

Biden's Climate Catch Up, or Trump's Regulatory Rollbacks? Key Environmental and Energy Considerations for the 2020 Elections

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Key Points

- It is apparent that former Vice President Joe Biden's "clean energy revolution" and climate goals stand in stark contrast with the policies the Trump Administration has pursued during its 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 article, we outline both candidates' key environmental and energy policies, including how the candidates might—or might not—achieve their policy goals. We also identify the significant late-term rules that a unified Democratic next Congress may seek to invalidate through the Congressional Review Act to minimize President Trump's legacy.

Background

With just over a month 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, President 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 Joe 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

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environmental goals are reminiscent of the policies of the Obama Administration, Biden's proposals also reflect his campaign's emphasis on climate change and environmental justice.

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 (CRA). 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 Senate or 60 "legislative" days for the House before the date on which the previous Congress adjourned its final session.¹ The temporal reach of the next Congress's 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, 2020, or as late as sometime in September 2020.² 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 fifteenth "session" day in the Senate and the fifteenth "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 longstanding and recent U.S. environmental and energy policies.³ Among the rules that could be vulnerable under the CRA is a July 2020 final rule from the Council on Environmental Quality (CEQ) that reforms and expedites the National Environmental Policy Act (NEPA) process for reviewing projects with significant environmental impacts.⁴ Despite President Trump's June 2020 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 CEQ 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's 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, 2020, or as late as September 2020 (although historically this date tends to fall in June, July or August). Should this date fall on May 20, 2020, 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
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 September 17, 2020
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 September 14 and 15, 2020
Effluent Limitations Guidelines and Standards for the	Revises effluent limitation guidelines and standards for	U.S. Environmental Protection	Finalized August 31, 2020

Rule	Potential Impact	Agency	Date Finalized or Proposed
Steam Electric Power Generating Point Source Category	toxic wastewater generated by power plants to remove required zero-discharge limitations and allow the use of less costly compliance technologies	Agency	
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, 2020
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, 2020
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, 2020
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, 2020
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	Finalized June 19, 2020

Rule	Potential Impact	Agency	Date Finalized or Proposed
		of Transportation	
Multiple Proposed Rules Governing Coal Ash Disposal	Replaces safety demonstration requirements for disposing coal ash with location-based criteria, require clay-lined impoundments to be retrofitted or closed in accordance with a court order, and establish a coal combustion residuals permitting program in Indian country	U.S. Environmental Protection Agency	Proposed August – December 2019; Partially Finalized August 28, 2020; Remaining Components Likely to be Finalized by January 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 January 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 February 3, 2020; Likely to be Finalized by January 20, 2021
Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act	Would allow 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	Proposed July 26, 2019; Likely to be Finalized by January 20, 2021

The Presidential Candidates' Positions on Key Environmental and Energy Issues

Domestic Energy

President Donald Trump

The Trump Administration has championed an “American energy independence” policy, which seeks to shift the country’s energy dependence away from foreign suppliers and toward U.S. energy sources, including primarily fossil fuels (coal, shale, oil and natural gas).⁷ Consistent with this policy, the Trump Administration repealed the Obama Administration’s Clean Power Plan, which sought to reduce carbon dioxide emissions from U.S. power plants, and replaced it with the Affordable Clean Energy Rule, which supplants a federal emissions reduction regime with one that allows states to establish their own, potentially less stringent, standards.⁸ The Trump Administration also has issued an executive order aimed at curtailing the use of foreign-sourced electric equipment installed on the U.S. “bulk-power system,” revised rules implementing the Public Utility Regulatory Policies Act of 1978 to afford states additional flexibility in setting energy rates, overhauled safety standards for offshore drilling to facilitate U.S. oil production, revised regulations governing the disposal of coal ash, promulgated a Department of Transportation rule authorizing the transportation of liquefied natural gas by rail, re-written rules implementing NEPA to hasten the federal environmental review of complex energy and infrastructure projects, and repealed U.S. Department of the Interior rules governing oil and gas fracking and methane emissions.⁹

The Trump Administration has effectuated its domestic energy agenda through a variety of tools, including permitting, rulemaking, executive order, and trade sanction. However, its favored tool is rulemaking, the tool with which the Administration has repealed and replaced signature Obama-era regulations in addition to advancing a number of additional priorities. Given the virtual certainty that these regulatory changes would be subject to litigation, the Trump Administration has gone to great lengths to develop these rules to withstand legal challenge although final resolution in that regard likely will take years to play out. If re-elected, President Trump can be expected to continue to use these tools to shepherd his support toward the fossil fuel industry and further domesticize U.S. energy production.

