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*Environmental Alert*

The election of Donald Trump as the 45th President of the United States may spur the most significant changes to U.S. environmental laws since the 1970s. While some of those anticipated changes may be quickly implemented, most will take considerable effort and collaboration to make happen, and others are unlikely to be implemented at all. Our views on the Trump Administration's likely impacts on environmental law are discussed below in the form of responses to questions we expect to be most common in the aftermath of the election results. Overall, we expect promotion of infrastructure projects, fossil fuels and manufacturing to be top priorities that will guide how the Trump Administration addresses environmental regulation.

There is, of course, inherent uncertainty to any analysis of how the Trump Administration might shape environmental law. Never having held elective office, Mr. Trump has no record of prior environmental policies to provide insight into his likely approach, and his populist movement has defied prediction and all political conventions. In this atmosphere of uncertainty, however, we hope to shed some light on the baseline questions about the future of environmental regulation in the United States.

## **Will Trump immediately abolish the U.S. Environmental Protection Agency (EPA)?**

No. Abolishing the EPA would require Congress to unwind more than forty years of environmental law upon which the business community depends. Complying with regulatory requirements is built into the standard processes, profit evaluations, and investment strategies of countless business across the country. Cars and trucks require EPA approval to be sold in the U.S.; pesticides must be registered with EPA; and pollution control and risk reduction technologies have been mandated by EPA and implemented by the relevant industries. Immediately abolishing EPA without addressing any of the underlying environmental laws that EPA administers and enforces would throw all of industry into deep uncertainty and wreak havoc with the economy.

It is much more likely that the Trump Administration and Congress would narrow or eliminate certain provisions of U.S. environmental laws that are currently implemented and enforced by EPA. However, accomplishing that objective will not only require the Administration to secure

sufficient votes in the U.S. House and Senate to pass the legislation but may require securing 60 votes in the U.S. Senate to overcome any threatened Democratic filibusters. Though achievable, any such significant changes to environmental statutes will certainly not occur overnight.

### **How might a Trump Administration amend environmental laws and regulations?**

The promotion and development of fossil fuels has been a key part of the Trump campaign, alongside his insistence on the illegitimacy of climate change science and disapproval of the Paris Agreement. It is therefore reasonable to expect that the Administration will promote changes to environmental laws, regulations and policies that could facilitate the development, transportation, and export of coal, oil, gas, and other petroleum products. That could include reincarnating the Keystone Pipeline project, pushing the Dakota Access Pipeline, and opening up (or easing the way for) increased exploration and production in the Arctic National Wildlife Refuge, other public lands, and offshore oil and gas plays to exploration in order to bolster American energy independence, jumpstart the economy, and improve global competitiveness. It would also likely include other infrastructure improvements to promote energy production.

As far as existing initiatives are concerned, the Trump Administration will almost certainly attempt to dismantle the regulatory framework for controlling greenhouse-gas emissions. An early step in that direction would be abandoning the Obama Administration's Climate Action Plan, which addresses methane emissions from existing oil and gas sources, including Information Collection Requests (ICRs) under the plan that are currently pending. Other targets will include the Clean Power Plan (CPP), the repeal of which would make it easier and cheaper to burn coal and natural gas.

These efforts will be complicated by precedent in the U.S. Supreme Court and D.C. Circuit compelling EPA to address greenhouse gas emissions, at least in the short term. Assuming the Trump Administration will populate current and future judicial vacancies—including on the Supreme Court—with conservative judges and justices, however, that precedent could change dramatically. Litigation over the degree to which those precedents constrain Trump's deregulatory agenda in the future should be expected.

Regulated industries have long sought a number of environmental reforms, many of which now may find life in the Trump Administration. Such perennial priorities include:

- Amending the Clean Air Act to reform how the National Ambient Air Quality Standards (NAAQS) are implemented so that costs are considered and the automatic five-year cycle for NAAQS reconsideration is removed;
- Amending the Administrative Procedure Act (APA) to curb the level of deference judges pay to federal agencies' interpretations;
- Reducing the delays and burdens associated with the review of major federal projects, particularly infrastructure projects, under the National Environmental Policy Act (NEPA);
- Reforming regulations under the Clean Water Act to limit the extent to which waters are considered "Waters of the United States," a set of regulations mired in litigation; and

- Limiting the import and substantive requirements of the Endangered Species Act, among others.

