

Ten Executive Branch Climate and Sustainability Developments to Watch in 2022

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With 2022 underway, the Biden-Harris administration is continuing to implement its “whole-of-government” response to climate change. In 2021, the administration focused on building **public-private partnerships** on clean energy, forest finance and climate-smart agriculture; developing **climate adaptation and resilience plans** for over 20 federal agencies; and renewing the United States’ international climate diplomacy.¹ In early 2022, the administration already has **announced** new actions and funding to address methane emissions—including \$1.15 billion for states to cap abandoned oil and gas wells—while the Department of Interior (DOI) will hold its first offshore wind auction later this month. Going forward, the Environmental Protection Agency (EPA) hopes to initiate new rulemakings to reduce greenhouse gas (GHG) emissions from fossil fuel-based energy production and consumption, and the National Highway Traffic Safety Administration (NHTSA) will finalize new corporate fuel economy standards. The year ahead could also see “**strong and systemic**” moves by financial regulators, such as the Securities and Exchange Commission’s (SEC) long-awaited proposed rule on climate-related disclosures. All told, we expect a flurry of regulatory and non-regulatory actions from the administration in 2022 aimed at achieving the United States’ **Nationally Determined Contribution (NDC)** under the Paris Agreement—a 50 to 52 percent reduction in economy-wide GHG emissions by 2030 en route to net-zero by 2050—especially as the Democrats’ window narrows for passing climate legislation before the congressional midterm elections.

In this alert, we highlight ten climate and sustainability developments to watch in 2022 as the Biden-Harris administration rolls out its “Year Two” environmental agenda.

1. SEC’s forthcoming disclosure rule to focus on accountability to investors on climate change risk and opportunity.

U.S. public companies remain on the lookout for the SEC’s proposed rule to enhance disclosure requirements for climate change risks and opportunities. Readers will **recall** SEC Chair Gensler’s assertion that “investors increasingly want to understand public companies’ climate risks and are looking for consistent, comparable and decision-

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useful disclosures to help them invest in companies that fit their needs.” Initially, the SEC **signaled** that the proposed rule would be out in late 2021, but it seems that drafting the rule is presenting more challenges than anticipated, and now interested stakeholders expect the SEC to act by mid-year.

In the meantime, as we enter into the Form 10-K and proxy season, U.S. public companies should be mindful of existing disclosure obligations in relation to climate change risks and opportunities faced by their companies, as well as ensuring such disclosure obligations are consistent with all other disclosures to investors (e.g., disclosures made in sustainability and earnings reports). As we described in more **detail here**, information regarding climate change-related risks and opportunities may be required in various disclosure items in a company’s SEC filings (e.g., the description of business, legal proceedings, risk factors and management’s discussion and analysis (MD&A) of financial condition and results of operations). Relatedly, companies that do not believe climate change poses any material risks to their operations or financial position should be prepared to support that position with quantitative and qualitative analyses, data and other supporting materials.

2. EPA will play a lead role in implementing the United States’ commitment to reduce GHG emissions from energy production and consumption.

After rejoining the Paris Agreement and announcing an aggressive new NDC in 2021, President Biden committed the country to significant reductions in GHG emissions from the production and use of fossil fuel-based energy. The United States also joined a **global pact** at last year’s UN Climate Change Conference calling upon parties to “accelerat[e] efforts toward the phasedown of unabated coal power,” and issued an **action plan** to implement the United States-led **Global Methane Pledge** to reduce global methane emissions by 30 percent below 2020 levels by 2030.² Accordingly, we anticipate that the administration in 2022 will continue to focus on coal, oil and natural gas and their ultimate disposition in the fuels used to power the economy.