Former Vice President Joe Biden

In an effort to court the progressive wing of the Democratic Party, Biden believes the Green New Deal is a crucial framework for meeting climate challenges as part of a broader “clean energy revolution.” To meet these challenges, Biden established a Unity Task Force with Sen. Bernie Sanders (I-VT) that makes number of climate-related recommendations, many of which are aimed at creating a “clean energy economy.”¹⁰ These include a number of specific goals, including: achieving a 100 percent clean energy economy (i.e., net-zero greenhouse gas emissions) by 2050, reducing the carbon footprint of the U.S. building stock by 50 percent by 2035, and directing \$400 billion of federal funds toward clean energy research and innovation (part of an overall \$2 trillion federal investment in clean energy and environmental justice initiatives).¹¹ The Biden-Sanders Unity Task Force recommendations even go further, advocating for the elimination of carbon pollution from power plants by 2035 and the installation of 500 million solar panels and 60,000 wind turbines.¹² According to the Biden campaign, funding for these energy initiatives would come from a reversal of the 2017 tax legislation that reduced the individual and corporate tax rates.¹³

Contrary to the Trump Administration’s efforts to boost fossil fuel energy sources, a Biden Administration would establish a new cross-agency initiative, the Advanced Research Projects Agency.¹⁴ This new “agency” would work to “decarbonize” key U.S. business sectors, decrease the costs of producing grid-scale energy storage

technology, produce more hydrogen energy from renewable resources, address the challenges of nuclear waste disposal, double U.S. offshore wind production by 2030, and accelerate the deployment of carbon capture sequestration technology for use at U.S. power plants.¹⁵ Importantly, the Biden campaign appears to have backed away—at least for now—from previous positions expressing support for a carbon pricing mechanism, such as a carbon tax or cap-and-trade system.¹⁶ The Biden campaign also has not embraced a full ban on hydraulic fracturing (or “fracking”), despite running mate Kamala Harris’s previous statements expressing support for such a ban.¹⁷

While many components of these domestic energy policy goals could be implemented through rulemaking or executive order, many would require congressional appropriations or legislation (e.g., reversal of the 2017 tax cuts, additional funding for clean infrastructure and authorization of a nationwide carbon tax).¹⁸ If elected, Biden would support the transition from a fossil fuel-based energy system toward one more rooted in renewable resources and developing strategies for climate mitigation and adaptation.

Air Quality

President Donald Trump

The Trump Administration has relied on the rulemaking process to repeal and, in many cases, replace many key Obama-era regulations aimed at curbing air emissions, including most notably the Clean Power Plan, U.S. Department of Interior (DOI) rules governing oil and gas fracking and methane emissions and fuel economy and carbon dioxide emission standards for passenger cars and light-duty trucks.¹⁹ U.S. Environmental Protection Agency (EPA) also issued a final rule in September 2019 that revokes California’s Clean Air Act preemption waiver, which had allowed California and other states to adopt more stringent motor vehicle emissions standards than those in place under federal law.²⁰ With respect to national air quality standards, the Trump Administration decided to retain the Obama-era standards for particulate matter, despite signals from the Administration’s early days indicating that EPA may have been considering confronting Supreme Court precedent foreclosing the agency from considering economic costs in formulating these standards.²¹ To that end, however, EPA issued a proposed rule in early June that aims to revamp the agency’s process for considering benefits and costs when promulgating significant rules under the Clean Air Act by requiring, among other things, that future rulemakings include benefit-cost analyses that do not factor so-called “co-benefits” from existing regulations in assessing the incremental benefits of new rules.²²

Most, if not all, of this Administration’s major air-related rule rescissions have faced legal challenges, many of which are still pending in the courts.²³ Beyond rulemaking, the Trump Administration has sought to downplay the impact of air pollution through discretionary executive action, such as through EPA’s rejection of a petition from Maryland seeking more stringent restrictions on emissions from coal-fired power plants in upwind states and the Bureau of Land Management’s (BLM) issuance of increasing numbers of leases authorizing oil and gas development on federal land.²⁴

If re-elected, the Trump Administration likely would continue the step-wise replacement of existing air regulations, further efforts to modify how economic impacts are accounted for in agency decisions, and use an additional four years to revise any components of the Administration’s rules that courts vacate.

