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## How Biden's Environmental Policies Will Affect New York

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## Environmental Law

## Expert Analysis

# How Biden's Environmental Policies Will Affect New York

**A**s this column has [previously](#) discussed, President Joe Biden's environmental policies are a sharp reversal of those of former President Donald Trump. Today's column spotlights how this change will affect New York state and New York City.

### Air Pollution

The New York Climate Leadership and Community Protection Act (CLCPA) requires steep declines in greenhouse gas (GHG) emissions, leading to an 85% reduction below 1990 levels by 2050. Transportation is the largest source of GHG emissions in the state, and achieving the CLCPA limits requires motor vehicles to have much lower emissions. Under the federal Clean Air Act and Energy Policy and Conservation Act, the federal government has sole authority to set air pollution and fuel economy standards for motor vehicles. The only exception is that California may set tighter standards if the Environmental Protection Agency (EPA) grants a waiver. If that happens, other states may adopt the California standards. For many years EPA has been granting waivers to California, and New York has been using the California standards.

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The Trump administration weakened the federal standards, revoked the California waiver, and interpreted the federal fuel economy law to bar all state greenhouse gas standards for motor vehicles, including California's. These actions have all been challenged in court. Had they stuck, it would have been impossible for New York to achieve the CLCPA's goals. However, the Biden administration has started the process of restoring and strengthening the standards that were adopted under the Obama administration. It has indicated that it intends to issue a notice in April proposing to restore the California waiver. The notice-and-comment process to restore the waiver will take until the end of the year. The Administration has also targeted July of this year to propose to revisit the rolled-back federal standards, though that rulemaking process will take substantial time after that, and almost surely will not apply before model year 2023. Meanwhile, several vehicle manufacturers have announced plans to electrify their fleets in the years to come.

While federal authority over motor vehicles is clear, there are great legal difficulties in regulating stationary sources of GHGs. The largest of these is coal-fired power plants. The Obama administration's signature policy to reduce emissions from these plants was the Clean Power Plan. Its statutory authority under the Clean Air Act involved several ambiguities, and the Supreme Court stayed it in February 2016. The Trump administration repealed the Clean Power Plan and replaced it with something it called the Affordable Clean Energy Rule, relying on its view that the Clean Power Plan was inconsistent with the plain language of the Clean Air Act. In January 2021 the U.S. Court of Appeals for the District of Columbia Circuit concluded that the Trump administration's legal interpretation of the Clean Air Act was incorrect, and thus vacated the new rule. *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir. Jan. 19, 2021). Although that ruling set the stage for reinstating the Clean Power Plan, the new administration has indicated that it does not intend to do so. The direction that the new administration intends to take remains to be seen.

PQ1: The Cross-State Air Pollution Rule is also being strengthened to impose greater controls on nitrogen oxides from power plants located in New York and several other states. This would reduce the pollution

drifting into New York from other states. New York already has its own greenhouse gas emissions standards for new and existing power plants, and it participates in the Regional Greenhouse Gas Initiative, which imposes a fee on such emissions.

EPA might also lower the national ambient air quality standards for PM 2.5 (fine particulate matter) and for ozone. Scientists have been arguing for years that these standards are too weak to protect public health. Under the current ozone standard, 70 parts per million, New York City and Nassau, Suffolk, Rockland and Westchester counties are in nonattainment, meaning the air is dirtier than the health standards require. If the standards are lowered to 60 parts per million, as many scientists have advocated, the entire state would be in nonattainment for ozone. The entire state is now meeting the current PM 2.5 standards; if those are lowered to the levels that have been under discussion, Manhattan and the Bronx would be in nonattainment. When there is a new nonattainment designation, the state must revise the state implementation plan and adopt new measures to meet the standards.

Methane is a powerful GHG and is the main component of natural gas. Leakage from natural gas extraction, processing, and pipeline transport and distribution is a significant source of methane emissions in New York, though quantifying them is difficult. The Trump administration weakened the federal regulation of this leakage. The Biden administration is expected to restore and strengthen these rules. The New York State Department of Environmental Conservation (DEC) is expected soon to propose its own regulation for methane emissions from the oil and gas sector.

An even more powerful GHG on a pound-for-pound basis is hydrofluorocarbons (HFCs), which are used mostly for refrigeration and air conditioning. In 2020 DEC adopted a set of rules that required the phase-out of the use of HFCs over a four-year period. The massive Consolidated Appropriations Act of 2021 passed by Congress and signed by President Trump in December 2020 included a new federal program to control HFCs. DEC is now studying whether it needs to take additional actions on HFCs to meet the new federal requirements and the reduction goals of the CLCPA.

The Biden Administration is moving to increase the “social cost of carbon,” a metric used in the cost benefit analysis of proposed regulations and other contexts. DEC is already a step ahead, having issued its own “value of carbon” **guidance** in December 2020, as required by the CLCPA.

### **Wetlands**

New York state has an important program to restrict development in freshwater wetlands, but it applies only to wetlands that are at least 12.4 acres in size unless they are of “unusual local importance.” The Army Corps of Engineers has its own program under the “dredge and fill” provision of §404 of the Clean Water Act that does not have a minimum size, and is not limited to wetlands that have been officially mapped as such. Thus some projects require federal but not state wetlands permits (though they would require state water quality certifications under Section 401 of the Clean Water Act).

