

Environmental Policy And The Election: Part 1

By **James Tucker, Stacey Mitchell and Bryan Williamson** (October 19, 2020)

Democratic presidential candidate Joe Biden's "clean energy revolution" and climate goals stand in stark contrast with the policies President Donald Trump has pursued during his first term, underscoring the significant impact the presidential election will have on U.S. environmental and energy policy.

The congressional elections also will impact significantly the country's environmental and energy policy, as the next Congress can shape policy not just through its constitutional powers, but also through the reversal of many of the Trump administration's late-term rules via the Congressional Review Act.

In this three-part article, we outline both candidates' key environmental and energy policies, including how the candidates might — or might not — achieve their policy goals.

The first installment identifies the Trump administration's significant late-term rules that a unified Democratic Congress may seek to invalidate to minimize Trump's legacy.

The second installment will analyze the policy differences between Trump and Biden on environmental issues including domestic energy, air quality and international climate diplomacy, and consider some likely consequences of those differences.

This third installment will cover the candidates' positions on water quality, biodiversity and federal lands, and environmental justice.

Background

With two weeks remaining before the 2020 elections, both presidential candidates have had ample time to define the policy goals they would seek to accomplish in the energy and environmental space if elected. As he did during the 2016 campaign and throughout his first term in office, Trump has made statements espousing a commitment to environmental protection, as part of a broader focus on job growth and an America-centric "energy dominance." In practice, the Trump administration has altered the cornerstones of U.S. policy and regulatory approaches to climate change, air quality, clean water and other environmental priorities through administrative processes and in the courts.

Former Vice President Biden, on the other hand, has proposed a number of plans designed to build a "clean energy future," including, most notably, a goal to achieve a carbon pollution-free power sector by 2035. While many aspects of Biden's environmental goals reflect the policies of the Obama administration, Biden's proposals also reflect his campaign's messaging on climate change and environmental justice.



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The Congressional Review Act

The candidates' proposed policies and the president's oft-touted regulatory rollbacks take center stage in public discussions, but a number of the Trump administration's environmental and energy accomplishments could be subject to the equivalent of a legislative veto from the next Congress via a unique legislative mechanism known as the Congressional Review Act.

Enacted in 1996, the CRA affords Congress the opportunity to reject by a simple majority vote of both chambers (with no filibuster available) any rule adopted by the executive branch, with one key limitation: The CRA applies only to rules finalized within 60 session days for the U.S. Senate or 60 legislative days for the U.S. House of Representatives before the date on which the previous Congress adjourned its final session.[1]

The temporal reach of the next Congress' authority to override a rule depends upon the date Congress adjourns at the end of this year, which means the CRA could reach back to rules finalized as early as May 20 of this year or as late as sometime last month.[2] The CRA also contains a so-called lookback provision that resets the 60-day clock if Congress adjourns for the end of the year before the 60 days have tolled. In that case, the clock begins again on the 15th session day in the Senate and the 15th legislative day in the House.

Fully aware of the power of the CRA with a new president and Congress (the 115th Congress in 2017 overturned 15 Obama-era rules), the Trump administration worked feverishly over the last few months to finalize a number of significant rules that have reshaped both long-standing and recent U.S. environmental and energy policies.[3]

Among the rules that could be vulnerable under the CRA is a July final rule from the Council on Environmental Quality that reforms and expedites the National Environmental Policy Act process for reviewing projects with significant environmental impacts.[4] Despite Trump's June executive order directing the heads of all agencies to identify ways to reduce the scope of or avoid entirely the NEPA review process in light of the COVID-19 pandemic, the administration may not have finalized the Council on Environmental Quality rule and other NEPA-related rules in time to avoid vulnerability under the CRA.[5]

Additionally, although regulations finalized prior to the CRA deadline ultimately may escape this quick demise from the next Congress, many tenets of the Trump administration's signature environmental and energy policies may be otherwise susceptible under a potential Biden presidency, the next Congress or both.

The CRA process becomes more important (or less so) depending upon the outcome of the congressional elections. Absent Democratic control of both the House and Senate, it is unlikely that Congress would be inclined to use this particular tool to overturn Trump administration regulations. Nevertheless, other tools are available through Congress' legislative powers (including the appropriations and budget process imbued in Congress' power of the purse) to alter or delay these Trump rulemakings when the next Congress convenes in January 2021.

Lastly, it is important to note that the Trump administration's most significant rules will continue to be litigated well beyond the 2020 elections.

Rules Potentially Subject to Review Under the CRA

As discussed above, the exact date to which review under the CRA extends (when considering potential rules the next Congress could overturn) depends on the day the current Congress adjourns for the final time in 2020, which is uncertain until the end of this year. Based on the original 2020 House calendar, this date can be as early as May 20, or as late as September (although historically this date tends to fall in June, July or August).

