



## **SPECIAL SUPPLEMENT BIDEN ADMINISTRATION UPDATE: INITIAL ACTIONS AFFECTING WATER SECTOR January 29, 2021**

The Biden Administration is off and running on its environmental and regulatory agenda with several immediate moves that impact the municipal clean water sector.

### **Key EPA Political Appointees**

#### **Michael Regan, EPA Administrator**

Michael Regan has been nominated and is awaiting confirmation. If confirmed by the Senate, Regan would be the first African American man to lead the EPA. Regan has been serving as the Secretary of North Carolina's Department of Environmental Quality (DEQ) where he has focused on climate change, emerging contaminants such as PFAS and 1,4-Dioxane, and environmental justice issues. Under his leadership, DEQ negotiated an agreement with Chemours Company to stop discharging PFAS chemicals (including GenX) into the Cape Fear River, thereby protecting downstream drinking water systems.

#### **Radhika Fox, Principal Deputy Assistant Administrator, Office of Water**

[Radhika Fox](#) has been appointed as Principal Deputy Assistant Administrator to EPA's Office of Water. If nominated for the Assistant Administrator position, she will need to be confirmed by the Senate. Her past work on water issues includes serving as Chief Executive Officer of the [US Water Alliance](#) and directing policy and government affairs for the San Francisco Public Utilities Commission, which is responsible for providing water, wastewater, and municipal power services. Fox has a proven track record of finding common ground among diverse stakeholders to address water challenges and has been an avid proponent of federal water infrastructure investment.

#### **Melissa Hoffer, General Counsel**

Melissa Hoffer has been appointed Principal Deputy General Counsel ("Acting General Counsel") pending Senate confirmation. She was with the Massachusetts Attorney General's Office where she served as the Chief of the Energy and Environment Bureau. Melissa was also previously at the Conservation Law Foundation for over five years as a vice president and director of its Healthy Communities and Environmental Justice Program.

### **Regulatory Freeze on Midnight Regulations**

On January 20, the Biden Administration issued a [Regulatory Freeze Memo](#) directing federal agencies, including EPA, to delay so-called "midnight regulations" issued in the last days of the Trump administration. The Memo instructs Federal agencies to immediately:

- refrain from proposing or issuing any new rules;
- withdraw, prior to publication, any as-yet unpublished rule sent to the Office of the Federal Register (EPA's recently finalized 2021 Financial Capability Assessment for Clean Water Act Obligations falls into this category; see [below](#)); and
- for rules published in the Federal Register, but not yet effective (e.g., Lead and Copper Rule Revisions), consider delaying the effective date for 60 days from the date of the memo, while providing, in the interim and to the extent permissible, opportunities (A) for interested parties to offer additional comments or (B) for agencies to consider pending petitions for reconsideration.

## Executive Orders Issued and Revoked

President Biden **issued** and **revoked** several executive orders (EOs) that affect the sector.

### President Biden EO: Protecting Public Health, the Environment and Restoring Science to Tackle the Climate Crisis

This EO directs EPA and other agencies to immediately review and “take appropriate action” to potentially undo dozens of Trump agency actions that it deems harmful to public health and the environment. In doing so, the agencies must be guided by the following policy objectives:

- advance and prioritize environmental justice
- use the best science and be protected by processes that ensure the integrity of Federal decision-making
- ensure access to clean air and water
- limit exposure to dangerous chemicals and pesticides
- hold polluters accountable, including those who disproportionately harm communities of color and low-income communities
- bolster resilience to climate change impacts, and
- create well-paying union jobs necessary to deliver on these goals

A [fact sheet](#) issued by the Administration lists a multitude of rules from EPA and other agencies that will be subject to this review and may be repealed, revoked or modified. EPA has 30 days to develop a preliminary list of action items that could be completed by the end of 2021, and 90 days to produce a list of actions that could be completed by the end of 2025. For significant changes to rules, a notice-and-comment period would be required. Here are the rules affecting the water sector that are under review:

- Reissuance and Modification of Nationwide Permits, [86 Fed. Reg. 2744](#) (Jan. 13, 2021). This rulemaking is favorable for municipal water, wastewater, and stormwater utilities because it separates controversial oil and gas pipelines, which will continue to be covered by NWP 12, from other utility line activity. A new NWP 58 would cover utility line activities that convey water and other substances that are not covered by NWP 12 (oil/natural gas) or the new proposed NWP 57 for electric utility line and telecommunications activities. Litigation challenging coverage of oil and gas under NWP 12 rather than individual permits has the potential of invalidating NWP 12. The new NWP 58 category will avoid a potential “guilty by association” loss of coverage for public water utilities; therefore, we are hopeful the rule is not revoked.
- National Primary Drinking Water Regulations: Lead and Copper Rule Revisions, [86 Fed. Reg. 4198](#) (Jan. 15, 2021). Because there is a three-year compliance schedule under the Trump Administration’s 2021 update to the Lead and Copper Rule it is likely that the Biden Administration will modify this regulation during the next three years rather than seeking to revoke/repeal it. [See below](#).
- Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information, [86 Fed. Reg. 469](#) (Jan. 6, 2021).
- Streamlining Procedures for Permit Appeals, [85 Fed. Reg. 51650](#) (Aug. 21, 2020).
- Drinking Water: Final Action on Perchlorate, [85 Fed. Reg. 43990](#) (July 21, 2020).

