



# Environmental Policy 2021

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**Joint Coastal Plain / Alabama Chapters &  
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- 2021 Under Trump
- 2021 Under Biden
- Inauguration Day
- People are Politics
- Congressional Review Act
- Rulemakings vs. Guidance
- “Guidance on Guidance”
- The Barrett Effect

- *Business as usual*
- General deregulatory trend
- Focus on shifting country's energy dependence away from foreign suppliers and toward U.S. energy sources

## We know what a Trump Administration looks like.

Without advocating for either candidate, for planning purposes:

- This presentation focuses on what is ***new and different*** in the event of a ***change*** in administrations.

### Major interest areas: *Green New Deal “Lite”*

- **Environmental justice**
- **Climate change**
- Clean electric power
- Renewable fuels
- Modern **infrastructure**
- Sustainable agriculture and conservation

## Environmental policy priorities:

- ***PFAS***
- ***Electricity***—Carbon free power sector by 2035
- ***Oil and gas***—Change methane limits
- ***Federal resources***—Restrict oil and gas permitting in public waters and on public lands
- ***Climate***—Rejoin Paris Climate Accord

***Environmental Justice***—look to bill cosponsored by Senator Harris (S. 4401 / H.R. 5986):

- ***Amend Civil Rights Act of 1964 to allow consideration of disparate impacts to establish discrimination***
  - *Overturn Alexander v. Sandoval* (U.S. 2001)
- Consider cumulative impacts for CWA and CAA permits
- Enhance consideration under NEPA
- Increase research on products affecting women and girls of color
- “Outdoor access for all” (parks and the outdoors)
- Federal Energy Transition Economic Development Assistance Fund as reliance on fossil fuels diminishes

## 2021 Under Biden

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Critical to the fate of policy initiatives under a Democratic Administration:

**Control of the U.S. Senate**



# Inauguration Day

THE WHITE HOUSE

WASHINGTON

January 20, 2009

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM:

  
Rahm Emanuel

Assistant to the President and Chief of Staff

SUBJECT:

Regulatory Review

President Obama has asked me to communicate to each of you his plan for managing the Federal regulatory process at the beginning of his Administration. It is important that President Obama's appointees and designees have the opportunity to review and approve any new or pending regulations. Therefore, at the direction of the President, I am requesting that you immediately take the following steps:

1. Subject to any exceptions, the Director or Acting Director

Effective January 20, 2021, expect a new Administration to stop all progress on outstanding rulemakings

- Like the 2009 Emanuel memo
- Stop, review, and delay or suspend rules—
  - Not yet been submitted to the Federal Register
  - Submitted but not yet been published
  - Final rules that have been published, but have not yet taken effect

## Transition team:

- Typically with prior agency experience
- Subject matter experts who—
  1. Coordinate with outgoing officials to ensure an orderly transition of power
    - Receive debriefings from sitting officials and prepare for arrival of incoming officials
  2. ***Identify people to lead and staff politically appointed positions at the agencies***

## Political appointees:

- ***President appoints*** agency leaders—heads of agencies, assistant secretaries and administrators, etc.—who drive policy
- ***Senate confirms*** appointments
  - “Acting” until confirmation
- The President also appoints numerous lower-level employees who do not require Senate confirmation

# Congressional Review Act

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Congress may, by **majority vote** of both chambers (no filibuster), reject any rule finalized during “lookback period”:

- Senate: 60 “session days” before adjournment
- House: 60 “legislative days” before adjournment
- Determined retrospectively
  - Could reach as early as May 20, 2020, or as late as September 2020

## Factors informing use of CRA:

- ***Control of Senate and House***
  - Likely to be a factor only if one party or the other controls both Houses
- Prohibition on agency “reissuing” the same regulation in the future or promulgating a regulation that is “substantially” similar
  - If a similar regulations is envisioned, better to amend via notice & comment procedures

Rules possibly vulnerable under the CRA:

- **CAA:** Rule allowing reclassification from “major source” to “area source” under § 112 (prepublication final rule issued Oct. 1, 2020)
- **CCR:** Federal permitting program (if finalized by January 20, 2021)
- **Migratory Bird Treaty Act:** “Take” regulations (if finalized by January 20, 2021)

Rules possibly vulnerable under the CRA:

- **CWA:** ELG rule (finalized October 13, 2020)
- **CAA:** New source performance standard regulations for oil and gas sector (finalized September 14 and 15, 2020)
- **NEPA regulations** (finalized July 16, 2020)
- **CWA Section 401 Certification Rule** (finalized July 13, 2020)



**When a new President seeks to change the course of policy inherited from the previous Administration,**

***what mechanism does the agency use?***

**Rulemaking:** Rules made following Administrative Procedure Act procedures (notice & opportunity for comment)

- **Pros** (from the agency perspective)
  - Binding legal effect
  - More difficult to reverse than guidance
- **Cons** (from the agency perspective)
  - Subject to notice and comment process
  - More time and effort than issuing agency guidance
  - More likely to result in judicial review

