

Earth Day 2021: CERCLA and RCRA in The Biden Administration: Elevating Climate Change and Environmental Justice in Addressing Hazardous Wastes

Publications

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We close out the Corporate Environmental Lawyer Blog's weeklong celebration of Earth Day with the two federal programs aimed at cleaning up existing toxic waste sites and preventing the creation of new ones: the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") and the Resource Conservation and Recovery Act ("RCRA"). The Trump Administration considered the remedial and regulatory roles of the CERCLA and RCRA programs as core EPA functions, so it did not target them for regulatory rollbacks like it did for many federal clean air (including climate change), clean water, and environmental review requirements. Nonetheless, the new occupant of the White House will change the focus of both these programs—in large part by elevating climate change and environmental justice considerations in decision-making.

CERCLA/Brownfields

Early in the Trump Administration, Scott Pruitt, then the EPA Administrator convened a Superfund Task Force that identified five priorities: (1) expediting cleanup and remediation, (2) invigorating responsible party cleanup and reuse, (3) encouraging private party investment, (4) promoting redevelopment and community revitalization, and (5) engaging partners and stakeholders. The Task Force set forth 42 recommendations to achieve those goals.

Following the Task Force recommendations, the Trump Administration prioritized 54 sites and completed remediation and delisted over 50 sites from the National Priorities List. The focus was often sites with redevelopment potential. At many of those sites, surprisingly aggressive settlements with potentially responsible parties funded the work. At the same time, however, the number of unfunded orphan sites (those with remediation plans but no funding source) grew as federal appropriations were limited. By January 2021, there were at least 34 unfunded orphan sites, many in at-risk areas.

The Biden Administration is expected to retain the goals and many of the recommendations from the Task Force, but it will redeploy resources to meet its priorities. Climate change (a phrase that *literally* had been removed from the Superfund Strategic Plan), and environmental justice (which

seeks to address the disproportionately high health and environmental risks found among low-income and minority communities) will reemerge as key considerations in CERCLA decision-making, especially in site prioritization and remediation plans. A 2019 GAO report indicated that these issues are often linked. It identified roughly 2/3 (975/1570) of the NPL listed Superfund sites as vulnerable to climate-related risks—hurricanes, flooding, wildfires and/or rising sea levels. Many of these sites were also located near low-income and minority communities. Biden will seek to pair his climate change and environmental justice goals with his redevelopment and infrastructure plans through Brownfield grants and other incentives.

The Biden Administration has also signaled it will address emerging contaminants. As noted by Steve Siros in Wednesday's Corporate Environmental Lawyer Blog, EPA is likely to designate per- and polyfluoroalkyl substances (“PFAS”) as “hazardous substances” under CERCLA and may set a maximum contaminant level (“MCL”) for these compounds under the Safe Drinking Water Act (“SDWA”). These actions could have a significant impact on new and existing cleanups. First, designating PFAS a “hazardous substance” would require facilities to report PFAS releases, which could trigger more investigations and cleanups. Second, any PFAS limits under the SDWA or state regulations would become Applicable or Relevant and Appropriate Requirements (“ARARs”) that would have to be considered in CERCLA listing and remedy decisions. Finally, these changes would require PFAS contamination to be evaluated in EPA’s five year review at each site and potentially trigger reopeners in prior settlements. Tighter standards for other chemicals, such as 1,4-dioxane, could have similar results.

Resources are already being deployed to support these efforts and additional funding for Brownfield and Superfund projects is in the works. The American Rescue Plan Act of 2021 provides \$100 million for EPA grants to address disproportionate environmental harms to at-risk populations and air quality monitoring. According to the American Jobs Plan Fact Sheet dated March 31, 2021, the Administration is proposing an additional \$5 billion for Brownfield and Superfund sites and an additional \$10 billion to monitor and remediate PFAS. The Administration is also proposing to restore the Superfund tax, which expired in 1995, to ensure that resources are available in the Superfund Trust to address unfunded site cleanups. Similarly, the Administration is considering reversing the financial responsibility exemption for chemical manufacturers, petroleum and coal products manufacturers and electric power generation, transmission and distribution facilities that was issued in the waning days of the previous Administration.

RCRA

Like CERCLA, RCRA was not a focus of the Trump Administration’s regulatory rollbacks—though funding cutbacks affected rule development and enforcement. The Biden Administration has already signaled that it intends to reenergize enforcement, including criminal prosecutions, which may lead to an increase in federal overfiling in RCRA enforcement actions, especially in states with lax enforcement histories.

Trump's most significant RCRA actions addressed coal ash, referred to as Coal Combustion Residuals ("CCR"). The Trump CCR rules, which were promulgated after the Obama-era CCR rule was vacated, are being reviewed for consistency with Biden's Executive Order Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis. Likewise, the CCR Permit Program and the Beneficial Use Rules for Electric Utilities, which were pending on Inauguration Day, are subject to the Presidential memorandum freezing regulations pending review.

Biden's focus on environmental justice and climate change will impact RCRA permit evaluations and enforcement, both in process and in substance. Procedurally, those seeking RCRA permits, and even RCRA permitted facilities, may be subject to additional notification requirements, more community involvement, and greater scrutiny. Substantively, the social cost of carbon and chemical exposure risks will become part of the evaluation.

Biden's other climate change initiatives may have more significant RCRA impacts down the road. For example, the push toward electric vehicles will reduce the demand for gas stations at current levels. That change, combined with the fact that underground storage tanks installed or upgraded to comply with the 1988 underground storage tank standards are nearing the end of their useful lives, will trigger tank closures throughout the country. More broadly, the transition from a fossil fuel economy to a clean fuel economy will reveal many other environmental issues that will require substantial efforts and resources to address.

The Biden Administration is already changing the course of environmental law. With CERCLA and RCRA, the shifts will be more subtle than in other areas, but the focus on climate change and environmental justice will have profound impacts on whose voices are heard and where, and how, resources are deployed. The Corporate Environmental Lawyer Blog will continue to monitor and report on developments in these areas and others. In the meantime, thank you for sharing Earth Day (and Earth Week) with us!

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