Former Vice President Joe Biden

As in the case of Biden's proposed energy initiatives, his focus on air would seek to "reinstate federal clean air protections, rolled back by the Trump Administration."²⁵ According to his campaign, a Biden Administration would focus on reducing the impact of emissions from the transportation sector, particularly through motor vehicle and aircraft standards and investments in sustainable aircraft fuel.²⁶ With respect to motor vehicle emissions, a Biden Administration would be expected to promulgate standards more similar to those in place under the Obama Administration, restore tax credits for electric vehicles, increase the number of electric vehicle charging stations throughout the country and attempt to require annual improvements in fuel economy and emissions performance for heavy-duty vehicles.²⁷ The Biden campaign also has pledged to require "aggressive methane pollution limits" on oil and gas operations and require agencies issuing federal permits to consider the impact of greenhouse gas emissions and climate change and commit to reducing climate pollution through federal infrastructure investments.²⁸ Lastly, Biden has stated that he would establish a new Cabinet position dedicated to addressing climate change, which reportedly would "go beyond EPA."²⁹

To complement the regulations the Biden campaign has previewed, we likely would see a Biden Administration that more aggressively pursues enforcement actions against fossil fuel-based energy producers and other large emitters of regulated pollutants that are found to violate existing standards. However, most of the Biden campaign's air quality aspirations, such as research-based emissions reductions initiatives and plans to expand zero-emission vehicle infrastructure, would require appropriations. Finally, any attempt to restore electric vehicle tax credits or establish an official new Cabinet position would require congressional authorization, although Biden could ascribe a new, climate-related title to an existing aid or advisor, or elevate the role of the Chair of CEQ without formally establishing a new Cabinet position.³⁰

International Climate Diplomacy

President Donald Trump

Consistent with one of his significant 2016 campaign tenets, President Trump, within the first six months in office, withdrew the United States from the United Framework Convention on Climate Change's 2015 Paris Agreement.³¹ In accordance with the Paris Agreement, the United States' withdrawal will become effective on November 4, 2020, one day after the 2020 presidential election.³² Also among this Administration's signature moves is its replacement of the North American Free Trade Agreement with the United States-Mexico-Canada Agreement (USMCA), which contains environmental provisions that are similar to those in other U.S. trade agreements, as well as provisions intended to support the oil and gas industry by reducing duties, allowing U.S. energy producers to bid on Mexican oil and gas exploration leases and challenge climate policies, and eliminating tariffs on steel used to construct pipelines.³³ In addition, the Trump Administration has issued trade sanctions and executive orders to restrict the use of foreign supplies and energy in an effort to bolster the production and export of U.S. oil and gas.³⁴

Given President Trump's reliance on constitutional authority to shrink the United States' role in developing international climate policy and bolster the nation's production of fossil fuels, we expect that, if re-elected, President Trump would

continue to focus on domestic policy, eschew international climate diplomacy as the United States officially withdraws from the Paris Agreement, and continue efforts to engage internationally to promote U.S. produced sources of energy abroad.

Former Vice President Joe Biden

The Biden campaign has announced its intention to recommit the United States to the Paris Agreement and “lead an effort to get every major country to ramp up the ambition of their domestic climate targets” with “transparent and enforceable” commitments.³⁵ A Biden Administration also would seek to join or initiate other international climate agreements, such as a global moratorium on offshore drilling in the Arctic; a commitment among G20 nations to end export finance subsidies of “high-carbon projects;” a program to offer financing for Belt and Road Initiative countries “lower-carbon energy investments;” and reforms to the International Monetary Fund and regional development bank standards to prioritize projects with low-carbon impacts.³⁶

If elected, Biden would be expected to take immediate steps to reverse the Trump Administration’s international climate efforts (or lack thereof) by relying on the same executive authority used to implement those policies in the first instance.

