

Priorities for President-elect Joe Biden's EPA

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It's been a long and dispiriting four years for the U.S. Environmental Protection Agency under President Donald Trump. There's a large measure of truth in the wry rebranding of the current agency by many observers as the anti-Environmental Protection Agency. The past four years have damaged considerably the stature and reputation of the EPA, a regulatory agency created 50 years ago by another Republican president, Richard Nixon.

President-elect Joe Biden has a unique opportunity to repair the integrity of a tarnished EPA and, more importantly, to reverse many of the misguided, unprincipled environmental policies and regulatory rollbacks the Trump administration's EPA has adopted in recent years. Here are some of the actions Biden and his newly announced EPA administrator, Michael Regan, can and should take to rehabilitate the agency's integrity and effectiveness:

Restore the EPA's traditional reliance on science in its decision-making. In the first months of the Trump administration, members of the EPA's respected Science Advisory Board were purged and replaced by individuals more politically malleable and ideologically aligned with the administration. The incoming Biden administration should quickly make personnel changes to the board that rehabilitate its integrity and traditional independent role. And that should be but the first important step in restoring sound science as a cornerstone of EPA regulatory policy.

Reestablish environmental enforcement as an EPA priority. Another cross-cutting issue on which the Biden administration should focus is environmental enforcement. Generally overlooked by the media but enormously consequential is the fact that over the past four years the Trump administration's EPA has largely turned its back on enforcing federal environmental statutes and regulations. The number of EPA-initiated enforcement proceedings has dropped precipitously over that period, as has the amount of fines and penalties collected by the agency for environmental violations. Even more cynically, in March the EPA issued a policy announcing that it would not enforce or seek penalties for noncompliance with environmental monitoring and reporting obligations -- citing the coronavirus epidemic. The Biden administration should waste no time in reversing the latter

enforcement moratorium and reestablishing environmental enforcement as an EPA priority. As President Abraham Lincoln once observed, "Without enforcement, laws are nothing more than good ideas." How true.

Restore California's ability to adopt its own, more stringent greenhouse gas emission standards for motor vehicles under the Clean Air Act. Perhaps no Trump administration environmental rollback has provoked more outrage from Californians than Trump's September 2019 announcement that he was revoking California's authority under the federal Clean Air Act to maintain its own greenhouse gas emission limits for motor vehicles -- limits more stringent than those national GHG standards imposed by the EPA. (Trump falsely tweeted that this revocation would make cars sold under the federal standard "far safer and much less expensive.") California Attorney General Xavier Becerra immediately filed suit challenging the revocation, and that litigation remains pending. But the Biden administration can quickly make the litigation moot by restoring California's independent authority to set its own GHG emission limits. In doing so, it would be déjà vu all over again: In 2008, former President George W. Bush similarly attempted to revoke California's statutory authority to establish its more aggressive vehicular GHG emission standards, only to have then-newly elected President Barack Obama reverse that decision and reinstate California's authority in the first months of his administration the following year. Biden should and likely will waste no time taking the same corrective action in early 2021. (Such a decision would have impact far beyond California's borders: The CAA expressly allows other states to "opt into" California's more stringent vehicle emission standards, and over a dozen states have done so; together with California, they represent over 40% of the U.S. motor vehicle market.)

Adopt a more balanced and protective "WOTUS" regulation under the Clean Water Act. For many years, the question of how to interpret and apply the jurisdictional limits of the federal Clean Water Act has bedeviled property owners, regulators and courts trying to determine what constitutes the "waters of the United States." No less a personage than U.S. Supreme Court Chief Justice John Roberts in 2006 urged the EPA to adopt a regulation clarifying the scope of federal regulatory authority under the CWA. After a decade of dithering, the EPA finally adopted such a regulation in 2018, in the waning days of the Obama administration. But that regulation never took effect, having been challenged by developers and property owners in court, and eventually renounced by the incoming Trump administration. Trump's EPA eventually replaced the Obama "WOTUS rule" with a far more circumscribed version, one leaving unprotected numerous wetlands and other ecologically sensitive resources. The Biden EPA should go back to the drawing board and replace the Trump WOTUS rule with one more protective of environmental values and resources.

