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Policy Review Heats Up Under New EPA Administrator Regan

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The swearing-in of Michael Regan as EPA Administrator means that open questions on policy, agenda-setting, and prioritization for the Agency will soon be answered. Issues that have risen to the top of the new EPA Administrator's priority list include environmental justice, including health outcomes impacted by the prevalence of per- and polyfluoroalkyl substances (PFAS); scientific integrity; new greenhouse gas limits for the electricity sector and automobiles; and a reconsideration of the flurry of EPA rulemakings issued in the late days of the Trump Administration.

Initial EPA Policies Targeted for Review

The process of reevaluating the Trump Administration's rules began on Inauguration Day, when the Biden Administration issued a non-exhaustive list of policies that federal agencies were directed to review, including 48 rules and guidance documents issued by EPA alone. The targeted policies covered a variety of topics covering air, climate, waste, water, and toxics, including (among others):

- procedural provisions under the National Environmental Policy Act;
- greenhouse gas emissions from stationary, aircraft, and other sources;
- regulation of Persistent, Bioaccumulative, and Toxic (PBT) chemicals and risk evaluation procedures under the Toxic Substances Control Act (TSCA);
- environmental permit reviews;
- transparency in science and cost-benefit analyses underlying regulatory actions;
- review of the ozone National Ambient Air Quality Standards (NAAQS) and emission standards for hazardous air pollutants;
- disposal of Coal Combustion Residuals and associated closure deadlines and demonstrations;
- drinking water regulations revising lead and copper rules and action on perchlorate;
- Clean Water Act Section 401 certification and the definition of "Waters of the United States";
- accidental release prevention requirements for Risk Management Programs under the Clean Air Act; and
- financial responsibility requirements under the Comprehensive Environmental Response, Compensation, and Liability Act.

Late-Trump Era Rulemaking: Freeze!

Contemporaneously with issuing this list of policies, President Biden's Chief of Staff, Ronald Klain, issued a "Regulatory Freeze" memo, as is customary at the outset of an administration change, which requested the following steps from heads of executive departments and agencies:

- a prohibition on agencies proposing or issuing rules until the new agency administrator or a delegate has reviewed and approved such rules;
- directs rules that haven't yet been published in the Federal Register to be withdrawn; and
- for regulations that have been published in the Federal Register but are not yet effective, directs agencies to consider postponing the policies' effective dates for 60 days and consider opening comment periods and petitions for consideration.

Executive Order as Yardstick for Regulatory Review

EPA was also directed to review the listed policies for consistency with Biden's Executive Order 13990 on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (EO), and to "take action" to address federal regulations and actions during the last four years that conflict with the EO objectives. Such action could include publishing for notice and comment proposed rules suspending, revising, or rescinding specified agency actions. Within 30 days of the EO, or by February 20, 2021, the EPA Administrator was directed to submit to the Director of the Office of Management and Budget (OMB) a preliminary list of any rules or policies being considered for further action by the end of this year, and within 90 days of the EO, or by April 20, 2021, the Administrator was to send an updated list of actions being considered that would be completed by December 31, 2025.

Rule Review in Practice: First Priorities Selected

Now that Administrator Regan has been sworn in, the policies and rules targeted for early action are coming into focus. On its website, EPA has provided notice that the following recent Trump-era rulemakings are either undergoing review or have already been reviewed under the Regulatory Freeze memo for consistency with the EO:

- On January 5, 2021, EPA submitted a pre-publication notice of a final rule to reopen the reporting period under the TSCA Active-Inactive Rule, where companies report to EPA which chemicals were manufactured, imported, or processed in the U.S. during the 10-year time period ending on June 21, 2016, in order to make corrections to confidentiality claims and substantiations. The final rule has not been published subject to review under the Regulatory Freeze memo.
- The January 14, 2021 Advance Notice of Proposed Rulemaking Addressing PFOA and PFOS in the Environment was similarly not published in the Federal Register due to undergoing agency

review. On February 22, 2021, EPA announced that it was re-proposing the Fifth Unregulated Contaminant Monitoring Rule to collect new data on PFAS in drinking water and re-issuing final regulatory determinations for PFOA and PFAS under the Safe Drinking Water Act.

- On January 12, 2021, EPA signed a Federal Register notice finalizing the 2021 Financial Capability Assessment for Clean Water Act Obligations; however, this guidance has not been published and is undergoing agency review.
- After review in accordance with the Regulatory Freeze memo, on March 10, 2021, EPA re-issued its Supplemental Notice of Proposed Rulemaking to improve the Greenhouse Gas Emissions Model compliance tool for heavy-duty engines and vehicle test procedures, unchanged from the version signed on December 23, 2020.
- On February 9, 2021, EPA withdrew and continues to review the toxicity evaluation of a perfluorinated substance known as PFBS, citing EPA's initial determination that "the conclusions in assessment were compromised by political interference as well as infringement of authorship and the scientific independence of the authors' conclusions."
- On March 10, 2021, the EPA Acting Administrator signed two rules intended to delay key dates for the revised lead and copper drinking water rule, in order to allow the Biden Administration more time to review the regulation.
- On March 16, 2021, EPA re-opened the public comment period on the final rules issued under TSCA on January 6, 2021 for five PBT chemicals, as part of EPA's review under the EO to determine consistency with Administration policy, and seeking information on exposure reductions, implementation issues, and additional or alternative measures.
- Based on public statements by EPA staff in the days before Administrator Regan's confirmation, it appears likely that EPA will reconsider both the particulate matter NAAQS and potentially the ozone NAAQS published in the final month of the Trump Administration.

EPA's Approach for Future Change

It remains unclear how the new Administration will prioritize its review of the remaining targeted regulations. Some finalized rules may be rolled back or revised through litigation or by Congress' use of the Congressional Review Act, for rules issued during the last 60 legislative days of the previous Congress (on or after August 21, 2020). On March 17, 2021, EPA applied to the U.S. Court of Appeals for the District of Columbia Circuit, requesting that the court voluntarily remand and vacate a rule published in the Federal Register on January 13, 2021. This rule finalized a significant contribution finding for greenhouse gas emissions for electric generating units that also established a framework for assessing significant contributions for other industries. Many other regulatory changes are

expected to occur through formal EPA notice and comment procedures.

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