Water Quality

President Donald Trump

Among the Trump Administration’s signature regulatory rollbacks, the replacement of the 2015 Waters of the United States Rule with the 2020 Navigable Waters Protection Rule, will be litigated beyond the 2020 elections.³⁷ Under the Trump Administration’s rule, which took effect on June 22, 2020, ephemeral streams and wetlands that connect to major underground water bodies do not receive protection pursuant to the Clean Water Act.³⁸ Beyond this rule, the Trump Administration finalized a rule in July 2020 that limits states’ authority to issue water quality certifications pursuant to the Clean Water Act, a rule that some proponents claim will prevent states from unduly delaying some energy and infrastructure projects.³⁹

If re-elected, we expect that the Trump Administration would continue its defense of the Navigable Waters Protection Rule, which already faces legal challenges in multiple district courts around the country that may take several years for the courts to resolve.

Former Vice President Joe Biden

The Biden campaign surprisingly has been quiet on any plans to attempt to repeal or replace the Navigable Waters Protection Rule, but such an action would seem likely given both the focus the Obama Administration placed on the Clean Water Rule (including studies demonstrating the connectivity between ephemeral streams and wetlands to other water bodies) and the increased risk of climate change-induced flood events, consistent with the Biden-Sanders Unity Task Force recommendations.⁴⁰ The Biden campaign has expressed a desire to focus on reducing impacts to the water supply from climate change and ensuring access to safe drinking water, both of which it has suggested can be accomplished through spending.⁴¹ Note, however, that potential Biden Administration attempts to increase access to safe drinking water likely would require congressional appropriations and may require rulemaking or legislation under or related to the Safe Drinking Water Act.

Biodiversity and Federal Lands

President Donald Trump

The Trump Administration has used executive orders (including orders on “Promoting Energy Independence and Economic Growth,” “Implementing an America-First Offshore Energy Strategy,” and “Promoting Energy Infrastructure and Energy Growth”), the rulemaking process, and leasing/permitting authority to ease restrictions on developments that impact protected species and to continue developing federal lands.⁴² The U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration reworked their implementation of the Endangered Species Act such that the agencies now consider economic factors in deciding whether to categorize species as endangered or threatened and no longer confer the same protections upon threatened species as they do upon endangered species.⁴³ Similarly, the National Marine Fisheries Service promulgated rules lifting prohibitions on gillnet fishing in two regions serving as whale feeding grounds, and BLM published Supplemental Environmental Impact Statements that would have allowed expanded drilling, mining and other activities in sage-grouse territory.⁴⁴ With respect to development on federal lands, the Trump Administration took steps to withdraw a DOI opinion that required BLM to use permits or grants to lease portions of easements associated with national parks and other public lands, reversed a prior DOI decision that prohibited the construction of a road across an Alaskan wildlife refuge, and reduced the size of national monuments.⁴⁵ Beyond rules loosening restrictions on protected species and lands, the Trump Administration has taken steps to protect species following lawsuits brought by environmental groups, such as by listing the Gulf of Mexico’s Bryde’s whale as endangered and initiating the review process used to determine whether giraffes should be listed as endangered species.⁴⁶

If re-elected, we expect the Trump Administration to continue to expand development on federal land and seek to further reduce the extent of protections for threatened species.

Former Vice President Joe Biden

While the Biden campaign has not announced concrete plans related to biodiversity and the use of federal land, it has pledged to support “[p]rotecting biodiversity, slowing extinction rates and helping leverage natural climate solutions by conserving 30% of America’s lands and waters by 2030.”⁴⁷ In addition, a Biden Administration would seek to “permanently” protect the Arctic National Wildlife Refuge, establish national parks and monuments, ban new oil and gas permitting on public lands and waters, and establish programs to enhance reforestation and develop renewable energy development on federal land and waters.⁴⁸ Although a Biden Administration could take some of these actions through proclamation or executive order, many of these actions would require rulemaking or agency adjudications, and some (e.g., establishing new national parks and permanently protecting wildlife areas) may require legislation.

A Biden Administration is unlikely to seek to reverse leases or permits that already have been issued (and that are not still subject to litigation), but additional new leasing on federal lands—both onshore and off—can be expected to be delayed while a Biden Administration examines the programmatic effects of those federal actions. Longer-term efforts to halt fossil-fuel leasing or to expand the footprint of federally protected land may require congressional support.

