

# NAVIGATING ENVIRONMENTAL POLICY IN A DIVIDED GOVERNMENT

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### **THE BIG PICTURE**

The Environmental Protection Agency ("EPA") will get lots of tough love from Congress this year, especially from House Democrats, but don't expect Congress to pass groundbreaking environmental legislation that President Trump will sign. Instead, Congress will oversee and investigate the EPA, the focus of this alert, and other federal departments, and will likely look to advance targeted environmental bills that have bipartisan support. Under this agenda, there are ongoing and significant risks and opportunities to many stakeholders. The time to engage is now.

The 116th Congress kicked off on January 3rd with a vastly different makeup and profile than the 115th. Beyond the obvious that the Democrats now control the House, the 116th Congress is younger and more diverse than the previous Congress. There are 10 newly elected senators and 101 newly elected representatives, of which 42 are women and 24 are people of color. And, at an average age of 47, the new Congress is a full decade younger than the previous Congress.

A more progressive Democratic House majority, with new committee chairmen and Nancy Pelosi (D-CA) in her second stint as Speaker, are anxious to make their mark. In the Senate, the leadership, committee chairmen and composition looks very similar to last Congress, albeit with one more Republican in the chamber. But with the Senate Republicans still holding a small majority, obtaining the 60 votes needed to proceed on bills will continue to be a challenge.

To make things even more interesting: the Iowa presidential caucus is only 12 months away. So even by Washington, D.C. standards, the 116th Congress will likely see partisan politics playing an even bigger role sooner than usual, as the partial government shutdown demonstrated.

On environmental issues, expect an active EPA with a lot of political theater in Congress. With a divided Congress, the tone of the debate and the agenda will be very different in each chamber. Expect an environmental agenda fraught with fierce oversight battles over climate change and the EPA's aggressive deregulatory agenda.

### **FULL STEAM AHEAD AT THE EPA**

Despite the election results, until the partial government shutdown occurred, the EPA was moving full steam ahead on its deregulatory agenda. The EPA's latest regulatory agenda lists 141 actions, including 25 priority actions it plans to propose or complete in the coming year. Among the most controversial are the Safer Affordable Fuel-Efficient ("SAFE") Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, which

freezes fuel economy standards at 2020 levels and revokes California's waiver; the Affordable Clean Energy Rule ("ACE"), which repeals and replaces the Clean Power Plan; and revisions to the Obama era definition of "Waters of the United States".

Beyond these headline-grabbing rules, the EPA is working on a smorgasbord of other significant actions that will impact the energy sector, health care, maritime, agriculture, chemical manufacturers, construction and development, municipalities, and many others. Of particular note, the EPA is actively considering actions to:

- Address PFAS (per- and polyfluoroalkyl substances) although the agency will not issue drinking water standards,
- Set new effluent limitations for steam power plants; and
- Implement new standards for:
  - lead and copper in drinking water,
  - coal ash disposal,
  - disposal of pharmaceuticals,
  - marine diesel engines,
  - wetlands discharge,
  - accidental release and risk management,
  - pesticide certification,
  - formaldehyde use in composite wood products, and
  - confidential business information, aka CBI claims under the Toxic Substances Control Act (TSCA).

## **PUSHBACK FROM THE NEW DEMOCRATIC HOUSE**

In the House, the key committee with primary EPA oversight responsibility, Energy and Commerce, has a new chairman, Frank Pallone (D-NJ), taking the gavel from Greg Walden (R-OR). Representative Pallone has not yet fully developed his agenda, but is moving quickly on his opening salvo. On his first day as Chairman, Pallone announced that his first committee hearing will focus on climate change, noting that it will be the first of many hearings on climate change because "there is no more pressing issue for our economy, our communities and our planet".

Chairman Pallone, along with a reconstituted select committee on climate, will hold extensive oversight hearings and investigations into efforts to rollback methane controls and Trump administration climate policies and actions to repeal the Clean Power Plan and weaken fuel economy standards, both of which the EPA hopes to issue in March. The House Science, Space and Technology Committee, led by incoming chairwoman Eddie Bernice Johnson (D-TX), is also expected to play an important oversight role in questioning the EPA on their use of science and the remake of the EPA's Science Advisory Board to include more industry-friendly voices.

Chairman Pallone will also likely convene extensive oversight hearings in an effort to slow down or derail the EPA's deregulatory train, similar to what House Republicans did in 2010, when they called on EPA Administrator Lisa Jackson and her lieutenants to testify more than once a week. In politics, turnabout is fair play and Acting EPA Administrator Wheeler and his lieutenants should expect the same treatment during the next two years. The House Democrats also will likely focus some of their oversight efforts on the EPA's most recent regulatory agenda of 147 actions, including the Waters of the U.S. rule and Mercury and Air Toxics rule, controlling emissions from power plants and the renewable fuel standards.

