

Where Trump's Environmental Rollbacks Stand: Part 2

By **Brian Israel, Lawrence Culleen and Emily Oler**

The first part of this article on the final weeks of the Trump administration's ambitious environmental deregulatory agenda discussed environmental rules that the administration has proposed but not finalized, as well as rules that the administration has indicated that it wishes to advance but has not yet proposed. The article also considered the hurdles that rules in these two categories face.

This second part of the article covers another category: We highlight more than 25 environmental rules that have already been finalized, but for which legal challenges have not yet been exhausted. These rules — more than 15 of which were finalized since President Donald Trump declared COVID-19 a national emergency in March — are at various stages of litigation.

With respect to the most recently published final rules, litigation may be anticipated, but has not yet been filed. In other cases, oral argument has been heard and a decision is pending.

In those cases, the current administration is anxiously awaiting whether opinions will issue before a new team takes the helm at the U.S. Department of Justice. Once new leadership is installed, the DOJ will have the chance to ask the courts to hold cases in abeyance, while the new administration considers whether to reconsider the rules under review.

Other cases are awaiting completion of briefing and/or oral argument. In these cases, the current administration is hoping the rules can be defended while the DOJ and its client agencies are still under the direction of Trump appointees. With every DOJ brief filed and oral argument presented, the ability of a new administration to flip positions and change legal arguments becomes more challenging.

In any event, once the Biden administration assumes office, it will have its hands full in sorting through many dozens of final rules in various stages of litigation across the government, deciding which cases they want to hold in abeyance and which cases they prefer to see play out — with or without the administration's support in defense of the rules.

Based on experience with past administrations, reversing course on a vast sea of regulations and agency actions is easier said than done. Numerous Trump administration efforts to repeal and replace Obama-era initiatives ran into trouble in the courts, for example. Judicial setbacks for the Trump administration will serve as lessons learned for a new Biden administration seeking to roll back the rollbacks.



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To the extent feasible, the next administration will likely take its time to set priorities, balancing the desire to undo certain deregulatory measures with the imperative to develop new regulatory programs to meet critical policy objectives and campaign commitments. The new administration will also likely pay careful attention to the intricacies of the Administrative Procedure Act, and the record support required for justifying changes in agency positions — including consideration of reliance interests — in order to avoid the same pitfalls that befell its predecessor.

Moreover, the new administration will have to contend with a large number of Trump-appointed judges — including three new U.S. Supreme Court Justices — who tend to be skeptical of executive branch overreach, and reluctant to extend judicial deference to agency interpretations under the Chevron doctrine.

Importantly, the Democrats' failure to win control of the Senate — depending on the outcome of the runoff elections for both Georgia Senate seats in January — has taken an important tool for regulatory change off the table: the Congressional Review Act's lookback provision.

Under the CRA, Congress has the authority to pass a joint resolution disapproving an agency rule issued toward the end of the previous administration. This joint resolution is powerful, because it makes the rule "of no force and effect" and bans the agency from issuing another rule in "substantially the same form" unless specifically authorized by statute.

The Trump administration and the 115th Congress made unprecedented use of the CRA — repealing 15 rules issued by the Obama administration.[1] Notably, in April 2019, the Office of Management and Budget issued an expansive definition of the types of agency actions covered by the CRA, including interpretive rules and some guidance documents.[2]

If the Democrats gain control of the Senate by winning both Senate seats in Georgia, regulations published in the Federal Register beginning in June of this year, or possibly even earlier, could be subject to the CRA's lookback period. With the Senate in Republican hands, however, the Biden administration will likely not have this legislative shortcut at their disposal.

List of Key Final Rules Currently Being Challenged in Court or Potentially Subject to Judicial Review

Proposed rules are not the only ones at risk. The Trump administration is also in a race against the clock for the judicial review process to play out in challenges to final rules that have already been issued.

Proponents of these rules would prefer that this administration's appointees oversee briefing and oral argument, and that courts issue decisions before the new administration can reconsider the position of the executive branch. In particular, for cases in which the Trump administration has promulgated a rule that advances an interpretation of a statute, a judicial determination that the interpretation is correct would be more difficult for the next administration to overcome.

COVID-19 has already caused delay in some of these cases. Most courthouses have closed their doors, postponed oral arguments and extended briefing schedules. Courts have had to transition to remote forms of oral arguments and hearings.

Once new leadership at the DOJ has had time to settle in, we can expect to see a slew of motions filed requesting courts to hold further proceedings in abeyance while the Biden administration undertakes review and potential reconsideration of the rules at issue. In the past, the courts have been amenable to such requests, putting cases on ice for many months.

