

Environmental Policy And The Election: Part 3

By **James Tucker, Stacey Mitchell and Bryan Williamson**

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 significantly affect 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 identified 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 analyzed the policy differences between Trump and Biden on environmental issues including domestic energy, air quality and international climate diplomacy, and considered some likely consequences of those differences.

This final installment covers the candidates' positions on water quality, biodiversity and federal lands, and environmental justice.

Water Quality

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.[1] Under the Trump rule, which took effect on June 22, ephemeral streams and wetlands that connect to major underground water bodies do not receive protection pursuant to the Clean Water Act.[2]

Beyond this rule, the Trump administration finalized a rule in July 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



James Tucker



Stacey Mitchell



Bryan Williamson

unduly delaying some energy and infrastructure projects.[3]

If Trump is reelected, we expect that his 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.

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 connections from 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.[4]

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.[5] 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

Trump

The Trump administration has used executive orders — including orders described as "promoting energy independence and economic growth," "implementing an America-first offshore energy strategy" and "promoting energy infrastructure and energy growth" — as well as the rulemaking process and leasing/permitting authority to ease restrictions on developments that impact protected species and to continue developing federal lands.[6]

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.[7]

Similarly, the National Marine Fisheries Service promulgated rules lifting prohibitions on gillnet fishing in two regions serving as whale feeding grounds, and the Bureau of Land Management published supplemental environmental impact statements that would have allowed expanded drilling, mining and other activities in sage-grouse territory.[8]

With respect to development on federal lands, the Trump administration took steps to withdraw a U.S. Department of the Interior opinion that required the 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.[9]

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.[10]

If Trump is reelected, we expect his administration to continue to expand development on federal land, and seek to further reduce the extent of protections for threatened species.

Biden

While the Biden campaign has not announced concrete plans related to biodiversity and the use of federal land, it has pledged that Biden will support "[p]rotecting biodiversity, slowing extinction rates and helping leverage natural climate solutions by conserving 30% of America's lands and waters by 2030." [11]

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.[12]

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

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.[13] In particular, the administration has overseen significant declines in overall levels of enforcement of federal environmental laws during its first term in office.[14]

Additionally, the U.S. Environmental Protection Agency's Office of Environmental Justice reportedly has provided fewer grants under the Trump administration compared to grants issued under the Obama and Bush administrations.[15] The U.S. Department of Justice also recently announced that it will no longer incorporate supplemental environmental projects into the resolution of civil enforcement actions.[16]

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

Biden

The Biden campaign has promised to make what it calls a "historic investment" in environmental justice, which it plans to fund by reversing the 2017 tax cuts.[17] A Biden

administration also would reinvigorate the work of the EPA and the DOJ in this area, reinstate federal protections designed to protect communities, and refer additional criminal anti-pollution cases to the DOJ.[18]

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.[19]

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 Trump and Biden take strongly diverging stands on virtually every facet of energy and environmental policy. But 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.

The outcome of congressional elections will shape the degree to which the legislative process, including the Congressional Review Act, will be a tool for shaping energy and environmental policies over the next few years. The outcome in November will determine which of these fundamentally different policy directions will be pursued.

Any administrative rules finalized from this point forward in 2020 will face a heightened risk of reversal, given the likelihood that a Democratic-controlled Congress would use the CRA to seek to overturn these rules. CRA review also would extend to a number of significant environmental and energy rules that agencies recently finalized or likely will finalize soon (see chart in **the first installment** of this article), 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.[20]

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.

James Romney Tucker Jr. and Stacey H. Mitchell are partners, and Bryan C. Williamson is an associate, at Akin Gump Strauss Hauer & Feld LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85

Fed. Reg. 22250 (April 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.).

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

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

[4] Biden-Sanders Unity Task Force, *supra* note 10 at 52.

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

[6] Exec. Order Nos. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017); 13795, 82 Fed. Reg. 20815 (April 28, 2017); 13868, 84 Fed. Reg. 15495 (April 10, 2019).

[7] 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).

[8] See Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Essential Fish Habitat, 83 Fed. Reg. 15240 (April 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&dctmId=0b0003e880fb63b3> (sage-grouse Supplemental Environmental Impact Statements). Both of these actions were challenged and overturned by federal courts.

[9] 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 and figures, <https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm> (last visited May 28, 2020) (showing reductions in national monument sizes).

[10] See Endangered and Threatened Wildlife and Plants; Endangered Status of the Gulf of Mexico Bryde's Whale, 84 Fed. Reg. 15446 (April 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 (April 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).

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

[12] *Id.*

[13] 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).

[14] 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/_epaig_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).

[15] 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>.

[16] 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>.

[17] 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/>.

[18] *Id.*

[19] Biden-Sanders Unity Task Force, *supra* note 10 at 46.

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