

## Biden Off to the Races — With a Boost From the D.C. Circuit

“Policy priorities may change from one administration to the next,” the D.C. Circuit pronounced, but the Trump EPA’s “tortured series of misreadings of [the Clean Air Act] cannot unambiguously foreclose the authority Congress conferred.” In a long-awaited ruling, issued just one day before inauguration, the court upheld EPA’s broad authority to address carbon emissions from power plants under Section 111(d) of the act. The opinion will boost the Biden administration’s ambitious climate agenda, which is already underway through a day one executive order.

In 2015, the Obama EPA promulgated the Clean Power Plan as a centerpiece of its efforts to fight climate change. For the first time, EPA wielded its authority to address carbon emissions from coal-

and gas-fired power plants, the largest emitting sector in the U.S at the time. The Supreme Court stayed the CPP pending appeal. Yet before any court could rule on the CPP’s merits, the Trump administration took the reins of power and froze the litigation.

Trump rescinded the CPP, and replaced it with the much narrower Affordable Clean Energy Rule. The ACE rule was itself challenged, and the D.C. Circuit heard an astounding nine hours of argument last September.

On the day before Biden took the oath of office, the D.C. Circuit, in a 147-page opinion by Judges Patricia Millet and Cornelia Pillard, struck down ACE and embraced the legal theories underlying the CPP. But practitioners realize this is not the end of the story. A dissenting opinion was authored by a newcomer to the D.C. Circuit, Judge Justin Walker, whose conservative views may be aligned with a majority of the justices on the Supreme Court. The case was remanded

to EPA, which will need to decide next steps in both litigation and the regulatory process.

Meanwhile, Biden wasted no time in coming out of the gates. Moments after inauguration, Biden issued an E.O. titled Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis. The E.O. articulates key principles, including a return to science-based decisionmaking; holding polluters accountable — particularly where minority and low-income communities suffer disproportionate harm; mitigating greenhouse gas emissions; and bolstering resilience to climate change. The E.O. ordered all

federal agencies to conduct an immediate, comprehensive review of any regulations and similar actions taken during the past four years. If inconsistent with these principles,

the agencies must consider whether to suspend, revise, or rescind them.

Certain high profile regulations are specifically called out. For example, the E.O. directs EPA to decide by September 2021 whether to reconsider the Trump administration’s changes to the New Source Performance Standards governing air emissions from the oil and gas sector. On the same timeframe, EPA must consider proposing new regulations to control methane and volatile organic compounds emissions from existing oil and gas operations, including from the transmission and storage segments of the industry. Implicit in these instructions is, of course, a directive for EPA to restore its legal authority to regulate methane emissions from oil and gas activities in the first place.

Also called out for rapid-fire review are the Trump administration’s light-duty vehicle fuel efficiency and greenhouse gas emissions standards; energy conservation standards for appliances; and the Mercury and Air Toxics Rule.

**The questions raised by the Biden directives are too numerous to fit this page**



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In addition, recent rules changing the way EPA considers the benefits and costs of air regulations, and placing certain limitations on EPA’s consideration of scientific data, must be reconsidered “as soon as possible,” the E.O. says.

The E.O. gives the secretary of the interior 60 days to conduct a review of whether the boundaries of national monuments diminished by Trump may be restored. It places a temporary moratorium on all oil and gas leasing activities in the Arctic National Wildlife Refuge. And, consistent with a campaign promise, it revokes the presidential permit for the Keystone XL pipeline.

Finally, the E.O. dismantled several climate-related actions that were adopted by Trump through executive order or guidance. For example, the E.O. rescinds the Council of Environmental Quality’s proposed guidance on assessing GHG emissions in NEPA reviews, and it created a new inter-agency working group to revitalize the social cost of carbon. The group must publish an interim and then a final metric, so that the economic costs of climate change may be considered in rulemaking, with particular attention to environmental justice and inter-generational equity.

The questions raised by the Biden directives are too numerous to fit this page. What will the new administration decide to keep? What will it revise? What will it simply discard? And what will it create anew? A lengthy and detailed scorecard will be needed just to track developments.