



LEGAL PRIMER VIRTUAL CLE SERIES:
The Latest Updates Impacting the Business and
Legal Environment
April 14, 2021

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Presenters:

Lindsey Conrad Kennedy

Member, Labor & Employment

COVID-19 & Employment Law: Where Are We Now?

David A. Rockman

Member and Chair, Environmental

Environmental Policy and Regulation in 2021: The New Biden Administration and More

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Member, Data Security & Privacy

Practice Makes Perfect: A Proactive Approach to Cybersecurity

Environmental Policy and Regulation in 2021:

The Biden Administration and more

David A. Rockman

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Agenda - Overview

- The New Administration
 - Climate Change
 - Infrastructure
 - Environmental Justice
 - Environmental Enforcement
- Other Hot Topics
 - PFAS Chemicals
 - Updated Phase I Standard

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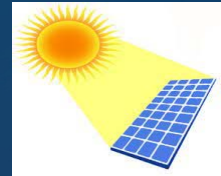
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Biden Administration Priorities

- Climate Change
 - A top-tier issue
 - Much more than a continuation of the Obama administration
 - Unprecedented whole government approach
- Racial Equity
 - Environmental Justice
 - EJ implementation questions

Climate Change – Goals

- Goals
 - 2035 – Zero carbon from electricity
 - 2050 – Net-zero carbon emissions
- Action Plan
 - Executive Orders
 - Regulations
 - Legislation?



Executive Orders – EO 13990

- January 20, 2021 Executive Order (EO 13990)
 - Review of all Trump Administration agency actions
 - Suspend/revise/rescind certain rules, including:
 - Emissions
 - Methane Emissions from Oil and Gas
 - Vehicle Emissions Standards
 - Appliance and Energy Standards
 - Hazardous Air Pollutants from coal and oil-fired plants

EO 13990 (cont.)

- Conservation/Protection
 - National Monument boundary changes
 - Arctic Wildlife Refuge protection
 - Revoke Keystone XL Permit
- Notable rules
 - Social cost of carbon
 - Science transparency
 - Waters of the United States

Climate Change – EO 14008

- January 27, 2021 EO 14008
- Climate at center of foreign policy and national security
 - Identifies several international/foreign policy actions
- Government-Wide approach
 - WH Office of Domestic Climate Policy established
 - National Climate Task Force (most of the Cabinet)

Climate Change – EO 14008 (cont.)

- Use Federal Government's buying power
 - Procurement
 - Federal Lands
 - Renewable energy focused
 - Pause on oil and gas on federal lands
- Infrastructure – sustainable focus
- Worker Empowerment
 - Civilian Climate Corp
 - Fishery resources
 - Energy communities
- Conservation – conserve 30% of land by 2030

Climate Change – Whole Gov't

- EO 13990 and 14008 mention, among others:
 - State, Treasury, Energy, Defense, Commerce, Homeland Security, Labor, Interior, Transportation, HHS, Agriculture, Education
 - Office of Management and Budget, General Services Administration
 - National Oceanic and Atmospheric Administration, Council on Environmental Quality, Environmental Protection Agency,
 - Directors of National Intelligence, Office of Science and Technology Policy
 - US Agency for International Development, US International Development Finance Corp, Millennium Challenge Corp., US Trade and Development Agency, Export-Import Bank of the US

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Climate Change – International

- International – per 1/27/21 EO
 - Rejoin Paris Accord
 - Special Presidential Envoy for Climate
 - Earth Day Virtual Leaders' Climate Summit
 - Climate finance plan
 - Assist developing countries
 - Promote capital investment sustainable > carbon
 - Push G7 and G20 countries to focus on climate



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Climate Change - Automobiles

- Federal fuel economy standards: rollback of the rollback
 - July target to address auto fuel standards
 - Reaffirm states ability to set own standards
- Electric Vehicles
 - Federal Fleet
 - Charging Infrastructure investment



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Climate Change – Possible Regulations

- “Significant Contribution Rule” vacated
- Power Plants
 - CPP v. ACE ping-pong
 - Biden admin – probably something new
- Methane emissions
 - Possible overturning of September 2020 rule that reversed Obama methane limits
 - Landfill methane rule (Trump) remanded by DC Cir.
- Nationwide Ambient Air Standards (NAAQS) vs. Sector-specific rules
 - Speed concern
- Carbon tax?