EPA reportedly **plans** to adopt a “coordinated” series of rules to decrease emissions from coal generation. First among equals **could include** a replacement of the Obama administration’s Clean Power Plan (CPP).³ Although the Supreme Court **is evaluating** EPA’s authority to regulate GHG emissions from existing power plants under Section 111 of the Clean Air Act⁴—the likely statutory basis of a replacement CPP—EPA has already reached into its regulatory toolkit to facilitate emissions reductions from coal plants. For example, EPA recently **issued denials** (and, in one case, an approval conditioned on a costly groundwater monitoring program) to coal facilities that requested extensions to comply with deadlines under the Coal Combustion Residuals Rule to close unlined coal ash impoundments. Several dozen additional of these determinations remain outstanding, and EPA is not expected to rule affirmatively on many.

Other EPA regulations, such as effluent limitation guidelines on coal plants’ wastewater discharges, reportedly **have contributed** to the closure of some plants. EPA likely will look to its broad authorities under the Clean Air Act, Clean Water Act and the Resource Conservation and Recovery Act to pursue future rulemaking and stricter enforcement of existing regulations and permit conditions for power plants—such as renewed or more stringent standards to limit emissions of mercury, acids, gases and other hazardous air pollutants, and increased efforts to require plant operators to respond to groundwater quality concerns and improve monitoring in the

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off-disadvantaged communities surrounding plants. This week, for example, EPA **proposed** to restore the legal foundation for the agency to impose emission limits on certain hazardous air pollutants from power plants (including EPA's long-contested **Mercury and Air Toxics Standards**). Almost certainly by design, these efforts will make it more expensive and difficult to produce coal-fired power. By year's end, we expect to see momentum toward a number of new agency actions and rules that finalize the proposals discussed above or seek further restrictions on coal-fired power. Altogether, EPA's "coordinated" suite of regulatory actions very well may force operators to consider plant shutdowns or technology conversions in 2022 and thereafter.

Beyond efforts targeting coal, EPA likely will finalize proposed performance standards and methane and volatile organic compound (VOC) emission guidelines for the oil and natural gas sectors. EPA proposed **new standards** in November 2021 for both new and existing sources of air pollution in all key segments of the oil and gas industry. Those standards target a range of "sources" at oil and gas sites, including fugitive emissions at wells, compressor stations and storage vessels, among numerous others. New requirements range from bolstered leak detection and monitoring programs to implementing zero-emission technology directly at the emission source.

Additionally, EPA has looked downstream to fuel itself as a vehicle to achieve climate goals. After years of delays, last December it **proposed** Renewable Fuel Standard (RFS) volumes for the 2020, 2021 and 2022 compliance years. Taking a somewhat pragmatic approach, EPA proposed to reduce the requirement for blending renewable fuel into traditional (nonrenewable) fuels for the 2021 compliance year, but proposed its intent to raise the renewable fuel volume obligations for 2022. Relatedly, EPA **proposed** late last year to deny all undecided and pending small refinery exemptions from RFS compliance.⁵

3. The Interior Department will continue issuing unprecedented offshore wind lease sales while reforming the federal oil and gas leasing program.

The Biden-Harris administration **made** historic commitments to offshore wind in its first year. That momentum continues in 2022, with DOI recently **announcing** a February 2022 wind auction for nearly half a million acres off the New Jersey and New York coasts. As the administration seeks to shift the country's energy mix from fossil fuels to renewable sources, expect to see at least two more offshore wind lease sales in 2022 for areas off the **California** and **North Carolina and South Carolina** coasts.⁶

DOI is also pursuing climate-inspired actions aimed at fossil fuel-based energy. Although courts **stymied** DOI's moratorium on the issuance of new oil and gas leases on public lands and waters, DOI took several steps last year that will carry over into noteworthy actions in 2022 and beyond. This includes a November 2021 **report** culminating from DOI's review of the federal oil and gas leasing program, which contains numerous recommendations to correct alleged "well-documented and long reported deficiencies" in leasing practices. The report signals upcoming changes (as early as this year) to leases' fiscal terms and remediation requirements, including minimum health, safety and environmental criteria and an increase in royalty rates—the latter of which was **inadvertently revealed** this week by the administration. We also expect DOI to rethink its land use planning decisions, which may mean reducing or changing the criteria used to evaluate the public lands and water available for oil and gas leasing, imposing more cumbersome lease stipulations and permit conditions, and requiring consultation with affected communities.

