already facing calls from public advocacy groups to reverse or revoke a number of pesticide regulatory actions taken by the Trump Administration. These include significant EPA decisions related to the continued registration of active ingredients in widely used herbicide and insecticide products, as well as recent changes to USDA regulations associated with the regulation of genetically engineered plants.

EPA may consider new labeling initiatives. As part of the new administration's wider effort to prioritize environmental justice, we also anticipate that EPA may consider new labeling initiatives and other protections for farmworkers and communities that experience higher levels of pesticide exposure.

The Biden Administration is expected to incentivize and promote climate initiatives in the agriculture sector. The Biden transition team has signaled an intention to incentivize ways to leverage agriculture's potential to help mitigate climate change, which may include increased support for climate-smart agriculture, carbon sequestration, and novel greenhouse gas reduction technologies available for implementation by growers and landowners.

Antimicrobial Pesticides

Disinfectants and antimicrobial products are expected to continue as an enforcement priority. Over the course of the pandemic, EPA has highlighted significant concerns about the import and distribution of disinfectants and other antimicrobial products making unapproved claims to protect users from COVID-19. We expect these products to remain a top EPA enforcement priority under the Biden Administration. As the pandemic situation continues to evolve, the Biden Administration will also need to consider if and how to expand, modify, or withdraw the series of temporary registration policies issued by EPA in 2020 as part of the Agency's effort to increase product availability and address supply chain issues for EPA-registered disinfectants.

Antimicrobial devices (such as UV lights and filters making antimicrobial claims) have also received heightened attention from EPA over the last year, and there may be efforts to further define EPA's requirements for these popular products, which do not require product registration but remain subject to certain key Federal Insecticide, Fungicide & Rodenticide Act (FIFRA) regulations.

Consumer Products

EPA is likely to continue enforcement in the retail sector. In recent years, EPA has brought several high-profile FIFRA enforcement actions against retailers, including e-commerce marketplaces, while emphasizing its expectation that distributors take steps to ensure that only EPA-approved pesticide products are made available for sale to the U.S. public. The Biden Administration is likely to continue these efforts. We similarly expect the Biden Administration to build on recent trends toward significantly higher civil penalty assessments under FIFRA, as reflected by an [October 2020 settlement](#) representing one of EPA's largest-ever FIFRA civil penalties.

OSHA

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The Biden Administration is likely to direct OSHA to take at least four actions:

Adopt an emergency temporary standard (ETS) setting mandatory requirements for workplaces to protect employees from COVID-19. Under section 6(c) of the Occupational Safety and Health Act of 1970, OSHA may adopt an ETS without notice-and-comment rulemaking, to take effect upon publication, if it determines that employees are exposed to grave danger from exposure to substances or physical agents or new hazards and that an ETS is necessary to protect employees from that danger. Under the Trump Administration, OSHA has resisted calls for adoption of an ETS, including in the House-passed HEROES Act. Instead, it has issued extensive guidance on its website, some of which cites already-existing standards. Under a Biden Administration, OSHA is likely to decide that mandatory requirements specific to COVID-19 in addition to its existing general standards are necessary to protect employees and issue an ETS. This ETS may apply to most employers, or it could be limited to employers of “essential” or “frontline employees,” which the Biden team has described as those who “are providing life-saving medical care, cleaning our hospital rooms, delivering our food and other essential goods, stocking our grocery store shelves, getting us from place to place, keeping our cities’ lights on, and so much more.”