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Climates Changes @ SCOTUS

- Surviving legal challenges will be key
 - A consideration in designing any standard
- Expectations
 - Certain challenges
 - Who supports/who opposes will be interesting
 - Court skepticism
 - Anti-regulation approach
 - Exceeding scope of authority
 - Climate change in particular



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Climate Change – Social Cost of Carbon

- Government has established the “social cost of carbon”
 - Recognizes externalities of CO2 emissions
 - Attempts to quantify costs of CO2 emissions and benefits of CO2 reductions
 - Used to evaluate rule-making
 - Important in cost-benefit analysis
- Under review by the Biden administration
 - Currently “reset” to \$51/ton
 - Similar to Obama era value
 - Much higher than value under Trump

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Climate Change – Social Cost of Carbon

- Addressed in EO 13990
 - Also addresses nitrous oxide and methane
 - Establishes Interagency Working Group on the Social Cost of Greenhouse Gases
 - Publish interim SCC, SCN and SCM within 30 days
 - Publish final values by January 2022
 - Calls for Recommendations
 - Application of social cost values (9/1/21)
 - Future updating of cost values (6/1/22)
 - Methodologies for calculating values (6/1/22)

Climate Change – Social Cost of Carbon

- Plenty of room for argument:
 - Persistence of carbon in the environment
 - Impact on air and water temperatures
 - Extent of other GHG emissions in the future
 - Adaptation/Mitigation costs
 - Discount rate to present value

Climate Change – SEC and ESG

- SEC
 - Reviewing existing guidance on 2010 climate-risk disclosures
 - SEC looking at potential disclosure policies related to ESG (Environmental, Social and Governance)
 - Seeking public comments on disclosure framework
 - Task force created to address ESG disclosure violations
 - New direction vs new PR ?



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Infrastructure Goals - Examples

- Elimination of all lead pipes
- Capping orphan wells/reclaiming abandoned mines
- Retrofit two million homes and buildings
- Offshore wind
 - 30 GW by 2030 (currently less than 10 MW online)
 - Clean energy tax credits
- EV charging stations (500,000 by 2030)
 - Electrify 20% of school buses
- Resilient infrastructure

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Environmental Justice – EO 12898 (1994, Clinton)

- To the greatest extent practicable and permitted by law ... each Federal agency shall make achieving environmental justice part of its mission
 - identifying and addressing disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations ...”
- Established Interagency Working Group on Environmental Justice
- Requires federal agencies to develop strategies for addressing EJ and to conduct activities and programs so that there is no discrimination based on race, color, national origin

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Environmental Justice

- EPA defines “environmental justice” as:

the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations and policies.



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Environmental Justice

- Fair treatment: No group should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.
- Meaningful involvement:
 - Opportunity for people to participate in decisions about activities that may affect their environment and/or health
 - Decision-makers will seek out and facilitate the involvement of those potentially affected.
 - Public's contribution can influence the regulatory agency's decision
 - Community concerns will be considered in the decision-making process

Environmental Justice

- EJ focus at US EPA is intended to extend to:
 - Setting standards and promulgating regulations
 - Permitting facilities and issuing licenses
 - Making grants
 - Reviewing actions of other agencies
- EJ in Practice – Effective or Meaningful ??

Recent Initiative: EJ 2020

- Deepen EJ within EPA programs
 - Focus on rulemaking, permitting, compliance and enforcements, and science
- Work with Partners to Expand Positive Impact
 - Focus on other federal agencies, state and local governments, communities and indigenous peoples
- Demonstrate Progress
 - Lead disparities, drinking water, air quality and hazardous waste sites

Environmental Justice – 2021

- EO 14008
 - Updates 1994 EO
 - Establishes White House EJ Advisory Council and White House EJ Interagency Council
 - Requires Council on Environmental Quality to create screening and mapping tools
 - Justice40 Initiative
 - Prepare recommendations for 40% of federal investments to go to disadvantaged communities
 - Clean energy, transit, workforce development, etc.