These final actions are listed in reverse chronological order, beginning with rules that have been signed but not published in the Federal Register.

- **Clean Air Act — Fuels Regulatory Streamlining Rule:** Final rule published Dec. 4; the rule overhauls the fuels regulatory program via a host of revisions which are slated to take effect on Jan. 1, 2021.[3]
- **Comprehensive Environmental Response, Compensation and Liability Act — Financial Responsibility Requirements for Chemical Manufacturing; Petroleum and Coal Products Manufacturing; and Electric Power Generation, Transmission and Distribution:** Final rule published on Dec. 2; finalizes proposed decisions not to impose financial responsibility requirements for facilities in these sectors; final rule covers all three sectors.[4]
- **Clean Air Act — New Source Review Applicability Revisions to Project Emissions Accounting:** Final rule published Nov. 24, effective Dec. 24; this is one of a series of controversial measures designed to reform the New Source Review program under the Clean Air Act.[5]
- **Clean Air Act — Repeal of the "Once In, Always In" Rule for Major Sources:** Published Nov. 19; environmentalists and some states have raised concerns that the proposal will result in plants removing important pollution controls.[6]
- **Resource Conservation and Recovery Act — Coal Ash Landfill Rule Governing Disposal of Waste (Part B):** Final rule published Nov. 12; permits coal ash disposal sites to continue operating without composite liners if they can show there is "no reasonable probability" of contaminating the groundwater; environmental groups are likely to challenge.[7]
- **Federal Insecticide, Fungicide and Rodenticide Act — Agricultural Worker Protection Standard:** Final rule published on Oct. 30, effective Dec. 29; changes application exclusion zone requirements in the 2015 rule to "clarify and simplify" them; some commenters contended that the revised standard is not sufficiently protective.[8]
- **Regulatory Guidance — U.S. Environmental Protection Agency's Guidance Documents Rule:** Final rule published Oct. 19 and effective Nov. 18; the rule establishes procedures and requirements to manage issuance of guidance subject to Executive Order No. 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents.[9]
- **Clean Water Act — Revisions to Obama-Era Effluent Limitations Guidelines for Power Plants:** Published in the Federal Register on Oct. 13, and set to be effective on Dec. 14; environmentalists argue that the rule unreasonably assumes that facilities will voluntarily adopt stricter requirements in exchange for longer

compliance deadlines; challenges to the final rule have been consolidated in the U.S. Court of Appeals for the Fourth Circuit.[10]

- **Clean Air Act — Rescinding New Source Performance Standards for Methane Emissions from the Oil and Gas Sector:** Final policy amendments published Sept. 14 and effective immediately; final technical amendments published Sept. 15 and effective Nov. 16; both rules have been challenged in the U.S. Court of Appeals for the D.C. Circuit, which initially issued an administrative stay of the policy amendments, but subsequently denied emergency motions for stay; briefing begins this month and ends in Feb. 2021.[11]
- **Resource Conservation and Recovery Act — Coal Ash Landfill Rule Governing Disposal of Waste (Part A):** Published in the Federal Register on Aug. 28, and effective on Sept. 28, the rule provides procedures for the postponement of closure of coal ash disposal sites; environmental groups challenged the rule in the D.C. Circuit on Nov. 24.[12]
- **EAB — Overhaul of Environmental Appeals Board Review:** Final rule published Aug. 21 and effective Sept. 21; the proposal faced opposition by environmental groups and some states.[13]
- **Toxic Substances Control Act — Significant New Use Rule for Long-Chain Perfluoroalkyl Carboxylate Substances:** Final rule published July 27; the 2020 National Defense Authorization Act required the EPA to finalize this rule; proposed guidance on the rule's application to articles with surface coatings containing the regulated substances sent to the OMB on Nov. 5.[14]
- **Safe Drinking Water Act — Perchlorate Drinking Water Regulation:** Final action published on July 21; the EPA announced withdrawal of its 2011 determination to regulate perchlorate; a challenge to this action is underway in the D.C. Circuit.[15]
- **National Environmental Policy Act — Comprehensive Overhaul of NEPA Regulations:** Finalized July 16; lawsuits have been filed in the U.S. District Court for the Western District of Virginia, the U.S. District Court for the Northern District of California and the U.S. District Court for the Southern District of New York, all seeking vacatur of the regulations in their entirety.[16]
- **Clean Water Act — Narrowing Timing and Scope of State Review Under CWA Section 401:** Final rule published July 13; states and environmental interest groups have challenged the rule in the U.S. District Court for the Northern District of California.[17]
- **Clean Air Act — Rollback of Obama-Era Mercury and Air Toxics Standards Rule:** Final rule published May 22; the rule's new cost-benefit methodology has faced criticism by environmentalists, who argue that the new method could be used to weaken regulations for other air pollutants; litigation over the rule is underway in the D.C. Circuit.[18]
- **Clean Air Act — Greenhouse Gas and Fuel Economy Standards for Light Duty Vehicles:** Final rule published April 30; the EPA and the National Highway