Finalize a permanent infectious disease standard. In 2014, the Obama Administration completed a Small Business Regulatory Enforcement Fairness Act (SBREFA) consultation on a possible infectious diseases standard to protect health care workers and workers in related occupations, or who are exposed in other high-risk environments, from increased risk of contracting TB, SARS, MRSA, and other infectious diseases that can be transmitted through a variety of exposure routes. It did not publish a proposed rule. The Trump Administration has classified an infectious diseases standard as a “long-term action.” This year OSHA denied an AFL-CIO petition asking for an infectious diseases ETS that would apply to COVID-19. The D.C. Circuit upheld that denial, deferring to OSHA’s determination that an ETS was not necessary in light of its other regulatory tools. The Biden Administration will probably make promulgation of an infectious diseases standard a priority, although it is more likely to go through traditional rulemaking than to issue a broad ETS. Rulemaking is likely to take years.

Double the number of OSHA investigators. According to OSHA data obtained in a 2020 FOIA request response, OSHA had 800 inspectors in FY 2016, 770 in FY 2017, 733 in FY 2018, 752 in FY 2019, and 790 in FY 2020. During the last four years of the Obama Administration, the number of OSHA inspections ranged from a high of over 39,000 to a low of just under 32,000. During the first two years of the Trump Administration, OSHA conducted just over 32,000 inspections per year, rising to 33,401 inspections in FY 2019. Its budget request for FY 2021 projected the number of inspections increasing to 33,791 while shifting the focus to the highest-impact and most complex inspections at the highest-risk workplaces. Increasing the number of OSHA inspectors depends on Congressional appropriations, so the Biden Administration budget is expected to request funding for additional inspectors.

Work closely with state OSHAs and unions to ensure comprehensive protection for frontline workers. A federal ETS on COVID-19 would apply in only about half the states, as the others administer their own state plans. It would not apply to state and local governmental workers in the states where federal OSHA has enforcement authority. Expect to see increased coordination with state agencies on COVID-19 requirements and guidance, including adoption by state OSHAs of either the federal ETS or their own versions (Virginia, Michigan, and Oregon have already adopted their own COVID-19 ETSs).

Natural Resources and Project Development

Authors: *Jamie Auslander, Parker Moore*

National Environmental Policy Act (NEPA)

The CEQ amendments to federal government-wide regulations implementing NEPA became effective in September 2020. Many of the regulatory changes (e.g., parallel reviews, early scoping, schedules) codified prior guidance, Executive Orders, and best practices on improving and expediting NEPA reviews that have spanned multiple prior administrations, and are unlikely to change in the Biden Administration. However, the new administration may moderate its defense of the more controversial aspects of the new regulations in pending litigation, issue guidance that mirrors preexisting regulations or initiate a new rulemaking. Individual agencies are in the process of amending their own NEPA regulations to conform to the new CEQ rule and may take a lighter hand in the Biden Administration. For individual projects, the new administration may also implement the new regulations liberally to require similar analyses as previously, and may generously grant time and page limit extensions. The Biden Administration is also expected to invoke multi-year NEPA programmatic reviews and corresponding moratoria to indefinitely pause disfavored activities (e.g., mineral leasing).

Species

The Biden Administration may revisit several Trump-era rulemakings revising implementation of Endangered Species Act Section 4 listings, Section 7 consultations, and Section 10 conservation planning, as well as interpreting key statutory terms such as “habitat.” An uptick in new listing decisions and a decrease in delistings can be expected, as the new administration works to reduce the backlog on species’ listings and avert additional lawsuits on listing petitions. Of particular note are expected listing considerations for pollinators, bats, and other species with expansive ranges. The Biden Administration also will likely abandon a pending rulemaking limiting Migratory Bird Treaty Act applicability to intentional take of migratory birds, or, if finalized, refuse to defend it in court or decide to initiate a new rulemaking to reverse it.

Infrastructure

Developments in wetlands, climate, and other topics will affect timing and level of review for infrastructure project permitting. The current “One Federal Decision” Executive Order and implementing multi-agency Memorandum of Understanding may be revised or rescinded, thereby potentially slowing down certain projects. The new administration will also likely place a higher priority on thorough consultation with tribal and public stakeholders through NEPA, Section 106 of the National Historic Preservation Act, and other laws. Projects that the Biden campaign indicated it prefers, like offshore wind or transit, for instance, may receive a higher priority or more agency resources than other projects. The terms of any new transportation reauthorization law and associated funding from Congress will also have major implications for project development.