Environmental Justice – 2021

- EO 14008
 - Directs EPA
 - Strengthen enforcement of violations with disproportionate impacts on underserved communities
 - Create a community notification program and provide real-time data
 - Directs DOJ
 - Develop comprehensive EJ enforcement strategy
 - Create office of Environmental Justice

Environmental Justice - Predictions

- What to Expect Now – Permitting:
 - Stricter scrutiny during permitting
 - Withdrawal of St. Croix refinery air permit
 - Halting of Houston-area Interstate expansion project
 - Chicago metal recycling plant relocation ?
 - US EPA objections to state issued permits more likely
 - Stricter monitoring and reporting requirements in permits
 - Easier public access to emissions/discharge data and other compliance records

Environmental Justice - Predictions

- What to Expect Now – Enforcement:
 - Enhanced enforcement
 - Citizen Suit potential
 - Public access to emissions/discharge data
- What to Expect Now – Other priorities
 - Focus on EJ community Superfund sites
 - Brownfield redevelopment grants

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EJ – Practical Tips

- Increase attention to compliance
- Awareness of publicly available information
 - Possible misinterpretation and errors
 - Increased citizen suit risk
- Understand your community
 - Who lives there/who else emits and discharges there
 - Build relationships
 - Start before there is problem
 - Proactive > Reactive

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Environmental Enforcement

- Trump Administration Enforcement Numbers
 - Criminal Prosecutions Down (half of Bush level)
 - Value of injunctive Relief – significantly reduced
 - Civil penalties - down about 40%
 - Civil referrals to DOJ – down about 50%
 - Superfund cleanup dollars – 50% lower than Obama
 - Inspections – reduced by 40-50%
- Biden Approach
 - Return to an enforcement based approach
 - Lasting impact of the Trump years?
 - Staffing, Morale and Expertise

US EPA Enforcement Priorities

- National Compliance Initiatives for 2020-2023
- Clean Air
 - Harmful Air Pollutants from Stationary Sources
 - VOCs
 - Hazardous Air Pollutants
 - Air Emissions from Hazardous Waste facilities
 - Vehicle Engine aftermarket defeat devices

US EPA Enforcement Priorities

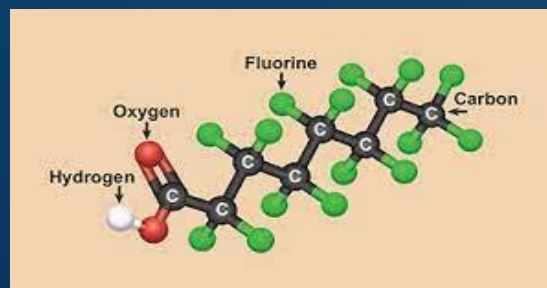
- Clean Water
 - Significant Non-Compliance from water discharge permits
 - Drinking Water Standards at community water systems
 - 7% had health-based violations in 2018
- Chemicals
 - Reducing risk of accidental releases
 - Federal Lead (Pb) Action Plan

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PFAS Chemicals

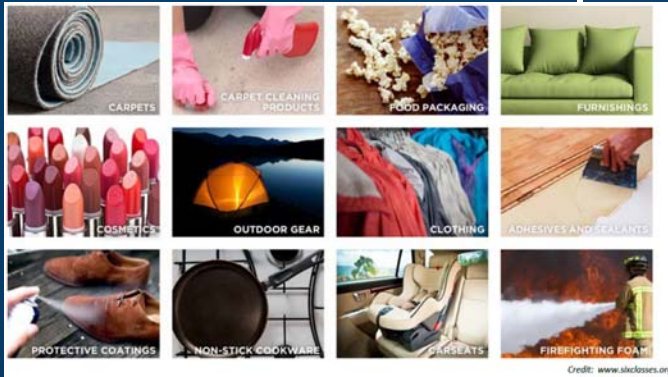
- Per- and Polyfluoroalkyl Substances (5000+)
 - PFOA – Perfluorooctanoic Acid
 - PFOS – Perfluorooctane Sulfonate



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PFAS - Uses



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PFAS Contamination

- As of January 2021, 2,337 locations in 49 states are known to have PFAS contamination.
- https://www.ewg.org/interactive-maps/pfas_contamination/