Environmental Justice

President Donald Trump

The Trump Administration has not publicly supported initiatives to enhance environmental justice, has taken steps to eliminate or curtail environmental reviews that consider impacts on vulnerable communities and has proposed to eliminate funding for environmental justice-related enforcement.⁴⁹ In particular, the Trump Administration has overseen significant declines in overall levels of enforcement of federal environmental laws during its first term in office.⁵⁰ Additionally, EPA's Office of Environmental Justice reportedly has provided fewer grants under the Trump Administration compared to grants issued under the Obama and Bush Administrations.⁵¹ The Trump Administration's Department of Justice also recently announced that it will no longer incorporate supplemental environmental projects into the resolution of civil enforcement actions.⁵²

If President Trump is re-elected, we likely would see little attention directed toward environmental justice causes and continued historically low levels of environmental enforcement.

Former Vice President Joe Biden

The Biden campaign has promised to make a "historic investment" in environmental justice, which it plans to fund by reversing the 2017 tax cuts.⁵³ A Biden Administration also would reinvigorate EPA's and the U.S. Department of Justice's work in this area, reinstate federal protections "designed to protect communities," and refer additional cases "criminal anti-pollution cases" to the U.S. Department of Justice.⁵⁴ Consistent with the Biden-Sanders Unity Task Force recommendations, we expect that a Biden Administration would use executive orders to direct agencies to use an "equity screening" tool to prioritize federal spending in disadvantaged areas and collaborate with state and local leaders to address pollution and public health shortcomings in impoverished and minority communities.⁵⁵

If elected, Biden's proposals purportedly would require Congress to reverse the 2017 tax cuts so as to allocate increased funding for environmental justice causes. Even without congressional support, a Biden Administration could support the environmental justice movement by ordering agencies to take steps to reverse Trump-era regulations, prioritize environmental justice considerations in permitting and increase environmental enforcement in disadvantaged areas.

Conclusion

As the election draws near, it is clear that President Trump and former Vice President Biden take strongly diverging stands on virtually every facet of energy and environmental policy. If elected, both candidates are likely to use similar tools such as executive orders, regulatory rulemakings, permitting decisions and the use of federal funds to advance their agendas. Further, the outcome of the Congressional elections will shape the degree to which the legislative process, including the CRA, will be a tool for shaping energy and environmental policies over the next few years. The outcome on November 3 will determine which of these fundamentally different policies will be pursued.

Any administrative rules finalized from this point forward in 2020 will face a heightened risk of reversal depending on the outcome of the 2020 elections, given the likelihood that a Democratic-controlled Congress would use the CRA to seek to overturn these rules. The CRA review also may extend to a number of significant environmental and energy rules that agencies recently finalized or may soon finalize (see chart above), including rules impacting scientific transparency in the rulemaking process, the disposal and management of coal combustion residuals, states' authority to set energy rates, protections for migratory birds, and hazardous air pollution emissions, among others.⁵⁶ Observers should keep a close eye on these rules and be prepared to engage with the next Congress—should Democrats assume control of both Houses—as it considers using the CRA in 2021.

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.*

⁷ *President Trump's Energy Independence Policy*, The White House (Mar. 28, 2017), <https://www.whitehouse.gov/briefings-statements/president-trumps-energy-independence-policy/>.

⁸ Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520 (July 8, 2019) (codified at 40 C.F.R. pt. 60 *et seq.*).

⁹ See Exec. Order No. 13920, 85 Fed. Reg. 26595 (May 1, 2020) (securing the U.S. "bulk-power system"); Oil and Gas and Sulfur Operations in the Outer Continental Shelf—Blowout Preventer Systems and Well Control Revisions, 84 Fed. Reg. 21908 (May 15, 2019) (codified at 30 C.F.R. pt. 250 *et seq.*) (offshore drilling safety rule revisions); Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Amendments to the National Minimum Criteria (Phase One, Part One), 83 Fed. Reg. 36435 (July 30, 2018) (codified at 40 C.F.R. pt. 257 *et seq.*) (coal combustion residuals rule revisions); Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule, 82 Fed. Reg. 61924 (Dec. 29, 2017) (codified at 43 C.F.R. pt. 3160) (oil and gas tracking rule rescission); Hazardous Materials: Liquefied Natural Gas by Rail, ___ Fed. Reg. ___ (June 19, 2020) (to be codified at 40 C.F.R. pts. 172-74, 179-80) (authorizing transportation of liquefied natural gas by rail); Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, ___ Fed. Reg. ___ (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500-05, 07-08) (re-writing NEPA's implementing rules); Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 49184 (Sept. 28, 2018) (codified at 43 C.F.R. pts. 3160, 3170) (methane rule rescission).