Energy, including Clean Energy Initiatives

Author: *Eric Christensen*

Action toward net zero climate goals requires expansion of renewable energy and increased electrification. Subject to the final composition of the U.S. Senate, one of the Biden Administration’s highest priorities would be climate legislation. Achieving net zero GHG emissions by mid-century would, of

course, require major changes to the energy industry, as exemplified by the stated goal of achieving a GHG-neutral electricity sector by 2035. Other changes could include, for example, a major expansion of renewable energy resources, new energy efficiency programs, new programs to support biofuels, and a major expansion of efforts to electrify the transportation sector. Likely, Biden would also seek to extend tax incentives for renewable energy development. Look for the Biden Administration to seek to implement as much of this agenda as possible by Executive authority if Congressional avenues seem foreclosed.

Prohibit or restrict fossil fuel production on public land. The Biden Administration may also consider major changes related to the production of fossil fuels, especially on public lands. The new Administration may seek to end new oil, gas, and coal permitting in public water and on public land, including the Arctic National Wildlife Refuge. He may also revisit and potentially reinstitute EPA and BLM rules restricting methane emissions from natural gas infrastructure. And, while Biden has repeatedly stated that while he would not ban hydraulic fracturing of natural gas, popularly known as “fracking,” on private lands, he likely would seek to prohibit fracking on federal lands. The government may also modify its position in ongoing litigation of rulemakings on these issues.

FERC to lead changes in energy market. The Biden Administration is also likely to significantly change the direction of the FERC. With the appointment of a new Chair and, eventually, a Democratic majority at the Commission, expect to see major changes in: (1) capacity market rules, especially the Minimum Price Offer Rule, which have proved highly controversial and have been criticized by many states as standing in the way of GHG reduction goals; (2) electric transmission policy, since a significant expansion of transmission capacity is widely acknowledged to be necessary to allow greater reliance on renewable energy resources; (3) expanded environmental review of pipeline projects, to include analysis of downstream GHG impacts. In addition, it is possible that FERC may change course on the Public Utility Regulatory Policies Act. The recent FERC rulemaking in this area has drawn sharp criticism from renewable energy interests and review of the new FERC rule is set for an appeal in the Ninth Circuit. Significant action to encourage renewable and low-GHG resources may also arise from FERC’s recent policy statement on carbon pricing, which opens the door to carbon pricing in the “organized” markets operated by Independent System Operators and Regional Transmission Organizations.

Responsible Sourcing/Product Regulation/ESG

Authors: Lauren Hopkins, Deepti Gage

While many of the anticipated developments highlighted in this outlook report can be expected to have indirect impacts on corporate sourcing practices, disclosures, and product stewardship, several of the Administration’s stated priorities would have a more direct impact. More specifically, the Administration’s goals to strengthen the domestic supply chain for certain critical materials and to improve corporate disclosures of climate-related information appear likely to play a central role in policy development during 2021.

Supply Chain and Domestic Production. President-Elect Biden’s “[Plan to Rebuild U.S. Supply Chains](#)” seeks to develop “stronger, more resilient domestic supply chains” focused on avoiding shortages of products essential to American national security. This goal involves creating large-scale shifts in production of essential products back to the United States as a means of protecting national security against threats like the current pandemic while also creating jobs domestically. As outlined in the plan, the focus on rebuilding domestic supply chains is not only for personal protective equipment but also for products like “energy and grid resilience technologies, semiconductors, key electronics, and related technologies, telecommunications infrastructure, and key raw materials.” Under the “Plan to Rebuild U.S.