One trend not likely to materialize, however, is a complete cessation in the issuance of leases and permits. Although DOI may in 2022 issue fewer leases and permits than in the past, there are no indications that it significantly will limit, restrict or stop these activities. Nor would such a drastic policy change likely survive legal scrutiny, even if environmental groups have had success as of late in challenging lease sales, including a suit that convinced the U.S. District Court for the District of Columbia this week **to vacate and remand** the record of decision underlying one of DOI's largest ever offshore **lease sales**.⁷

4. Federal agencies will continue to regulate and provide incentives to spur the proliferation of zero-emission vehicles and supporting infrastructure.

During his campaign, President Biden **pledged** to reduce GHG emissions from transportation and develop "rigorous new fuel economy standards aimed at ensuring 100% of new sales for light- and medium-duty vehicles will be electrified" by 2050. This includes deploying a coordinated approach centered on more stringent regulations and efforts to promote the production and adoption of electric vehicles (EVs) and build-out of EV infrastructure.

EPA and NHTSA, the agencies charged with regulating tailpipe emissions and fuel economy, respectively, bear much responsibility for meeting this lofty pledge. In December, EPA issued a **final rule** that provided aggressive new standards for tailpipe GHG emissions for model year (MY) 2023 through 2026. NHTSA, meanwhile, **repealed** a Trump administration rule (SAFE I) that "codified regulatory text and made additional pronouncements" regarding the federal Energy Policy and Conservation Act's preemption of state and local laws related to fuel economy standards. This sets the stage for EPA in the coming weeks to restore the waiver for California's zero-emission vehicles mandate and GHG emission standards within the State's Advanced Clean Cars program, allowing California (and states that mirror California's tailpipe emission standards) to adopt standards more stringent than those in place under federal law. NHTSA also will finalize new corporate average fuel economy standards for MY 2024-2026 vehicles in the near future to replace the Trump-era standards.

EPA has also committed to propose standards for subsequent MY vehicles beginning with MY 2027. Those standards are expected to contain the most stringent tailpipe emission restrictions to date—ostensibly an effort from this administration to spur the widespread adoption of hybrid and zero-emission vehicles. EPA **may** even look beyond the traditional tailpipe emission standards (which typically apply to new vehicles) to meet its climate goals, such as targeting regulations and enhanced incentives directly at electric vehicles or older, higher emitting vehicles. As an ancillary strategy to ensure emission reductions, we expect EPA **to continue** its aggressive enforcement of aftermarket automobile parts manufacturers, consistent with one of the agency's ongoing **National Compliance Initiatives**.

The success of these strategies, of course, is dependent on the country's ability to build infrastructure to support widespread EV charging. NHTSA's parent agency, the Department of Transportation (DOT), plans to use \$7.5 billion in funding in partnership with the Department of Energy (DOE) to make that happen. Together, DOT and DOE **will start** in 2022 to "build out a national EV charging network that can build public confidence, with a focus on filling gaps in rural, disadvantaged, and hard-to-reach locations."

5. Federal agencies will use updated estimates of the social costs of GHG emissions to justify more stringent regulation and action on climate change—and to potentially influence new areas of government decision-making.

This spring, we anticipate that the **Interagency Working Group on the Social Cost of Greenhouse Gases** (Working Group) will propose an updated schedule of costs to society from carbon dioxide, methane and nitrous oxide pollution (the “Social Costs of GHGs”).⁸ Federal agencies use these social costs to inform cost-benefit analyses and justify rulemakings and other executive action, such as decisions over **leasing public lands** for fossil fuel development and production. The forthcoming Social Costs of GHGs—which likely will increase the current **interim values**—will be subject to public comment and **scientific peer-review**, with the Working Group aiming to publish final values for agency use this summer.⁹

Notably, the administration may expand the influence of the Social Costs of GHGs in 2022 to government procurement. The Federal Acquisition Regulatory (FAR) Council¹⁰ is **considering** potential amendments to federal acquisition rules that would impose new requirements to incorporate the Social Costs of GHGs into procurement decisions and “giv[e] preference to bids and proposals from suppliers with a lower” GHG footprint. This would mark a departure from historical uses of the Social Costs of GHGs, which largely has been limited to cost-benefit analyses in rulemakings.