¹⁰ *Joe's Plan for a Clean Energy Revolution and Environmental Justice, Biden for President*, <https://joebiden.com/climate/>; *Biden-Sanders Unity Task Force Combating the Climate Crisis and Pursuing Environmental Justice* (July 2020), <https://joebiden.com/wp-content/uploads/2020/07/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf>.

¹¹ *Joe's Plan for a Clean Energy Revolution and Environmental Justice*, *supra* note 10; *The Biden Plan to Build a Modern, Sustainable Infrastructure and an Equitable Clean Energy Future*, Biden for President, <https://joebiden.com/clean-energy/>.

¹² *Biden-Sanders Unity Task Force*, *supra* note 10 at 47.

¹³ *Joe's Plan for a Clean Energy Revolution and Environmental Justice*, *supra* note 10.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Amy Harder, *Joe Biden unlikely to push carbon tax as part of climate change plan*, *Axios* (Aug. 20, 2020), <https://www.axios.com/joe-biden-carbon-tax-climate-change-plan-e8d522a8-5015-45fc-8164-3ec5c8a0d8a3.html>.

¹⁷ "Harris: 'There is No Question I'm in Favor of Banning Fracking,'" *Youtube* (Sep. 4, 2019), <https://www.youtube.com/watch?v=IHnXl6S0E8w&feature=youtu.be>.

¹⁸ The Clean Air Act may allow the U.S. Environmental Protection Agency to approve state compliance plans that implement a carbon tax, but Congress would need to authorize any attempt to institute a federally mandated carbon tax. See Samuel D. Eisenberg et al., *A State Tax Approach to Regulating Greenhouse Gases Under the Clean Air Act*, *The Brookings Institute* (May 22, 2014) (discussing the legal bases for imposing state or federal carbon taxes under Section 111(d) of the Clean Air Act).

¹⁹ The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24174 (Apr. 30, 2020) (codified at 40 C.F.R. pts. 86 *et seq.*, 600 *et seq.*).

²⁰ The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51310 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 *et seq.*, 86 *et seq.*).

²¹ See *Review of the National Ambient Air Quality Standards for Particulate Matter*, 85 Fed. Reg. 24094 (Apr. 30, 2020) (to be codified at 40 C.F.R. pt. 50 *et seq.*) (retaining Obama-era particular matter standards); William H. Haak, *Trump Orders EPA 'Back to Basics' on NAAQS*, *The Magazine for Environmental Managers* (July 2018) (citing Memorandum from E. Scott Pruitt, Administrator, U.S. Env'tl. Protection Agency, to Assistant Administrators, U.S. Env'tl. Protection Agency, (May 8, 2018), available at <https://www.epa.gov/sites/production/files/2018-05/documents/image2018-05-09-173219.pdf>) (discussing the Trump Administration's renewed emphasis on assessing the economic impact of national ambient air quality standards revisions).

²² *Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process*, 85 Fed. Reg. 35612 (June 11, 2020) (to be codified at 40 C.F.R. pt. 83), available at https://www.epa.gov/sites/production/files/2020-06/documents/consistent_transparent_bca_fr_notice_final_prepub_0.pdf.

²³ See *Roundup: Trump-Era Agency Policy in the Courts*, *Institute for Policy Integrity*, New York Univ. School of Law, <https://policyintegrity.org/trump-court-roundup> (last visited May 28, 2020) (tracking outcomes of litigation involving the Trump Administration's agencies).