Supply Chains,” the Administration has stated that it will conduct a 100-day review starting January 20, 2021 to identify key national security risks across U.S. domestic and international supply chains. Following the review, the administration will request that Congress enact a mandatory, permanent, quadrennial “Critical Supply Chain Review.” Outside of the published plan, Biden also campaigned on his support of bipartisan efforts to foster a domestic supply chain for rare earth elements and other strategic materials that the United States generally imports from China and other countries. These efforts will be of heightened importance as the demand for batteries and the technology related to “clean energy” infrastructure increases.

Government Procurement. The Biden Administration plans to fuel the demand for these supply chains and domestic production through its federal government procurement powers, which accounts for more than \$500 billion in contracts annually, and through the Defense Production Act. Under his “[Made in All America](#)” campaign, Biden plans to focus on “Buy[ing] American” through \$400 billion in procurement investments throughout his first term. The “Made in All America” investments are on top of his clean energy and infrastructure plan investments. Biden also plans to direct the FTC to increase enforcement on false “Made in America” advertising and labels.

Human Rights and Forced Labor. By increasing demand for domestic production of certain products and materials, the Biden Administration may indirectly elevate the conversation surrounding human rights challenges in global supply chains. While the Biden Administration does not appear to have made any express commitments in regards to Uyghur human rights, the Biden administration did call on the Trump Administration to take action on China’s “genocide” of Uyghur Muslims. Vice-President-Elect Harris has been quite clear on her stance on China’s human rights violations. Harris’s legislative co-sponsorship of “S.3744 – the Uyghur Human Rights Policy Act of 2020” and votes in favor of accountability on issues regarding Chinese human rights violations in Xinjiang, Hong Kong, and Tibet indicate that she may seek to promote legislative action or other U.S. government response to the reported human rights concerns in China in particular. She also opposed allowing Chinese companies like Huawei to conduct business in the United States.

ESG Reporting. In the Biden Administration’s [Climate Plan](#), the President-Elect stated he would require public companies to “disclose their climate risks and greenhouse gas emissions in their operations and supply chains.” This may also prompt the SEC to revisit long-debated regulatory action to require more comprehensive disclosures of environmental, social, and governance topics.

Environmental Justice

Authors: [John Cruden](#), [Julius Redd](#), [Stacey Halliday](#)

Under the Biden Administration, we can expect a revised, revamped government approach to environmental justice (EJ) issues, and that EJ will gain far more prominence across the federal government, touching issues from global climate policy to chemical restrictions. This “all-of-government approach” to ensuring equity in environmental protection and giving a meaningful voice to vulnerable communities, is particularly evident in President-elect Biden’s July 2020 [Plan to Secure Environmental Justice and Equitable Economic Opportunity](#), in which he identifies an ambitious list of measures for incorporating EJ into federal actions and policies. Biden’s pre-election EJ platform gained further momentum with the staffing of his transition team, placing longstanding EJ advocates in roles to shape the goals and composition of EPA, CEQ, HHS, and other executive branch agencies. The recent anticipated nominations of Brenda Mallory to head CEQ, Michael Regan as EPA Administrator, Deb Haaland as Interior Secretary further evidence this commitment.

Given consistent pre- and post-Election Day statements and actions signaling the administration's commitment, EJ is likely to be a significant part of the President-elect's agenda from the outset. Many of the Biden team's stated EJ goals do not require Congressional involvement, giving agencies like EPA and CEQ the ability to put those plans in motion on Day One. Expect to see the following key policy themes and actions in furtherance of the Biden Administration's EJ goals:

Revision and reinvigoration of Executive Order (EO) 12898. The [1994 EO](#), directing federal agencies to incorporate EJ into their missions, inspired the creation of agency EJ policies, offices, and programs. However, its implementation has not been consistent, and the Biden Administration will likely seek to not only update the EO, but also increase accountability. A primary piece of this plan will likely be to charge the White House Environmental Justice Advisory Council and White House Environmental Justice Interagency Council with developing performance metrics and annual reporting on agency implementation and progress towards EO goals, with direct White House oversight through the CEQ.