### President Biden EO: Modernizing Regulatory Review

The EO requires the Office of Management and Budget to produce recommendations for improving and modernizing regulatory review. These recommendations should:

- provide concrete suggestions on how the regulatory review process can promote public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations;
- include proposals that would ensure that regulatory review serves as a tool to affirmatively promote regulations that advance these values; and
- be informed by public engagement with relevant stakeholders.

### President Trump EO 13771: Reducing Regulation and Controlling Regulatory Costs

President Biden [revoked](#) this EO that directed EPA and other agencies to identify two rules for repeal for every new rule they issue, known as the “2 for 1” order. The Biden EO says federal agencies “must be equipped with the flexibility to use robust regulatory action to address national priorities,” such as the COVID-19 pandemic, economic recovery, racial justice, and climate change, and includes EO 13771 among a list of orders Biden says “threaten to frustrate” the federal government’s ability to confront these problems.

### President Trump EO 13891: Promoting the Rule of Law Through Improved Agency Guidance Documents

This EO imposed APA-like procedural requirements before agencies could adopt significant guidance documents. It has been revoked. However, EPA promulgated a [rule](#) that is still in effect, which requires the Agency to solicit public comment on all proposed significant guidance. The rule provides that the EPA will use an [online portal to clearly identify active EPA guidance documents](#) for the public and establishes: standard elements for significant guidance documents, procedures for the EPA to enable the public to comment on proposed significant guidance documents, and procedures for the public to request that an active guidance document be modified or withdrawn.

### President Trump EO 13892: Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication

The purpose of this revoked EO was to rein in use of Guidance Documents in enforcement proceedings. The EO provided that federal agencies may not rely on or “cite” a guidance document in an enforcement action to define noncompliance without prior notice. In addition, agencies had to propose and adopt procedures that: encourage voluntary self-reporting of violations in exchange for waivers and reductions in civil penalties; encourage voluntary disclosures by regulated parties; and provide pre-enforcement rulings on request to regulated parties. The same EO also prohibited an agency from taking any action with a legal consequence without providing a pre-enforcement opportunity for the regulated entity to contest the agency’s proposed legal and factual determinations.

### EPA Requests Litigation on Trump-EPA Rules Be Stayed

On January 21, EPA sent a [letter](#) to the U.S. Department of Justice (DOJ), requesting that DOJ obtain abeyances or stays of proceedings in pending litigation seeking judicial review of any EPA regulation promulgated between January 20, 2017, and January 20, 2021, so that EPA has a chance to review the underlying rules. If an abeyance or stay is impractical, EPA wants DOJ to ask for extensions to give the agency time to conduct its review. It appears to us that the Biden Administration is only seeking to stay litigation challenging Trump Administration regulations and not lesser actions such as federal agency approvals of delegated State regulatory actions (such as EPA Regional Office approvals of State Water Quality Standards). However, interest groups challenging non-regulatory actions by the Trump Administration may also petition the Biden Administration for a review of the EPA’s litigation position.

### **Affordability Guidance**

On January 12, EPA signed a Federal Register notice finalizing its 2021 Financial Capability Assessment (FCA) for Clean Water Act (CWA) Obligations and posted a pre-publication version on its [website](#). Unfortunately, the guidance was not published in the Federal Register by January 20, so it is now subject to the Biden Administration’s regulatory freeze.

The purpose of the updated guidance is to document EPA’s commitment to consider more than median household income (MHI) when assessing a community’s financial capability to implement federally mandated infrastructure programs including POTW upgrades; control measures to address CSOs, SSOs, stormwater, and TMDLs, as well as integrated plans which consider broader community infrastructure needs and priorities, such as drinking water. For the first time in writing, EPA is expressly acknowledging the importance of considering drinking water burdens when establishing CWA compliance schedules. This is a game changer for communities with significant drinking water infrastructure needs who are contemporaneously struggling to implement a CWA compliance program.

The guidance has not been specifically called out for review by the Administration. Thus, we are hopeful that once the new leadership at the Office of Water has a chance to get up to speed, the guidance will be published. We will monitor this carefully and inform the membership if any action (such as letters of support to EPA management) is needed to facilitate finalization. Read our full analysis of the guidance [here](#).

### **Proposed UCMR 5 Includes Additional PFAS Compounds—Rule Now on Hold**

On January 15, Former Administrator Wheeler signed EPA’s [proposed Fifth Unregulated Contaminant Monitoring Rule](#) (UCMR 5), and it was subsequently submitted to the Federal Register for publication. As such, this falls into the category of not-yet published regulations sent to the Office of the Federal Register that agencies must withdraw under the Regulatory Freeze memo.

