



## What's Next for Environmental Regulation if Biden Wins?

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If Joe Biden is elected President there will be significant changes in environmental regulation for American businesses. Some changes can (and likely will) take place very quickly, with the stroke of a pen. These could include revocation of certain EPA directives and guidance documents and many of President Trump's Executive Orders -- such as his October 2019 Orders limiting the ability of agencies to regulate through guidance and his January 2017 Orders requiring federal agencies to streamline the environmental permitting process. Other changes will require rulemaking under the Administrative Procedures Act (APA) or legislation by Congress.

How quickly could a President Biden roll back regulations? The answer is: It depends. Regulations that have been proposed, but are not yet final, can be pulled back by a Biden Administration. Final regulations -- yes, even final regulations published in the Federal Register on the last day of the Trump Administration -- are more difficult. They must go through the APA rulemaking process to repeal or amend them, and that's not something that can happen quickly or is done easily. Moreover, any amendment or modification will require justification to protect it from being deemed "arbitrary and capricious" by a court.

There are other ways the new Administration could address regulations it does not like. It could de-emphasize their enforcement or ask Congress to withhold or not appropriate funds to implement them. As to final regulations issued in the waning days of the Trump Administration, Congress could use the Congressional Review Act (CRA) to pass a joint resolution disapproving of the regulations. A regulation becomes void if the President signs the resolution or if his veto of it is overridden by two-thirds of both houses. Congress passed 14 such resolutions in 2017 after President Trump won in 2016, and President Trump signed all of them. These included rollbacks of several of the Obama Administration's key environmental regulations, including rules amending the Clean Air Act's Risk Management Program, regulations restricting methane emissions from oil and gas production, and revisions of standards for certain streams under the Surface Mining Control and Reclamation Act.

The CRA really only comes into play if Biden wins the presidency *and* Democrats have majorities in both houses of Congress come January 2021. But assuming that happens, how far back can the CRA be used to void Trump Administration regulations? The "look-back" period under the CRA is any

regulation published 60 session days or less prior to a Congress adjourning *sine die*. Exactly when that 60-day cut-off date occurred in 2020 can only be projected at this point, but at the moment the date appears to be May 13. Thus, any final rules published from that date forward are likely to be subject to the CRA.

Perhaps the most significant environmental final rule published in recent months was the Navigable Waters Protection Rule defining "waters of the United States." The rule was important to developers, agricultural interest and other businesses because it scaled back the Obama Administration's Clean Water Rule and narrowed the scope of waters, including wetlands, over which the federal government has jurisdiction. Can that rule be voided by the CRA? No, it was published in the Federal Register on April 21, 2020, so it is outside the 60-day "look-back" period and not within the grasp of the next Congress. That does not mean, however, that a Biden Administration cannot take steps to repeal or modify it administratively through the rulemaking process.

Will business interests have reason to fear and environmental groups have reason to cheer if a Blue Wave emerges on November 3. Probably. And that will be even more so if the Democrats control the Senate, do away with the filibuster, and need only 51 votes to pass legislation.

Buckle up, folks. This election will be one heck of a ride.

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- Channing J. Martin ? 804.420.6422 ? [cmartin@williamsmullen.com](mailto:cmartin@williamsmullen.com)

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