6. DOE and the Federal Energy Regulatory Commission (FERC) will seek to expand electric transmission infrastructure as a gateway to decarbonize the power sector.

The Biden-Harris administration **recognizes** the critical need to accelerate the build-out of new transmission infrastructure—including interstate power lines connecting intermittent renewables to load centers—to achieve its vision of a carbon-free grid by 2035. Accordingly, DOE launched the **Build a Better Grid** initiative in January to “support the development of nationally significant transmission projects and grid upgrades” by deploying over \$20 billion in financing to reduce project development risk and utilizing existing statutory authorities to facilitate permitting and siting. One such authority is DOE’s ability to designate National Interest Electric Transmission Corridors (NIETCs), or areas DOE determines are experiencing—or expected to experience—transmission capacity constraints or congestion that adversely impacts customers.

Meanwhile, FERC Chair Richard Glick **seeks** to initiate one or more rulemakings this year to update FERC’s transmission planning, cost allocation and generator interconnection rules. While too early to speculate on their scope, FERC has a robust record upon which to build its proposed rules. For example, hundreds of stakeholders responded to a July 2021 **advanced notice of proposed rulemaking** that outlined numerous potential reforms within three areas: (i) regional transmission planning; (ii) cost responsibility for regional transmission facilities and interconnection-related grid upgrades; and (iii) oversight over the identification of and payment for new transmission facilities.

Despite consensus within the administration on the critical need for new transmission, DOE’s proposal to advance transmission development in NIETCs may face reluctance at FERC. Although DOE designates NIETCs, FERC has the authority to grant transmission developers federal eminent domain authority within a NIETC. While

FERC's authority was expanded through the bipartisan [Infrastructure Investment and Jobs Act](#) (IIJA)—e.g., by allowing FERC to override a state's denial of a siting permit under applicable law¹¹—Commissioner Allison Clements recently [cautioned](#) that FERC is hesitant to use such authority to preempt state opposition. FERC has instead opted for a collaborative approach with the states on transmission development by forming a [joint taskforce](#) with the National Association of Regulatory Utility Commissioners (NARUC).

7. The use of market mechanisms to support emissions reductions will command greater attention by federal agencies.

As voluntary markets for carbon offsets and other climate-related products continue to evolve, the Biden-Harris administration has shown interest in better assessing the risks and opportunities of these markets for reducing emissions—and what role, if any, the federal government should play in scaling their development.

To that end, we believe the Commodity Futures Trading Commission (CFTC) is likely to take a closer look this year at new financial products under development in the carbon derivatives markets to ensure integrity and transparency, while also considering the potential need for greater oversight to prevent manipulation and fraud. Last September, the CFTC's Energy and Environmental Markets Advisory Committee (EEMAC) [recommended](#) that the CFTC form a new subcommittee to issue a report on “the interplay between secondary cash markets for carbon allowances and offsets and the derivative markets for those products, with the goal of promoting uniformity across the various markets and enhancing liquidity.”¹² Although the CFTC has not yet adopted the EEMAC's recommendation, we anticipate the CFTC will do so once it regains quorum—especially given Chairman Rostin Behnam's [support](#) for increasing the CFTC's engagement in industry-led and market-driven processes in the climate and broader environmental, social and governance (ESG) space.

