

President Biden's First Day of Environmental Initiatives

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Like a runner bursting out of the starting blocks, President Joe Biden has swiftly taken far-reaching steps to implement his agenda. The president's decisions and executive orders in just his first day in office reverse many actions taken during the past four years, and set a new course for the future. Protection of the environment has assumed a prominent place in the administration's plans. Recognizing the "converging economic, health and climate crises that have exposed and exacerbated inequities," Executive Order 13985, the president has focused on actions to simultaneously address climate change and equity concerns in ways that will revitalize the economy.

As anticipated, on his first day in office, the president gave formal notice that the United States would rejoin the Paris Agreement on climate change. This highly symbolic action combined with the appointment of former Secretary of State John Kerry as Special Presidential Envoy for Climate highlights the administration's commitment to reduce domestic greenhouse gas emissions and its intent to lead the international community in the climate arena. Efforts to meet national greenhouse gas reduction goals will likely result in proposals for new statutes or regulations addressing domestic carbon emissions. Whether the preferred legal mechanism to achieve greenhouse gas reduction will be individual facility emission limits, a cap-and-trade regime or a carbon tax remains to be seen.

Also on his first day in office, Biden issued Executive Order 13990, titled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." In light of the previous administration's characterization of climate change as a hoax, the recognition of a "climate crisis" is striking. In keeping with the president's multiple objectives, the executive order commences with a policy statement expressly referencing environmental protection, environmental justice, reliance on sound science, and creation of well-paying union jobs. The order instructs executive departments and agencies to take actions to pursue these objectives while confronting the climate crisis.

One well-publicized provision of this executive order is the revocation of the existing presidential permit for the Keystone XL Pipeline. This planned infrastructure is intended to transport tar sands oil from Alberta, Canada to refineries on the Gulf Coast. The executive order notes the Obama administration's determination that this pipeline has limited significance for energy security and runs counter to the development of a clean energy economy. The executive order reiterates the need for "a sustainable climate pathway" and to "build back better" by reducing emissions and creating jobs. One unanswered question is whether the Biden administration views this pipeline as unique. If these policies similarly cause the revocation or denial of other pipeline approvals by the Federal Energy Regulatory Commission or other agencies, the impact on energy distribution may be substantial.

The executive order likewise instructs federal agencies to suspend, revise or rescind agency actions of the prior administration through rulemaking or other lawful means. This will result in the review and possible reversal of over 100 administrative environmental and energy actions taken during the last four years. Consistent with the president's emphasis on reducing greenhouse gases, the order specifically identifies the following areas for revised regulation: reducing methane emissions in the oil and gas sector, establishing motor vehicle fuel economy standards, setting appliance and building efficiency standards, and promulgating national emission standards for hazardous air pollutants from coal and oil-fired electric utility generation. The EPA has already requested the department of Justice to seek a stay of pending litigation to afford the administration an opportunity to review regulations of the prior administration which have been challenged in court.

The executive order also takes steps to preserve environmentally and culturally sensitive areas, which may include restricting development of oil and gas reserves. These areas include national monuments at Bears Ears, Grand Staircase-Escalante, and Northeast Canyons & Seamounts Marine, where monument boundaries had been narrowed by the prior administration. Likewise, the executive order pauses oil and gas leasing activities in the Arctic National Wildlife Refuge while a comprehensive analysis of potential environmental impacts is conducted. Certain Arctic waters are also placed off limits to drilling. A review of all oil and gas leasing on federal lands is expected.

One section of the executive order addresses an important and controversial subject—how to assess the costs and benefits of a regulation. Current cost-benefit analyses are often alleged to be biased in favor of finding that the economic costs of a regulation to industry, which are frequently quantifiable, outweigh the environmental benefits of the regulation which are more difficult to quantify. When the burdens of a regulation are found to outweigh its benefits, the regulation may not be adopted, or if already in effect, the regulation may be rescinded. The executive order focuses on the need for better accounting of the social and environmental costs and benefits of reducing climate pollution.

To that end, the executive order establishes an Interagency Working Group on the Social Cost of Greenhouse Gases. The Working Group will examine the social cost of carbon, nitrous oxide and methane emissions. Among the costs to be examined are those resulting from changes to agricultural productivity, human health, property at risk of flooding and the value of ecosystem services. In a related memorandum issued on Inauguration Day, "Modernizing Regulatory Review," Biden instructed the Office of Management and Budget to recommend ways for the regulatory review process to fully account for regulatory benefits that are difficult or impossible to quantify. And the Office of Management and Budget must propose procedures to ensure that vulnerable communities are not inappropriately burdened by the recommended procedures.

While the executive order on the climate crisis requires consideration of environmental justice while addressing climate change, the new administration's intense focus on advancing equity for minority and underserved populations affected by poverty and inequality is most evident from a separate executive order also issued on Biden's first day in office. Executive Order 13985, "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," requires each agency to assess the extent to which its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups. Agencies will select programs and policies for review, identify barriers to accessing benefits and services and report on whether new policies, regulation or guidance documents may be necessary to advance equity in agency actions and programs. Efforts will be made to ensure that government contracting opportunities are made available equally, and increased engagement with community-based organizations and civil rights organizations will be pursued. The order establishes a working group to gather or aggregate data useful for measuring equity.

When implementing this executive order in the environmental arena, government agencies will need to resolve several issues not addressed explicitly by the order. The extent to which systemic changes should provide capacity building assistance to disadvantaged populations to assist them in securing the benefits of equal opportunity is unmentioned. Likewise, whether agencies should take steps to ensure similar outcomes for persons accessing opportunities offered by agencies—a discriminatory effects analysis consistent with Title VI regulations—is likewise unstated. Given the long debate over these questions, additional executive orders or other efforts to define "equity" more clearly can be anticipated.

From his first day in office, Biden has made clear his commitment to addressing the climate crisis by reducing greenhouse gases using mechanisms that will benefit disadvantaged communities and stimulate the economy. Federal agencies have been directed to do their part through regulations and other actions. And much can be achieved through their efforts. Yet to fully realize his climate goals while promoting equity and jobs, Biden will also need legislative reform. The success of his initiatives may depend on whether passing legislation is possible in our politicized Congress.

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