²⁴ See *Response to Clean Air Act Section 126(b) Petitions From Delaware and Maryland*, 83 Fed. Reg. 50444 (Oct. 5, 2018) (EPA's rejection of Maryland's petition); U.S. District Court for the District of Montana, Great Falls Division, Order in Case No. CV-18-73-GF-BMM (May 1, 2020), https://earthjustice.org/sites/default/files/files/39_-_order.pdf (litigation related to BLM's issuance of 287 oil and gas leases in December 2017 and March 2018).

²⁵ *Joe's Plan for a Clean Energy Revolution and Environmental Justice*, *supra* note 10.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Sean Sullivan, *His campaign limited, Joe Biden sketches out his would-be Administration*, *Wash. Post*. (Apr. 17, 2020), https://www.washingtonpost.com/politics/his-campaigning-limited-joe-biden-sketches-out-his-would-be-administration/2020/04/17/2ffc8b28-80bd-11ea-8013-1b6da0e4a2b7_story.html.

³⁰ See *U.S. Constitution*, art. II, § 2 (requiring the “Advice and Consent of the Senate” for appointments of “Officers of the United States”).

³¹ Press Release, Michael R. Pompeo, U.S. Sec. of State, On the U.S. Withdrawal from the Paris Agreement (Nov. 4, 2019), <https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/>.

³² Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 13, 2015, in Rep. of the Conference of the Parties on the Twenty-First Session, U.N. Doc. FCCC/CP/2015/10/Add.1, annex (2016).

³³ See Scott Vaughan, *USMCA Versus NAFTA on the Environment*, *Int'l Inst. For Sustainable Dev.*, <https://www.iisd.org/library/usmca-nafta-environment> (noting similarities between the two agreements); Marianne Lavelle, *5 Reasons Many See Trump's Free Trade Deal as a Triumph for Fossil Fuels*, *InsideClimate News* (Jan. 24, 2020), <https://insideclimatenews.org/news/24012020/trump-trade-usmca-nafta-climate-change-oil-gas> (describing industry-friendly provisions in the USMCA).

³⁴ Timothy Gardner, Alissa de Carbonnel, *Aggressive U.S. energy policy tests ties with European allies*, *Reuters* (July 10, 2019), <https://www.reuters.com/article/us-usa-energy-europe/aggressive-u-s-energy-policy-tests-ties-with-european-allies-idUSKCN1U512P> (noting sanctions on oil exports from Iran and Venezuela).

³⁵ *Joe's Plan for a Clean Energy Revolution and Environmental Justice*, *supra* note 10. Note that an attempt to rejoin the Paris Agreement would require providing notice to the United Nations of the country's intent to re-enter the Agreement, followed by a 30-day waiting period.

³⁶ *Id.*

³⁷ The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22250 (Apr. 21, 2020) (codified at 33 C.F.R. pt. 328 *et seq.* and 40 C.F.R. pts. 110 *et seq.*, 112 *et seq.*, 116 *et seq.*, 117 *et seq.*, 120 *et seq.*, 122 *et seq.*, 230 *et seq.*, 232 *et seq.*, 300 *et seq.*, 302 *et seq.*, 401 *et seq.*).

³⁸ *Id.* at 22251 (rule). Note that the U.S. District Court for the District of Colorado issued a stay in June 2020 that prohibited this rule from taking effect in Colorado. Order Granting As-construed Motion for Stay of Agency Action, *Colorado v. U.S. Envtl. Protection Agency*, Civil Action No. 20-cv-1461-WJM-NRN (Jun. 19, 2020).

³⁹ Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42210 (July 13, 2020) (codified at 40 C.F.R. pt. 121).

⁴⁰ *Biden-Sanders Unity Task Force*, *supra* note 10 at 52.

⁴¹ *Joe's Plan for a Clean Energy Revolution and Environmental Justice*, *supra* note 10.

⁴² Exec. Order Nos. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017); 13795, 82 Fed. Reg. 20815 (Apr. 28, 2017); 13868, 84 Fed. Reg. 15495 (Apr. 10, 2019).

⁴³ See Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45020 (Aug. 27, 2019) (codified at 50 C.F.R. pt. 424 *et seq.*) (allowing consideration of economic factors in determining Endangered Species Act listings); Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44753 (Aug. 27, 2019) (codified at 50 C.F.R. pt. 17 *et seq.*) (no longer requiring equivalent protections for threatened species as for endangered species).