Meanwhile, the Department of Agriculture (USDA) is preparing to launch a [Climate-Smart Agriculture and Forestry Partnership \(CSAFP\)](#) program in the near future to finance “the deployment of climate-smart farming and forestry practices to aid in the marketing of climate-smart agricultural commodities” in voluntary carbon and ecosystem services markets. The program could kick off a series of actions from USDA in 2022 to help farmers, landowners and ranchers generate new revenues through voluntary climate action—i.e., by adopting farming and land practices resulting in measurable, verifiable GHG emission reductions or sequestration—which Congress may look to bolster through the [Growing Solutions Climate Act](#). As we summarized [here](#), the Senate's bill—passed last June with significant bipartisan support—directs USDA to establish a certification program to provide transparency and “informal endorsement of third-party verifiers and technical service providers that help private landowners generate carbon credits through a variety of agriculture and forestry related practices.” The bill may face an uphill battle in the House, where it has since stalled.

8. USDA will continue its focus on voluntary and incentive-based programs to advance climate-smart agriculture and protect critical carbon sinks.

USDA began 2022 by [announcing](#) a series of new climate-smart agricultural initiatives that build on its actions last year to combat climate change. On January 10, the National Resources Conservation Service (NRCS) [expanded](#) the availability of its

Environmental Quality Incentives Program (EQIP) **Conservation Incentive Contracts option** and announced it will allow producers to immediately re-enroll in the **Conservation Stewardship Program (CSP)** following an unfunded application to renew an existing contract—thereby lifting a two-year ineligibility restriction for CSP participants who failed to re-enroll during the year their contract expired. The changes will help to incentivize the implementation of conservation management practices nationwide and increase participation in both programs. NRCS further announced that it will host a sign up for agricultural producers in 11 states to combat climate change through the adoption of cover crops as part of its **Cover Crop Initiative** early this year.

USDA also emphasized that it will prioritize restoring forest health and reducing “climate-amplified risks” to forests and grasslands through a new U.S. Forest Service **ten-year strategy**. The strategy, launched in January, will scale forest health treatments—e.g., thinning, prescribed burning or pruning—on tens of millions of acres of overgrown forests and grasslands to reduce wildfire risk.

Going forward, USDA will continue its efforts to implement the IIJA, which provides billions in funding for climate-smart infrastructure and wildland fire mitigation. In the near term, we expect USDA to announce a **notice of funding availability** soliciting pilot project proposals for the CSAFP program discussed above.

9. The Department of Health and Human Services (HHS), and potentially the Federal Communications Commission (FCC), likely to consider new climate resiliency strategies to ensure the continuity and effectiveness of health care services.

Climate change-related disasters and extreme weather events—such as hurricanes, flooding, winter storms and prolonged heat waves—directly impact human health and can greatly burden health care systems, particularly in the area of telemedicine. **Telehealth** provides an alternative to traditional in-person care by utilizing telephones, tablets, computers and remote patient monitoring devices. Telehealth can help expand access to health care, for example, where there are socioeconomic barriers related to travel or **physician shortages in rural areas**. Recognizing the important relationship between communications services and the provision of health care, the FCC has implemented various **programs** to expand telehealth in response to the COVID-19 pandemic.¹³

With the growth of telehealth comes increased climate-related vulnerabilities for the health care system. As HHS recognizes in its **2021 Climate Action Plan**, power and internet outages caused by climate-driven events¹⁴ can disrupt the provision of health care (such as telemedicine) and health-based research activities. When health care facilities providing those services are affected, patients ultimately suffer. Consistent with the administration’s commitment to developing climate resiliency in accord with principles of **environmental justice**, we anticipate new agency efforts that respond to the relationship between climate change-related disasters and weather events, the disruption of communications services and the provision of critical telehealth services. This could include infrastructure improvements, conducting risk assessments for major health care facilities and moving critical infrastructure to flood-resilient locations.

10. United States' support for global agreement on ocean plastic pollution foreshadows a "whole of government" approach to reduce plastic pollution and waste at home.