Implementation of new EJ enforcement mechanisms and tools. In addition to bringing a new EJ focus to environmental enforcement, the Biden Administration has articulated specific plans to build a new dedicated EJ office – the Environmental and Climate Justice Division – within the DOJ. Though creation of the new Division would likely require some degree of congressional approval through the appropriations process, DOJ's Environment and Natural Resources Division could marshal resources to meet the same goals in the interim. In addition, Biden has shown determined interest in significant reform of EPA's External Civil Rights Compliance Office, which oversees the agency's administrative enforcement of its anti-discriminatory obligations under Title VI of the Civil Rights Act. This reform includes pledges to rescind EPA's *Select Steel and Angelita C.* settlements, open a public comment process to inform agency guidance on investigating Title VI complaints, and working with Congress to institute a private right of action for disparate treatment and impacts under Title VI.

Empowerment of EJ communities through information and resources. In amplifying the use of science in environmental decision-making, the Biden team also advocates making those scientific tools available to EJ communities and advocates. Consistent with this goal, the President-elect has proposed developing a data-driven Climate and Economic Justice Screening Tool - expanding upon EPA's current GIS mapping tool, EJSCREEN – to identify communities threatened by the cumulative impacts of multiple stressors of climate change, economic and racial inequality, and multi-source pollution. In addition, the administration will likely increase environmental monitoring in fenceline communities to improve public access to real-time data, as well as require industry to meet more robust community notification requirements. Biden has also pledged to reinstate the White House Tribal Nations Conference, appoint Native Americans to high-level government positions (such as Deb Haaland as Interior Secretary), and ensure fulfillment of tribal treaty and trust obligations. Additional possible actions on tribal engagement include more robust and meaningful tribal consultation during agency decision making, and increased evaluation of the impacts of federal decisions on treaty rights, which was beginning to be explored in the context of EPA rulemaking during the Obama Administration.

For a closer look at anticipated EJ actions under the Biden Administration, please see our recently released article [here](#).

International

Authors: Paul Hagen, Russ LaMotte, Dacia Meng

The marquis headline of the Biden Administration's international environmental policy will be an immediate and sustained focus on climate change. That will likely include most prominently an announcement on Day 1 of a return to the Paris Agreement (easy to do as an executive decision), followed in the coming months by the formulation of a revised nationally-determined commitment (much harder and more complex, and dependent to a large extent on the outcome of the Senate runoff elections in Georgia). While we anticipate that the Paris Agreement and the U.S. nationally determined contribution (NDC) will be a priority for the Biden Administration, there are a number of other international environmental agreements and negotiations that will require the Biden Administration's attention in the coming year:

Kigali Amendment (HFC phase down). Although the content of the U.S. NDC will be the primary focus of U.S. international (and domestic) climate diplomacy early in the new administration, the Biden platform included a commitment to "embrace" the Kigali Amendment to the Montreal Protocol within the first 100 days. That amendment – a negotiated phase-down of production and consumption of HFC chemicals that were introduced as substitutes to ozone-depleting refrigerants but which have very high global warming impacts – was one of the signature global environmental accomplishments of the Obama Administration. Despite wide and deep support by U.S. industry and by environmentalists in the United States, the Trump Administration never advanced the amendment to the Senate for advice and consent to ratification. The Biden Administration will undoubtedly jump-start that effort, although the reference to an "embrace" of Kigali (rather than ratification of it) was no doubt carefully chosen.