Traffic Safety Administration have received some criticism for finalizing during the COVID-19 crisis; lawsuits have already been filed in the D.C. Circuit, where briefing is scheduled to be completed in June 2021.[19]

- **Clean Water Act –The Navigable Waters Protection Rule:** Final rule published April 21 (but signed in January); challenges have been brought against the rule in district courts across the country; these cases can proceed concurrently; a district court stayed the rule in Colorado, but other courts denied stay motions.[20]
- **Clean Air Act – Rule Creating Subcategory of Power Plants Under Mercury and Air Toxics Standards Rule:** Final rule published April 15; environmental groups have challenged the rule in the D.C. Circuit, arguing that it has no legal basis and weakens MATS limits for the new subcategory of power plants, resulting in increased air pollution; petitioners moved to hold the case in abeyance for 90 days for the EPA to take action on pending administrative petitions for reconsideration of the rule; on Oct. 30, the D.C. Circuit ordered the motion granted and the case be held in abeyance pending further order by the court.[21]
- **Clean Air Act – Repeal Appliance Maintenance and Leak Repair Hydrofluorocarbons Regulations:** Final rule published March 11; a coalition of 16 states have argued the rule is unlawful and would increase, rather than decrease, emissions; the Natural Resources Defense Council, as well as the states of New York, Connecticut, Illinois, Maine, Maryland, Minnesota, New Jersey, Oregon, Virginia and Washington, the city of New York and Washington, D.C., have challenged the rule in the D.C. Circuit, with briefing scheduled to be completed in March 2021.[22]
- **Clean Air Act – Renewable Fuel Standards Blending Volume Obligations for 2020:** Final rule published Feb. 6; challenges have been brought by various industry groups in the D.C. Circuit and briefing is set for early 2021; the D.C. Circuit heard oral argument in litigation challenging the 2019 renewable volume obligations in September, and a decision is pending in that case, which could affect the 2020 RVO challenge.[23]
- **Clean Air Act – Rollback of Obama-Era Risk Management Plan Rule:** Final rule published Dec. 19, 2019; litigation challenging the rule is underway in the D.C. Circuit, and environmental groups also filed litigation in the D.C. Circuit on Oct. 26, challenging the EPA's denial of their petition to reconsider the rule.[24]
- **Clean Air Act – National Emission Standards for Hazardous Air Pollutants for Clay Ceramics Manufacturing:** Final rule published Nov. 1, 2019, in response to petition for reconsideration of 2015 rule.[25]
- **Clean Air Act – SAFE Vehicles Rule Part One Rule:** Final rule published Sept. 27, 2019; revokes waiver for California to implement more stringent greenhouse gas and fuel economy standards; litigation underway in the D.C. Circuit with final briefs submitted Oct. 27; litigation in D.C. district court stayed pending resolution of the D.C. Circuit case.[26]
- **Endangered Species Act – Rollbacks Under the ESA:** Three separate rules under the ESA were published Aug. 27, 2019 (the Listing Rule, the Interagency Consultation Rule and the 4(d) Rule); environmental groups and a coalition of states

have filed suits over the three rules in the U.S. District Court for the Northern District of California.[27]

- **Clean Air Act — Landfill Methane Delay Rule:** Final rule published Aug. 26, 2019; allows more time for submission of state implementation plans for landfill emission guidelines, and for EPA review of state plans and EPA preparation of federal implementation plan; litigation underway in the D.C. Circuit; briefing scheduled to be completed by Dec. 11.[28]
- **Clean Air Act — The Affordable Clean Energy Rule:** Final rule published July 8, 2019; rescinds and replaces Obama-era Clean Power Plan; litigation underway in the D.C. Circuit, which heard a remarkable nine hours of oral argument on Oct. 8.[29] The Obama-era Clean Power Plan was challenged in 2016, but the D.C. Circuit did not have the chance to decide the case before the Trump administration took over; whether the D.C. Circuit will ever have the opportunity to issue a decision in this second case remains to be seen.

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[2] Guidance on Compliance with the Congressional Review Act, OMB (April 11, 2019).

[3] Fuel Regulatory Streamlining, EPA (Oct. 15, 2020); see also Sarah Grey, EPA Proposes to Overhaul Fuels Regulatory Program and Implement Revised One by End of 2020, Arnold & Porter (April 17, 2020).