**Agency guidance:** Informs how legislation and regulations are interpreted and enforced

- **Pros** (from the agency perspective)
  - Good government: Helps ensure consistency in interpretation and application of regulations
  - Faster process if no notice and comment process
  - Less likely to be challenged in court
- **Cons** (from the agency perspective)
  - Less likely to have binding legal effect

## Is a guidance document subject to judicial review?

- “Final agency action” per the APA?
  - Two-part test (Bennett v. Spear (U.S. 1997)):
    1. “mark the consummation of agency’s decisionmaking process”
    2. “be one by which rights or obligations have been determined, or from which legal consequences flow”
- To decide regulations vs. guidance, EPA must balance considerations of ease and speed of process and long-term binding effect

# “Guidance on Guidance”

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- Exec. Order 13891 (Oct. 9, 2019):
  - Guidance “**does not bind** the public, except as authorized by law or as incorporated into a contract”
- OMB memo (Oct. 19, 2019):
  - Guidance **NOT** for “new positions that the agency treats as **binding**” or “to **coerce** private-party conduct” by stating “the only acceptable means of complying” or “by threatening enforcement action”
  - To do that, an agency must issue **regulations**

## “Guidance on Guidance”

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- EPA finalized new procedures for issuing, identifying, and maintaining agency guidance on September 14, 2020
- Online portal to clearly identify active EPA guidance documents
- Provides procedures for the public to request modification or withdrawal of an active guidance document



# EPA Guidance Documents

On October 9, 2019, President Trump signed [Executive Order 13891](#), “[Promoting the Rule of Law Through Improved Agency Guidance Documents](#).” Among other things, the Executive Order directs federal agencies to make active guidance documents available via an online guidance document portal.

On October 31, 2019, the [Office of Management and Budget \(OMB\)](#) issued [implementing guidance M-20-02 \(PDF\)](#), which set deadlines and related information for establishing the searchable, indexed online database for all active guidance documents.

On October 19, 2020, EPA published its final rulemaking [EPA Guidance; Administrative Procedures for Issuance and Public Petitions](#), providing further detail about the agency's development and issuance of guidance documents. Additionally, the rule provides the public the means to petition the agency with requests to modify or withdraw an active guidance document.

This portal contains only documents that meet the definition of “guidance document” in Section 2(b) of Executive Order 13891. Therefore, it does not contain documents that are excluded from that definition. For example, the Executive Order excludes, among others, internal guidance directed to the issuing agency or other agencies that is not intended to have substantial future effect on the behavior of regulated parties and internal executive branch legal advice or legal opinions addressed to executive branch officials. Because excluded documents are not “guidance documents” under the Executive Order, their omission from this portal does not imply that they are deemed rescinded under Section 3(b) of the Executive Order.

EPA's guidance documents lack the force and effect of law, unless expressly authorized by statute or incorporated into a contract. The agency may not cite, use, or rely on any guidance that is not posted on this web area, except to establish historical facts.

## Find Guidance Documents

Enter keyword, document title, or other terms of interest to find Offices/Regions that have applicable guidance documents.

Search

## ***Justice* Amy Coney Barrett:**

- Found by the ABA to be “well qualified”
  - ***Not*** an ideological evaluation
  - ABA relies on experience and academic credentials
- “Textualist” – believes in a strict reading of the Constitution and statutes
  - Clerked for Justice Antonin Scalia



## Not an extensive judicial record on energy and environmental issues

- Climate statements at confirmation hearings:
  - “I don't think I am competent to opine on what causes global warming or not”
  - “I don't think that my views on global warming or climate change are relevant to the job I would do as a judge”
- Recall *Massachusetts v. EPA*:
  - Supreme Court held CO<sub>2</sub> is a “pollutant” under the CAA
  - Dissents were based on standing and obligation of EPA to respond to petition to compel mobile source rulemaking

## ***One case on “Article III” standing:***

- **Elements:** (1) Injury to the plaintiff (2) traceable to defendant and (3) redressible by the court
- Obama library case (*Protect Our Parks*)
- Citizen challenge to the City’s plans to cut trees and lease park property for an Obama library
- Then-Judge Barrett:
  - Plaintiffs are “concerned bystanders,” which does not entitle them to bring a federal case
  - To establish standing, the court must find “not injury to the environment but injury to the plaintiff”

## Possible *reconsideration of the Chevron doctrine*?

- 1984 Supreme Court case responding to “judicial activist” cases (air quotes)
- Deference to agency interpretations of statutes
  - *But* that increased agency power at the expense of courts
- Reducing agency deference would increase power of judges to interpret laws



Thank you!

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