⁴⁴ See Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Essential Fish Habitat, 83 Fed. Reg. 15240 (Apr. 9, 2018) (codified at 50 C.F.R. pt. 648) (gillnet fishing rules); Bureau of Land Mgmt., Greater Sage-Grouse Draft Supplemental EISs (2020), <https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=renderDefaultPlanOrProjectSite&projectId=90121&dctmlId=0b0003e880fb63b3> (sage-grouse Supplemental Environmental Impact Statements). Both of these actions were challenged and overturned by federal courts.

⁴⁵ See Memorandum from Acting Solicitor and Principal Deputy Solicitor, U.S. Dept. of the Interior, to Secretary, U.S. Dept. of the Interior, Assistant Secretary for Land and Minerals Management, U.S. Dept. of the Interior, Assistant Secretary for Water and Science, U.S. Dept. of the Interior, and Director, Bureau of Land Mgmt., (Sept. 1, 2017), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37048.pdf> (DOI permit/grant opinion); U.S. Fish and Wildlife Service, Agreement for the Exchange of Lands (Jan. 22, 2018), https://www.doi.gov/sites/doi.gov/files/uploads/izembek_revised_land_agreement_ak.pdf (DOI agreement to allow road construction through the Izembek National Wildlife Refuge); *Antiquities Act 1906-2006 maps, facts, & figures*, <https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm> (last visited May 28, 2020) (showing reductions in national monument sizes).

⁴⁶ See Endangered and Threatened Wildlife and Plants; Endangered Status of the Gulf of Mexico Bryde's Whale, 84 Fed. Reg. 15446 (Apr. 15, 2019) (codified at 50 C.F.R. pt. 224) (listing the Gulf of Mexico Bryde's whale as endangered); Endangered and Threatened Wildlife and Plants; 90-Day Findings for Four Species, 84 Fed. Reg. 17768 (Apr. 26, 2019) (codified at 50 C.F.R. pt. 17) (issuing notice of petition findings and initiation of a status review for four species, including the giraffe).

⁴⁷ *Joe's Plan for a Clean Energy Revolution and Environmental Justice*, *supra* note 10.

⁴⁸ *Id.*

⁴⁹ See, e.g., U.S. Env'tl. Protection Agency, *FY 2018 EPA Budget in Brief* (2017), <https://www.epa.gov/sites/production/files/2017-05/documents/fy-2018-budget-in-brief.pdf> (proposing to eliminate environmental justice programs in EPA's fiscal year 2018 budget).

⁵⁰ U.S. Env'tl. Protection Agency, Office of Inspector General, *EPA's Compliance Monitoring Activities, Enforcement Actions, and Enforcement Results Generally Declined from Fiscal Years 2006 Through 2018*, Report No. 20-P-0131 (Mar. 31, 2020), https://www.epa.gov/sites/production/files/2020-04/documents/_epaog_20200331_20-p-0131_0.pdf (identifying lower levels of inspections, enforcement actions, and supplemental environmental projects undertaken in fiscal year 2018 compared to those undertaken in fiscal year 2007).

⁵¹ Anita Desikan *et al.*, *Abandoned Science, Broken Promises: How the Trump Administration's Neglect of Science Is Leaving Marginalized Communities Further Behind*, Center for Science and Democracy at the Union of Concerned Scientists (2019), <https://www.ucsusa.org/sites/default/files/2019-10/abandoned-science-broken-promises-web-final.pdf>.

⁵² Memorandum from Jeffrey Bossert Clark, Assistant Attorney General, U.S. Dept. of Justice, to ENRD Deputy Assistant Attorney Generals and Section Chief, (Mar. 12, 2020), available at <https://www.environmentallawandpolicy.com/wp-content/uploads/sites/452/2020/03/DOJ-SEP-Policy.pdf>.

⁵³ *Joe's Plan for a Clean Energy Revolution and Environmental Justice*, *supra* note 10; *The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity in a Clean Energy Future*, Biden for President, <https://joebiden.com/environmental-justice/>.

⁵⁴ *Id.*

⁵⁵ *Biden-Sanders Unity Task Force*, *supra* note 10 at 46.

⁵⁶ *Roundup: Trump-Era Agency Policy in the Courts*, *supra* note 23.

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