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US EPA - PFAS Action Plan

- Issued February 2019, Updated February 2020
 - Looks ahead to proposing standards, developing recommendations, making assessments, sharing information, etc.
- Practical Steps
 - Developing test methods
 - Collecting drinking water data
 - Developing cleanup recommendations
 - Guidance for wastewater permits, disposal of PFAS

Drinking Water - Federal

- 2009 – Provisional health advisories for PFOA/PFOS.
- 2013 to 2015 – Testing mandate for 6 PFAS compounds
- 2016 – Revised its exposure guidelines for PFOA and PFOS; issued new drinking-water health advisories at 70 ppt, for either chemical individually or combined.
- 2020 – Preliminary determination to regulate PFOA and PFOS for drinking water
- 2021 – Determination to regulate PFOA and PFOS in drinking water; 29 PFAS chemicals to be monitored in drinking water

State Regulations

States...

State	Drinking Water Action	Compound	Level (ppt)
California	Response Levels	PFOA	10
		PFOS	40
	Notification Levels	PFOA	5.1
		PFOS	6.5
Connecticut	Action Level	Sum of PFOA, PFOS, PFNA, PFHxS, PFHpA	70
Massachusetts	Adopted Regulation 9/16/20	Sum of PFOA, PFOS, PFNA, PFHxS, PFHpA, PFDA	20
Michigan	Adopted Regulation 8/3/20	PFOA	8
		PFOS	16
		PFNA	6
		PFHxS	51
		PFBS	420
		PFHxA	400,000
Minnesota	Health Based Guidance for Water	PFOA	35
		PFOS	15
		Surrogate of PFOS HBV	47
		GenX	370



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State Regulations

States...

State	Drinking Water Action	Compound	Level (ppt)
New Hampshire	Adopted Regulation 10/1/19	PFOA	12
		PFOS	15
		PFHxS	18
		PFNA	11
		PFNA	13
New Jersey	Adopted Regulation Adopted Regulations 6/1/20	PFOA	14
		PFOS	13
New York	Adopted Regulation 7/30/20	PFOA	10
		PFOS	10
North Carolina	Health Advisory	GenX	140
Vermont	Adopted Regulation 3/17/20	Sum of PFOA, PFOS, PFNA, PFHxS, PFHpA	20



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PFAS – Risk Levels ??

- PPT – parts per trillion
 - One drop of water in 20 Olympic sized swimming pools
 - One second in 31,000 years
- Debate over what appropriate risk levels are
 - Potential for standards to be made too conservative
 - 2019 Department of Defense letter
 - Advocates groundwater cleanup level of 380 ppt
- Challenges with ubiquity of PFAS at low levels
 - Difficult to sample
 - Present even in rain

PFAS: Hazardous Status

- TRI reporting required for 172 chemicals
- Significant advocacy for PFAS chemicals to be hazardous substances
 - January 2021 – bipartisan letter from Congress
- Less current drivers for designation of waste PFAS materials as a hazardous waste
- Either goal could be accomplished through legislation or regulation
 - Which, how many, on what basis

Hazardous Substance

- Designation as a Hazardous Substance under CERCLA
 - Would allow a CERCLA cause of action for PFAS related remedial costs
 - Also triggers CERCLA release reporting requirements
- Hazardous Waste
 - Only applies if otherwise a waste
 - Trigger full set of HW requirements
 - Broad vs. narrow listing

Hazardous Substance Designation Status

- February 2019 – EPA's Action Plan discussed designation of some PFAS chemicals as hazardous substances
- January 2021 – EPA proposal to designate two PFAS substances as hazardous substances sent to OMB. Done in an advance notice of proposed rulemaking
 - PFOA and PFOS
- New EPA Administrator Michael Regan has identified PFAS regulation as top priority

Phase I Standard Update

- Phase I Environmental Site Assessment
 - Basic due diligence before buying or leasing property
 - Site visit, interviews and database review
 - Purpose – identify RECs
 - Provides federal liability relief
- ASTM Revisions for 2021
 - Revised definitions
 - More research into adjoining properties
 - PFAS as a non-scope item

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Thank you

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