Reverse the Trump administration's abysmal approach to (non-)regulation of toxic substances. Perhaps in no area of environmental regulation has the Trump EPA been so deficient as it has in its approach to regulation of toxic materials. It has attempted to roll back a number of toxic standards, ignored congressional mandates and deadlines to

promulgate others and, in the process, endangered public health. A particularly egregious example is the EPA's most recent regulatory misadventure: last week, the Trump administration issued a so-called "Lead and Copper Rule" that, if left in place, will delay remediation of aged lead pipes that currently deliver critical drinking water supplies to millions of Americans for up to three decades and, in some cases, indefinitely. The toxicity of antiquated, leaching lead pipes is well-known to doctors and public health officials, and is especially dangerous to children, the elderly and pregnant women. The Biden EPA should waste no time in revisiting the Trump EPA's Lead and Copper Rule, replacing it with a new regulation that is far more responsive to the urgent public health crisis presented by lead pipes that contaminate drinking water supplies. More broadly, the Biden administration should restore EPA regulation of toxic and hazardous materials to a top priority.

Make environmental justice a major focus of the Biden EPA. Presidential administrations before Trump's had given at least a nod and a wink to environmental justice concerns. The Trump administration, by contrast, has given environmental justice policies the back of its hand. The incoming Biden administration can and should make environmental justice a major theme and priority. Biden's EPA -- led by Administrator Regan, who currently leads the North Carolina Department of Environmental Quality -- is in a perfect position to do just that. Both Biden and Regan have stressed their commitment to making sure that the environmental and public health interests of minority, underserved and poor communities are prioritized by EPA and the federal government generally. (In fulfilling that commitment they would be wise to consult with environmental officials in California, which -- as in so many areas of environmental policy -- has led the nation when it comes to aggressively fostering environmental justice initiatives.)

Make climate change and GHG reduction the overarching focus of EPA environmental policy. The most encouraging environmental message from the incoming Biden administration to date is that it is committed to reversing the Trump administration's criminal neglect of national and international climate change concerns. Biden has assembled a broad-based climate change leadership team -- consisting of multiple cabinet members, former U.S. Senator and Secretary of State John Kerry, former EPA Administrator Gina McCarthy and others -- to engage on climate change issues both at home and abroad. That makes eminently good sense. Biden's EPA has a major role to play in meeting this overarching challenge, and the early signals are promising that it will.

Adopt a multifaceted strategy to revoke and replace Trump administration's anti-environmental policies comprehensively and swiftly. There's a great deal that the incoming Biden administration can do to neuter and reverse the innumerable environmental rollbacks the Trump administration has attempted. One of Trump's most egregious strategic errors has been his efforts to regulate by executive order rather than through the Administrative Procedure Act's formal rulemaking process. In many cases, courts have invalidated those legally flawed executive orders, leaving in place preexisting environmental standards; those orders that remain on the books can be revoked by new executive orders Biden should adopt

in the first weeks of his administration. In other instances, Trump's EPA has attempted to adopt "interim" or "non-final" regulations; they can similarly be nullified quickly by the incoming administration. Finally -- and most consequentially -- the state of California has led a broad coalition of other states and environmental organizations in bringing court challenges to virtually every regulation the Trump EPA has adopted to roll back federal environmental standards. Most of those cases remain pending. The Biden administration, led by the Justice Department and the EPA, should attempt to negotiate settlements of those lawsuits that incorporate the Biden administration's renunciation of the misguided Trump regulatory rollbacks. In many cases, that will be the most efficient and expeditious way to invalidate the pernicious, anti-environmental policies promulgated by the Trump administration over the past four years.

The EPA has been battered, bruised and besmirched over the past four years under the Trump administration. A great many reforms will be required to repair the damage to the agency, the nation's environment and the public interest. Those reforms cannot and will not occur overnight. But the corrective measures summarized above -- some already embraced by the incoming Biden administration -- should go a long way towards restoring the EPA's historic stature and, more importantly, protecting the nation's environment and public health. Here's wishing President-elect Biden and Administrator-designee Regan the very best of luck in doing so. □