Should this date fall on May 20, the following environmental- and energy-related rules and proposed rules (if finalized) may be subject to review and possible rejection by the next Congress:[6]

| Rule | Potential Impact | Agency | Date Finalized or Proposed |
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| Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act | Allows major air emissions sources that fall below hazardous air pollution emissions thresholds to be reclassified as "area sources" that no longer are required to adhere to Maximum Available Control Technology standards | U.S. Environmental Protection Agency | Finalized Oct. 1 |
| Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) | Requires RTOs and ISOs to revise tariffs to ensure that market rules facilitate the participation of distributed energy resource aggregations | Federal Energy Regulation Commission | Finalized Sept. 17 |
| Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources | Rescinds greenhouse gas and volatile organic compound emissions standards applicable to the transmission and storage segment of the oil and gas industry, as well as methane standards applicable to the production and processing segments; also revises requirements applicable to fugitive emissions, well site pneumatic pumps, closed vent system certifications, and alternative emissions limitations by expanding regulatory exemptions and providing additional compliance paths | U.S. Environmental Protection Agency | Finalized Sept. 14 and 15 |

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| Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category | Revises effluent limitation guidelines and standards for toxic wastewater generated by power plants to remove required zero-discharge limitations and allow the use of less costly compliance technologies | U.S. Environmental Protection Agency | Finalized Aug. 31 |
| Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act | Expedites the NEPA review process by providing time and page limits to agency reports, allowing agencies to adopt other agencies' determinations related to proposed projects, and permitting agencies to comply with NEPA through compliance with other statutes. | Council on Environmental Quality | Finalized July 16 |
| Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978 | Affords states greater flexibility in calculating energy rates pursuant to the Public Utility Regulatory Policies Act of 1978 | Federal Energy Regulatory Commission | Finalized July 16 |
| Clean Water Act Section 401 Certification Rule | Limits states' authority to issue water quality certifications pursuant to the Clean Water Act | U.S. Environmental Protection Agency | Finalized July 13 |
| Notice of Availability of the National Petroleum Reserve in Alaska Integrated Activity Plan Final Environmental Impact Statement | Opens more land in Alaska to leasing for permanent infrastructure development, including the Teshekpuk Lake Special Area. | Bureau of Land Management, U.S. Department of the Interior | Issued June 26 |
| Hazardous Materials: Liquefied Natural Gas by Rail | Authorizes the bulk transportation of liquefied natural gas by rail | Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation | Finalized June 19 |
| Multiple Proposed Rules Governing Coal Ash Disposal | Replaces safety demonstration requirements for disposing coal ash with location-based criteria, require clay-lined | U.S. Environmental Protection Agency | Proposed August – December 2019; partially finalized Aug. 28, 2020; some components |

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| | impoundments to be retrofitted or closed in accordance with a court order, and establish a coal combustion residuals permitting program in Indian country | | likely to be finalized by Jan. 20, 2021 |
| Strengthening Transparency in Regulatory Science | Would require the U.S. Environmental Protection Agency to consider only publicly available data in rulemakings | U.S. Environmental Protection Agency | Proposed April 30, 2018; supplemented March 18, 2020; likely to be finalized by Jan. 20, 2021 |
| Migratory Bird Permits; Regulations Governing Take of Migratory Birds | Would refine the scope of protections for migratory birds to prohibit only those actions directed at migratory birds and their nests and eggs | Fish and Wildlife Service, U.S. Department of the Interior | Proposed Feb. 3; likely to be finalized by Jan. 20, 2021 |

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[1] 5 U.S.C. § 801(d).

[2] Given the House of Representative's 2020 calendar, the earliest possible date to which the provisions of 5 U.S.C. § 801(d) could extend is May 20, 2020. However, this date almost certainly will be pushed to a more recent date depending on the date on which Congress adjourns for the final time in 2020. Most often, this date takes place in June or July. See Daniel R. Perez, *Upcoming CRA Deadline has Implications for Regulatory Oversight by Congress* (Dec. 11, 2019), <https://regulatorystudies.columbian.gwu.edu/upcoming-cra-deadline-has-implications-regulatory-oversight-congress> (providing overview of the CRA).

[3] Rachel A. Potter, *Keep calm and regulate on?*, The Brookings Institution (May 19, 2020), <https://www.brookings.edu/research/keep-calm-and-regulate-on/>.

[4] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304 (July 16, 2020) (codified at 40 C.F.R. pts. 1500-05, 07-08).

[5] Executive Order on Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities, The White

House (June 4, 2020), <https://www.whitehouse.gov/presidential-actions/eo-accelerating-nations-economic-recovery-covid-19-emergency-expediting-infrastructure-investments-activities/>.

[6] For the purposes of this list of rules that potentially are subject to review under the CRA, we have assumed the following: the earliest possible CRA "deadline" (May 20, 2020) becomes the actual CRA "deadline;" agencies submit rules to Congress shortly after publishing the text of the final rule; all such rules are subject to CRA review; and agencies finalize proposed rules issued to date. In practice, the CRA applies only to final (not proposed) rules, although the text of the CRA does not expressly provide that a rule must be finalized before Congress may review it. Cong. Rsch. Serv., R43992, The Congressional Review Act (CRA): Frequently Asked Questions (Jan. 14, 2020), <https://fas.org/sgp/crs/misc/R43992.pdf>. As a result, we have listed a few notable proposed rules or actions which agencies may not finalize and which therefore ultimately may not become subject to review under the CRA. In addition, we note that the "class of rules the CRA covers is broader than the category of rules that are subject to the [Administrative Procedure Act's] notice-and-comment requirements." Cong. Rsch. Serv., R45248, The Congressional Review Act: Determining Which "Rules" Must Be Submitted to Congress (Mar. 6, 2019), <https://fas.org/sgp/crs/misc/R45248.pdf>. This means that the next Congress can overturn actions not typically thought of as "rules," including agency Records of Decision, guidance documents, and memoranda. Id.