In November, Secretary of State Anthony Blinken **announced** the United States' "support for multilateral negotiations on a global agreement to combat ocean plastic pollution" set to begin on February 28, 2022, at the **fifth session** of the UN Environment Assembly. While the United States' negotiating position will become clearer as talks unfold, Secretary Blinken's statement that the "agreement call on countries to *develop and enforce strong national action plans* to address this problem at its source" hints that a "whole-of-government" approach to reducing plastics waste and pollution could be in the works this year. Such an approach could ultimately involve greater "cradle to grave" scrutiny of plastic production and plastic products.¹⁵

Momentum is building within the Biden-Harris administration for increased action on plastic pollution and waste. Last month, DOE **announced** \$13.4 million in funding for seven "next generation" technologies that reduce plastic waste and "cut the carbon footprint of plastic production," which currently "accounts for more than 3% of total U.S. energy consumption." Going forward, we anticipate EPA to initiate efforts this year "to establish a goal related to climate impacts associated with the production, use, consumption and disposal of materials," which is all but certain to include plastic. The goal—noted by EPA in its November 2021 **National Recycling Strategy**—will be one component in EPA's broader "series dedicated to building a circular economy," with the national recycling strategy serving as Part One.

¹ These are but a few of the Biden-Harris administration's noteworthy climate-related actions in 2021. For a comprehensive listing, see [here](#).

² As noted earlier, the administration **announced** a series of new actions in January 2022 to follow-through on the Global Methane Pledge.

³ In the CPP, which faced challenges in the courts and ultimately rescission during the Trump administration, EPA classified power plants as an air pollution source to justify emission guidelines spanning from heat-rate improvements to the substitution of natural gas-combined cycle units and the use of renewable energy.

⁴ 42 U.S.C. § 7411.

⁵ Changes to internal EPA procedures **may make** it easier and faster for the agency to approve applications for biofuels intended to replace petroleum-based fuels and additives, but some industry groups advocated during EPA's recent **public hearing** for scaled back 2022 required volumes for conventional biofuels.

⁶ For estimated timeframes on these potential leases and others through 2025, see the Bureau of Ocean Energy Management's **offshore wind proposed leasing schedule**.

⁷ Friends of the Earth v. Haaland, No. 21-2317 (RC), slip op. (D.D.C. Jan. 27, 2022).

⁸ While President Biden's **Executive Order 13990** (EO 13990) directed the Working Group to issue the final Social Costs of GHGs "no later than January 2022," the administration recently clarified that the Working Group "intends to publish its proposed final estimates within the next two months." Defendants' Supp. Brief at 23, Louisiana v. Biden, No. 2:21-cv-01074-JDC-KK (W.D. La. Jan. 21, 2022) (ECF No. 90) (the "January 21 Supplemental Brief").

⁹ Defendants' Supp. Brief at 23, Louisiana v. Biden, No. 2:21-cv-01074-JDC-KK (W.D. La. Jan. 21, 2022) (ECF No. 90).

¹⁰ The FAR Council includes representatives from the Office of Federal Procurement Policy, the Department of Defense, NASA and the General Services Administration.

¹¹ See 16 U.S.C. § 824p(b). For more background on NIETCs and FERC's authority prior to the IIJA, see our post [here](#).

¹² CFTC Energy and Environmental Markets Advisory Committee, [Sept. 15, 2021 Meeting Transcript](#) at 5-6.

¹³ For more background on FCC telehealth initiatives, see our post [here](#).

¹⁴ Hurricane Ida, for example, resulted in significant communications service disruptions in Louisiana and Mississippi, and the FCC [acted quickly](#) to provide regulatory relief for impacted consumers and communications providers.

¹⁵ For example, a 2021 [report](#) from the National Academies of Sciences, Engineering, and Medicine [recommends](#) that the United States develop a “systemic strategy” that “focuses on identifying, implementing, and assessing equitable and effective interventions across the entire plastic life cycle to reduce the US contribution of plastic waste to the environment.”

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