A splintered decision from the Supreme Court, *Rapanos v. United States*, 547 U.S. 715 (2006), and other rulings have left considerable uncertainty over the extent to which

Section 404 applies to isolated or intermittent wetlands. The Obama administration adopted a controversial and much litigated regulation, the “Waters of the United States” rule, that broadly defined the areas subject to regulation. The Trump administration took action, now being litigated, to narrow the rule considerably. The Biden administration is giving this a fresh look. The outcome (and the inevitable court challenges) will determine the regulatory status of these small wetlands.

### **Securities Disclosure**

In 2010 the Securities and Exchange Commission (SEC) issued guidance on disclosure of climate change issues. Neither the Obama nor the Trump administrations vigorously enforced compliance with this guidance. In the absence of strong federal securities regulation on climate disclosures, the New York Attorney General’s office utilized the state’s securities disclosure law, the Martin Act. Most prominently it sued ExxonMobil for alleged violations. This case went to trial, and in 2019 the judge ruled for ExxonMobil.

The SEC under President Biden has indicated that it is adopting a stricter stance toward enforcement of its 2010 guidance and will consider issuing stronger guidance or regulations. Other financial regulators such as the Federal Reserve are also looking more closely at climate issues. Thus the Martin Act may recede in importance in the climate context.

### **Renewable Energy**

President Biden has called for a zero emissions electricity grid by 2035. This is even more aggressive than the CLCPA requirement of a zero emissions grid by 2040. One key element of New York’s plans is a large program of building offshore wind projects. Those projects require the approval of the Bureau of Ocean Energy Management

in the U.S. Department of the Interior. The Trump administration was moving slowly in granting the necessary approvals. This will almost certainly pick up under the Biden administration, which has appointed Amanda Lefton, formerly First Assistant Secretary for Energy and Environment for Governor Andrew Cuomo, as Director of the Bureau.

The Federal Energy Regulatory Commission (FERC) and the Department of Energy may be moving to overcome the state resistance that may arise to the major program of building new transmission lines that must accompany the massive amount of new wind and solar generation needed to meet President Biden's goals. This federal role may not be necessary in New York, however, in view of the strengthened state authority over transmission siting provided by the Accelerated Renewable Energy Growth and Community Benefit Act signed by Governor Cuomo in April 2020 (and the subject of our May 14, 2020 [column](#)).

FERC is likely to take other relevant actions. It is expected to reverse the actions it took under the Trump administration to favor fossil fuels over renewables in the electricity markets (the "minimum offer price rule"); to take a harder look at proposed natural gas pipelines; and to approve a proposal that the New York Independent System Operator is considering to add a price on carbon to the wholesale price of electricity.

### Chemicals

The discovery several years ago of classes of contaminants called PFAS in the drinking water in Hoosick Falls, N.Y., increased concern about these persistent chemicals. The New York Legislature and DEC have adopted restrictions on use of PFAS chemicals in food packaging and in firefighting foams, and requiring

testing for them at remediation sites. The Trump administration began the process to regulate these chemicals under the Safe Drinking Water Act. It appears that the Biden administration is [moving](#) to expand the regulation of PFAS under the Toxic Substances Control Act (TSCA), the Clean Water Act, and the Comprehensive Environmental Response, Compensation and Liability Act.

In 2019 New York adopted legislation regulating sale of products containing another emerging contaminant, 1,4-dioxane, and in 2020 DEC adopted maximum contaminant levels for this chemical in drinking water. In its final months the Trump administration took action under TSCA which could result in preemption of some state regulation of this chemical. Environmental groups have sued. It is not known whether the Biden administration will reopen the issue.

The Biden administration's focus on environmental justice is likely to lead to stronger requirements for community participation in decisions on contaminated site remediation and in many other areas.

### Congestion Pricing

In 2019 the New York legislature adopted a law allowing a "[congestion pricing](#)" fee on motor vehicles entering Manhattan south of 60th Street. This program was intended to begin in January 2021 and to provide a major source of revenue to the Metropolitan Transportation Authority. The program requires the approval of the U.S. Department of Transportation, which has been holding it up.

It now appears that President Biden's Secretary of Transportation, Pete Buttigieg, is moving in the direction of allowing the approval process to proceed.

### NEPA

Most environmental impact statements in New York are prepared

under the State Environmental Quality Review Act, but on the order of half a dozen every year are prepared for New York actions under the National Environmental Policy Act (NEPA). Under President Trump the Council on Environmental Quality (CEQ) revised the regulations under NEPA, and in particular purported to remove the requirements for cumulative impact assessment, narrowed the range of indirect impacts that must be assessed, and made many other changes.

The Biden administration has indicated it is reassessing these changes to the NEPA regulations, and is also strengthening the requirements to consider issues related to climate change. To provide time for the reassessment, CEQ has agreed to a 60-day pause in the litigation that was brought by states, including New York, against the NEPA changes.

### Flood Maps

As this column has [previously](#) discussed, the flood maps of the Federal Emergency Management Agency (FEMA) look at historical flooding but not anticipated future flooding as worsened by sea level rise and other climate changes. Congress in 2012 told FEMA to devise new procedures for considering these issues in its flood mapping. FEMA devised the procedures but did very little to implement them. The Consolidated Appropriations Act of 2021 authorized substantial funds for FEMA to carry out this mandate. This could ultimately lead to a major increase in the properties that are designated as falling within the FEMA flood zones. That in turn can increase the cost of insuring and developing these properties.