[4] Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Chemical Manufacturing Industry, 85 Fed. Reg. 10,128 (Feb. 21, 2020); Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Petroleum and Coal Products Manufacturing Industry, 84 Fed. Reg. 70,467 (Dec. 23, 2019); Financial Responsibility Requirements Under CERCLA Section 108(b) for Facilities in the Electric Power Generation, Transmission, and Distribution Industry, 84 Fed. Reg. 36,535 (July 29, 2019).

[5] Prevention of Significant Deterioration and Nonattainment New Source Review: Project Emissions Accounting, 84 Fed. Reg. 39,244 (Aug. 9, 2019).

[6] Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, 85 Fed. Reg. 73,854 (Nov. 19, 2020).

[7] Hazardous and Solid Waste Management System: Disposal of CCR; A Holistic Approach

to Closure Part B: Alternate Demonstration for Unlined Surface Impoundments, 85 Fed. Reg. 72,506 (Nov. 12, 2020).

[8] Pesticides; Agricultural Worker Protection Standard; Revision of the Application Exclusion Zone Requirements, 85 Fed. Reg. 68,760 (Oct. 30, 2020).

[9] EPA Guidance; Administrative Procedures for Issuance and Public Petitions, 85 Fed. Reg. 66,230 (Oct. 19, 2020). See Ethan Shenkman, Guidance on the Administration's Two Executive Orders on Guidance, *Envtl. F.* (Jan.-Feb. 2020).

[10] Steam Electric Reconsideration Rule, 85 Fed. Reg. 64,650 (Oct. 13, 2020).

[11] Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, 85 Fed. Reg. 57,018 (Sept. 14, 2020); Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration, 85 Fed. Reg. 57,398 (Sept. 15, 2020).

[12] Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; A Holistic Approach to Closure Part A: Deadline to Initiate Closure, 85 Fed. Reg. 53,516 (Aug. 28, 2020).

[13] Streamlining Procedures for Permit Appeals, 85 Fed. Reg. 51,650 (Aug. 21, 2020).

[14] Long-Chain Perfluoroalkyl Carboxylate and Perfluoroalkyl Sulfonate Chemical Substances; Significant New Use Rule, 85 Fed. Reg. 45,209 (July 27, 2020).

[15] Drinking Water: Final Action on Perchlorate, 85 Fed. Reg. 43,990 (July 21, 2020).

[16] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020); see also CEQ Finalizes Comprehensive Changes to NEPA Regulations, *Arnold & Porter* (July 30, 2020).

[17] Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020); see also EPA Finalizes Clean Water Act Water Quality Certification Rule and Attempts to Narrow State and Tribal Review, *Arnold & Porter* (June 11, 2020).

[18] National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generation Units Reconsideration of Supplemental Finding and Residual Risk and Technology Review, 85 Fed. Reg. 31,286 (May 22, 2020); see Michael Phillis, EPA Rolls Back Basis for Power Plant Mercury Emission Limit, *Law360* (April 16, 2020).

[19] The Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (April 30, 2020).

[20] The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250 (April 21, 2020).

[21] National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Subcategory of Certain Existing Electric Utility Steam Generating Units Firing Eastern Bituminous Coal Refuse for Emissions of Acid Gas Hazardous Pollutants, 85 Fed. Reg. 20,838 (April 15, 2020).

[22] Protection of Stratospheric Ozone: Revisions to the Refrigerant Management Program's

Extension to Substitutes, 85 Fed. Reg. 14,150 (March 11, 2020); Comments of Massachusetts et al. re: Protection of Stratospheric Ozone: Revisions to the Refrigerant Management Program's Extension to Substitutes.

[23] Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes, 85 Fed. Reg. 7,016 (Feb. 6, 2020).

[24] Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act, 84 Fed. Reg. 69,834 (Dec. 19, 2019).

[25] National Emission Standards for Hazardous Air Pollutants for Clay Ceramics Manufacturing, 84 Fed. Reg. 58,601 (Nov. 1, 2019).

[26] The Safer Affordable Fuel-Efficient Vehicle Rule Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 27, 2019).

[27] Revision of the Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45,020 (Aug. 27, 2019) (the Listing Rule); Revision of Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976 (Aug. 27, 2019) (the Interagency Consultation Rule); Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44,753 (Aug. 27, 2019) (the 4(d) Rule).

[28] Adopting Requirements in Emission Guidelines for Municipal Solid Waste Landfills, 84 Fed. Reg. 44,547 (Aug. 26, 2019).

[29] 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. 35,520 (July 8, 2019).