Importantly, the Trump Administration requires no Congressional approval to abrogate and void the numerous environmental policies and guidance documents issued by the prior administration. Among the likely targets of the Trump Administration are the U.S. participation in the Paris Climate Accord, CEQ guidance documents on reviewing greenhouse gas impacts, the guidance on the social cost of carbon, and guidance on climate change mitigation.

### **Will the Trump Administration enforce environmental laws?**

Yes. Though Trump's political appointees will head both EPA and the U.S. Department of Justice (DOJ), a majority of existing personnel are non-political and will continue into the new Administration. Bureaucratic inertia and pre-existing caseloads will prevent any changes in enforcement from kicking in immediately upon the inauguration. DOJ has hundreds of pending civil and criminal cases and investigations for environmental violations. From both a political and legal perspective, it would be impracticable to dismiss all such cases. Of course, there may be individual cases where appropriate Executive Branch oversight may be given to pending cases. While the Administration has some latitude to adjust its prosecutorial focus it will have to exercise care in such exercises to avoid controversies such as those that occurred early in the Reagan Administration when EPA Administrator Gorsuch was accused of politically interfering in Superfund cleanups.

With respect to future cases, DOJ and EPA enjoy significant enforcement discretion in selecting enforcement matters. The Administration's enforcement priorities will to a large degree be shaped by budget limitations and by the political appointees nominated by Trump for senior enforcement positions, none of whom have been publicly identified yet. It is reasonable to expect to see the administration appoint officials who are more sympathetic to the regulated community. In that regard, one recurring complaint from industry has been the alleged use of consent decrees to set new, de facto regulatory standards.

### **What might the Obama Administration do in response to Trump's election?**

We expect three immediate impacts to Trump's victory.

First, the Obama Administration will push through as many "Midnight Rules" and other regulatory actions as it can before the inauguration. Among those we expect to be included in that drive are (1) the BLM Venting and Flaring Rule, (2) the EPA amendments to Risk Management Program Rule, and (3) the Department of Interior's Stream Protection Rule governing mining. If these Midnight Rules are not yet published in the Federal Register, the Trump Administration would be able to "pull back" those rules and shelve them without going through the formal notice and comment process of the APA. In contrast, final rules published in the Federal Register, even on the last day of the Obama Administration, would require the new administration to follow the rulemaking process under the APA.

Another alternative to pushing back on Midnight Rules is the Congressional Review Act (CRA). While the CRA has only been used once successfully to roll back an ergonomics rule, several Midnight Regulations from the Obama Administration would likely be subject to Congressional resolutions of disapproval under the CRA. If a resolution of disapproval passes, then a regulation becomes void and the administration could not issue a substantially similar rule in the future. These resolutions have been ineffective in limiting regulations in the Obama Administration because several have been vetoed in the last few years. With the President and Congress now sharing the same party, those vetoes no longer act as an effective check on the CRA.

Second, DOJ and EPA may file priority environmental enforcement cases before the Obama Administration ends, on the theory that an already pending case is much more difficult for a new administration to dismiss, as discussed above.

Finally, the Obama Administration may agree to settle other pending lawsuits more quickly and favorably than it previously indicated, particularly ones for violations of regulatory regimes that might be at risk in the new administration.

### **Will the Trump Administration affect how Non-governmental Organizations (NGOs) and States address environmental matters?**

Yes. Without a sympathetic EPA to advance the NGO's radical agenda, NGOs can be expected to file a greater number of citizen suits. With a Trump Administration anticipated to push forward on infrastructure projects, NGOs will likely file citizen suits in an effort to block those projects. To the extent that EPA and DOJ retreat from enforcing in certain industry sectors, it's likely that NGOs will step up their own enforcement efforts.

Trump's deregulatory agenda may cause certain states to push in the opposite direction. In particular, California, New York, Oregon and Washington can be expected to push forward aggressively on climate change policy, particularly if, as anticipated, the Trump Administration vitiates the prior administration's commitment to the Paris Treaty, the CPP, and other signature GHG milestones of the Obama Administration. Certain states can also be anticipated to partner with NGOs on filing enforcement cases and trying to pick up some of the docket that may decline at EPA and DOJ once the new administration comes into power.

### **What can you do to understand these and other issues in more depth?**

As all of us find our way under a new Trump Administration, we will work closely with you to navigate the many changes that are certain to come in the world of environmental regulation and enforcement, to anticipate those that are less obvious, and to help you obtain clarity as we settle in to the new regime.

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