The proposed UCMR 5 requires monitoring of 29 PFAS compounds and lithium. All public water systems (PWSs) serving  $\geq 3,330$  customers (and 800 representative PWSs serving fewer than that) must collect samples for these contaminants for a 12-month period between years 2023–2025. This UCMR iteration shows that EPA is staying true to its commitment to monitor for more PFAS and at lower levels than was possible under the [UCMR 3](#).

As to the significance of rapidly increasing the number of monitored PFAS (from 6 to 29), this could have big implications for regulatory actions. From 2013–2015, EPA required approximately 5,000 PWSs to monitor for six PFAS in the UCMR 3 (2012) (PFOS, PFOA, PFNA, PFHxS, PFHpA, PFBS). The results led to the proposed [regulatory determination for PFOA and PFOS](#) issued in March 2020 for public comment. Having a more robust set of national occurrence data will result in even more intense regulatory scrutiny and pressure following the conclusion of UCMR 5 sampling. This specific rulemaking was not listed by the Biden Administration for review. With PFAS being a priority of the new administration, this rule may be modified but is expected to move forward.

**Further Drinking Water Actions.** In addition to the UCMR, note the following actions that would be withdrawn since they were not yet published in the Federal Register:

- [Regulatory Determination 4](#) – This rule’s [prepublication form](#) was signed on January 15, 2021, but was not published. It included the final regulatory determinations for contaminants on the fourth Contaminant Candidate List (CCL 4). EPA decided to regulate PFOS and PFOA in drinking water—and not 1,1-dichloroethane, acetochlor, methyl bromide (bromomethane), metolachlor, nitrobenzene, and RDX. This process would set into motion establishment of a primary drinking water regulation if continued.
- [CERCLA/RCRA Advanced Notice of Proposed Rulemaking \(ANPRM\)](#) – EPA released this [prepublication version](#) on January 14, 2021 to solicit public comments on how to regulate PFOA

and PFOS environmental contamination under CERCLA and RCRA. The notice notes that although EPA started the process of designating PFOA and PFOS as hazardous substances, “in light of EPA’s success and experience in addressing PFAS in drinking water at levels above EPA’s current health advisory, EPA is reconsidering.” EPA asked for public comment on what additional or alternate regulatory steps or authorities would be best suited and could be most appropriately tailored to address PFAS contamination in the environment.

### **Lead and Copper Rule Revisions Face Obstacles under New Administration and Recent Litigation**

EPA’s Lead and Copper Rule Revisions (LCRR) is under a microscope by the new administration and is being challenged by the NAACP and several environmental groups, which filed lawsuits in the D.C. Circuit in mid-January. The LCRR in its current form would impose a significant regulatory burden on public waters systems; if revised, it will only get more onerous.

**White House Attention.** As detailed above, on January 20, the Biden Administration took several steps to hit pause on many EPA rules and activities. EPA issued a Regulatory Freeze Memo that would give the Administration an additional 60 days to review rules that have been published but have not yet gone into effect—this would include the LCRR that was published in the Federal Register on January 15, with an effective date of March 16, 2021. The LCRR also received a specific mention in the list of the EPA Rules to be reviewed under the January 20 EO where agency heads must review environmental regulations that threaten the national policy of protecting public health and the environment.

**Environmental Lawsuits Seek to Make Strengthen the Rule.** Both the Sierra Club and Natural Resources Defense Council (NRDC) filed separate lawsuits on January 15 against the EPA, petitioning the D.C. Circuit to review the final LCRR EPA action. (NRDC’s petition clearly states that it seeks to “review and set aside” the final rule.) Newburgh Clean Water Project, NAACP, and United Parents Against Lead joined Sierra Club in its initial filing. The lawsuits were consolidated on January 25.

The Petitions for Review provide no hints as to what particular aspects of the Rule are being challenged (called “shell appeals”). While we do not currently know the details, EarthJustice, Sierra Club’s counsel, submitted comments on the EPA Science Advisory Board (SAB) Review of the Proposed LCRR that provides some insight. EarthJustice advocated for the following:

- Lowering the action level to 5 ppb from 15 ppb;
- Requiring faster lead service line (LSL) replacement;
- Mandating notice to homeowners for any detectable lead level in drinking water (separate from the 15 ppb threshold);
- Making water utilities sample all outlets used for drinking or cooking in schools/daycares; and
- Prioritizing water utility samples of school/daycares for low-income and children of color by completing an “equity in prioritization” analysis.

A lowered action level of 5 ppb stands out as a big change. Sampling every school fixture and developing an “equity in prioritization” plan would be expensive and potentially controversial.

Initial consolidation filings are currently taking place (docketing statements, statement of issues). Procedural motions are due February 24 and dispositive motions on March 11. For now, stay tuned; there is likely much more LCRR activity/debate yet to come.