Democrats will also likely question the EPA on several recent policy changes, including:

- Relaxing its cost-benefit approach to make it easier for the EPA to roll back existing rules;
- Relaxing the so called "once in always in" policy that allows major source emitters to be reclassified as minor sources;
- Establishing new Superfund task force reforms which some environmental groups consider a payoff to polluters;
- Changing the delegation of authority to centralize more decision with the Administrator (i.e. 404 wetlands designations and Superfund Record of Decisions);
- Limiting the EPA's veto authority over the Corps of Engineers on dredge and fill permits;
- Reorganizing the EPA regions and research office; and
- Relaxing NEPA reviews to advance projects and permits more quickly.

## **SUPPORT FROM SENATE REPUBLICANS**

In the Senate, the Environment and Public Works ("EPW") committee has primary jurisdiction over the EPA. Senator John Barrasso (R-WY) is still the chairman, and Senator Tom Carper (D-DE) continues as the ranking member. Although Mr. Barrasso has not fully announced his committee's priorities, he is likely to continue to support the EPA's de-regulatory agenda and actions to promote coal. Mr. Carper, along with his democratic colleagues, will continue to push back, much as they did during the 115th Congress. Because three Democratic committee members, Senators Cory Booker, Kirsten Gillibrand, and Bernie Sanders are exploring a presidential run, the committee may face an unusual amount of political posturing right out of the gates.

The first test case before the committee is the confirmation fight over Acting EPA Administrator Andrew Wheeler, who has been nominated by President Trump to permanently fill the EPA's top job. On January 16, the EPW committee held a confirmation hearing to consider Mr. Wheeler's nomination, and on February 5th the committee voted along party lines to report Mr. Wheeler to the full Senate. However, the last time that he was confirmed by the Senate to become Deputy EPA Administrator, the process took six months. So, elevating Mr. Wheeler, this time to become EPA Administrator, may be similarly controversial.

## **LEGISLATIVE OPPORTUNITIES**

On the legislative front, don't expect Congress to advance nationwide climate legislation, such as the so-called "Green New Deal", a cap-and-trade program or a carbon tax. While House Democrats may try to move such

legislation, the Senate is not expected to follow suit, nor would President Trump sign such legislation. Rather than enacting broad-based climate legislation, the Democrats will likely frame other legislative actions, such as infrastructure, as a vehicle for addressing climate, and they will likely look for targeted opportunities to address the effects of climate change through funding climate adaptation — i.e., improving infrastructure to withstand extreme weather events and by advancing legislation for energy projects which reduce greenhouse gas emissions. They will also likely advance a Water Resources Development Act to authorize dredging and water-related construction projects, and similar legislation that has historically had bipartisan support.

House Democrats may also dust off the Congressional Review Act ("CRA") to try to overturn EPA deregulatory actions on climate change (and perhaps other rules — e.g., Waters of the U.S.), but only as a messaging tactic. Although the benefit of a CRA measure is that it only requires a simple majority in the Senate, Majority Leader Mitch McConnell (R-KY) is unlikely to entertain a CRA vote, and the President would certainly veto any CRA measure.

## **BUCKLE UP**

It is going to be an interesting couple of years. Even though broad climate legislation is unlikely, it is still going to be a lively 116th Congress, and environmental issues will continue to be front and center. The EPA is working on no fewer than 147 rules, many of which are deregulatory, and the new Congress is going to pay close attention to each one.

The new Democratic House committee chairmen are promising significant EPA oversight, and may even take steps to delay or completely stop the EPA from moving forward on some of the most politically charged and controversial rules, like those deregulating power plants and vehicle emissions. Chairman Pallone could become the agency's worst nightmare.

While the EPA may get a slightly better reception in the Senate with Chairman John Barrasso running the Environment and Public Works Committee, ranking committee Democrat Tom Carper will continue to be highly critical of the agency's actions. The accelerating presidential campaigns can be expected to also shine a spotlight on the EPA's activities.

As in any Congress, there will be twists and turns and events that will shape debate, so how all of the environmental issues will play out during the 116th Congress is not yet known. However, it is clear that the EPA will continue its efforts to try to relax regulations that control emissions from coal, chemical, oil and gas, utilities, mining and other carbon-based industry sectors, and it is clear that the House Democrats will push back hard. The impact of these efforts will be significant on these industry sectors. It is important that affected companies act now and make their voices heard before the EPA and Congress.

Although the 116th Congress will provide two years of political posturing and a temptation to kick the can down the road, it may also provide opportunities where legislative compromise and new regulatory proposals can happen rather quickly. This makes it even more important for interested parties to monitor the regulatory and legislative situation closely, and to watch for both threats and opportunities in Congress and the administration to help shape environmental policy and regulations.

## KEY CONTACTS



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