The new administration will need to determine whether there is existing authority under U.S. law to implement U.S. obligations under Kigali, particularly given that intervening court decisions and Trump Administration rollbacks of HFC-related regulations under the Clean Air Act have significantly altered the existing HFC controls available to EPA under current U.S. law. The long-term solution will likely involve new HFC-related legislation, and there are bipartisan bills introduced in both houses of Congress that will undoubtedly be reintroduced in the new Congress, but that will take time, and one question is whether existing authority exists for the U.S. to implement its near-term draw down obligations sufficient for the U.S. to ratify the amendment in the meantime. Another question is the degree to which the evaluation of that existing authority can rely on the HFC-related controls that have been imposed in the past two years by an ever-increasing number of U.S. states. [**12/29/2020 Update:** The [omnibus 2021 appropriations and pandemic relief bill](#), which President Trump has now signed, includes a new grant of statutory authority that is expressly designed to empower EPA to fully implement the Kigali Amendment. EPA will begin a rulemaking process in 2021 that will establish a phasedown in the production and import levels of HFC chemicals in a manner that tracks the Kigali timetable – a step that appears to eliminate any doubt about whether the U.S. possesses sufficient domestic authority to implement its obligations under the amendment. The enactment of this authority will now clear the way for the incoming Biden Administration to transmit the amendment to the Senate for advice and consent, which the Senate appears likely to grant, and there is little doubt that the Administration will push that through. Although the precise timing of those steps remains to be seen, it seems likely that the United States could be a party to the amendment before the end of 2021.]

Circular Economy/ Basel Convention. Looking beyond climate change to other multilateral environmental agreements, the Biden Administration will be confronted quickly with the need to develop a U.S. position on issues relating to the circular economy. Parties to the Basel Convention are considering a

proposal put forward by Switzerland and Ghana that would extend the Convention's controls and trade bans to all non-hazardous electrical and electronic waste. The proposal, along with other amendments under negotiation, threatens to expand legal and logistical barriers to cross-border shipments of electrical and electronic products for reuse, repair, and recycling, including a wide range of IT equipment, appliances, solar panels and batteries. Parties will convene at COP-15 in July 2021 to consider the proposed amendments, providing the U.S. (a non-party) with limited time and leverage to shape evolving requirements governing global trade flows.

More immediately, on January 1, 2021, amendments to the Basel Convention on the classification and control of plastic waste take effect, imposing new prior informed consent controls and trade bans on the cross-border movement of most types of plastic wastes. Because the U.S. is a non-party to the Convention, most countries will be obligated to prohibit trade in many types of waste plastics with the U.S. absent new bilateral or regional agreements allowing such trade. The U.S. has recently announced that a new bilateral arrangement signed with Canada will keep the U.S. – Canada border open to such trade but it is likely that many other trade flows will be disrupted unless the Biden Administration opts to conclude additional agreements allowing plastics recyclables trade with particular countries to continue. Longer term, some business and environmental stakeholders may decide to encourage the Biden Administration to consider ratification of the Basel Convention.

Expect negotiations on a new international plastics agreement. In addition, the Biden Administration will be confronted quickly with the question of whether to alter the United States' prior opposition to the initiation of negotiations, under UNEP auspices, of a new multilateral environmental agreement focused on broader controls on plastic production and use. Nordic countries, supported by others, have been pushing for the launch of such a new negotiating mandate. The next meeting of the UN Environment Assembly in February was going to see a showdown on this issue, but the debate will now be postponed for at least a few months due to the pandemic-related decision to move that meeting to a virtual-only session focused on administrative and budget issues.

The negotiating mandate adopted by UNEA will be critical, as it will determine the potential scope of the treaty. While the specific tools for an international plastics agreement are yet to be decided, they could include establishing production or waste reduction targets, reporting requirements, product design mandates, and extended producer responsibility requirements. The treaty could also follow a similar form to the Paris Agreement, requiring countries to develop national action plans.

Beveridge & Diamond has assembled an Election Analysis Task Force—including members with former senior U.S. and state government experience—that is closely watching election-related developments across multiple environmental, energy, and natural resources subject areas. Please let us know if and how we can assist you in addressing the impacts of the election on your organization. Visit our [Election Resources Page](#) for additional resources and information on upcoming events.