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Biggest Environmental Policy Actions To Watch In 2022

By Juan Carlos Rodriguez

Law360 (January 3, 2022, 12:02 PM EST) -- In 2022, the Biden administration will accelerate its efforts to achieve its environmental priorities by moving ahead with important regulations in a number of areas, from climate change and environmental justice to toxic chemicals.

The U.S. Environmental Protection Agency is poised to come out with new regulations for air pollution from power plants and vehicles, as well as for a couple of different water quality issues.

The White House has said it will issue new regulations for implementing the National Environmental Policy Act, and the Department of the Interior intends to promulgate new rules for species protection.

The U.S. Securities and Exchange Commission is getting into the climate act, and it's likely it will issue some new regulations regarding corporate disclosures.

Here are some key environmental policy areas to watch in 2022.

Climate Change

There has been a lot of talk on the climate change front over the past year, but some of the most significant actions are likely to develop in 2022.

There are currently no regulations on greenhouse gas emissions from existing power plants, due to court battles over how it should be done. The Biden administration is likely to put its own spin on this matter, which has remained a subject of debate since the Obama era.

And although new, more stringent emissions standards for cars, light trucks and heavy trucks were just implemented, the Biden administration could develop new regulations that stretch even further into the future.

Christopher A. Treanor, counsel at Akin Gump Strauss Hauer & Feld LLP, said that aside from regulation, there is already a lot of money appropriated by Congress for climate-related infrastructure projects, and if the Build Back Better budget reconciliation bill passes, there will be even more.

"A lot of private-sector clients will be looking to see where the opportunities are to find funding in order to make significant investments on emissions reductions in clean energy technologies," Treanor said.

Methane

Methane, a powerful greenhouse gas, has been the subject of increasing regulation over the past decade. Biden's administration has made finding new ways to crack down on emissions **a priority**, and while past rules have applied to new and modified oil and gas sources, a proposed rule issued in November also contains guidelines for existing sources, which are by far the largest contributor in the sector.

Jonathan Kidwell, a partner at Kirkland & Ellis LLP, said the proposal leaves much to the imagination, and the details will get worked out through the public comment process in 2022.

For now, the EPA has proposed requiring states and tribal governments to come up with their own plans to regulate the pollutant, which could lead to some tricky regulatory issues for operators.

"With any kind of rulemaking where there's potentially a patchwork with states, tribal and federal governments involved, and given the focus on pollution control technology, there will be potentially a greater impact on smaller operators," Kidwell said. "It's fair to say that one of the effects of [rules] is that it will make it more expensive to operate."

Water

Two big water rules could be coming in 2022: one defining the scope of the federal government's jurisdiction under the Clean Water Act and another establishing how states and tribes may use their authority under the law to block or stall projects.

The Trump administration rescinded and replaced an Obama-era rule defining "waters of the U.S.," a key CWA term used to determine when federal permits may be required. And the Biden administration has proposed rescinding the Trump-era rule.

That gives the EPA and Army Corps of Engineers the opportunity to craft yet another rule defining the term, one that also will likely lead to prolonged litigation and an uncertain future.

And the Biden administration has said it intends to revise the 2020 Clean Water Act Section 401 Certification Rule after determining that it erodes the authority of states and tribal authorities to block those water-based projects and act as active collaborative partners in water pollution regulation.

Chemicals

Per- and polyfluoroalkyl substances, also known as PFAS, or forever chemicals because of their longevity in the human body and environment, have been a priority for regulation at the EPA for the past two administrations.

The Biden administration has announced a multiagency, three-year strategy to begin addressing PFAS contamination, including through establishing a timeline for drinking water limits and designating some substances as a hazard under the Comprehensive Environmental Response, Compensation and Liability Act. The EPA has also said it is taking steps toward regulating PFAS as hazardous waste under the Resource Conservation and Recovery Act.

Allyson Cunningham, a partner at Lathrop GPM, said the CERCLA designation has the potential to greatly expand those potentially liable for PFAS contamination and to change the landscape on PFAS remediation.

"It is difficult to emphasize how the hazardous substance designation will explode PFAS liability across industries previously untouched by this issue," Cunningham said. "Another open question is how this designation will impact those Superfund sites where remedial actions are already underway and the possibility of new or additional remedial action being required."

Financial Disclosures

Companies are anticipating developments in how the SEC requires them to report certain climate change information, said Noah Perch-Ahern, a partner at Greenberg Glusker Fields Claman & Machtinger LLP.

He said the SEC is developing new regulations for public companies pertaining to mandatory disclosures for climate change risks and has also been enforcing misleading claims concerning emissions issues.

In addition to the SEC, Perch-Ahern said there are various federal and state regulatory regimes that govern environmental marketing materials and disclosures, and new policies and precedent will undoubtedly continue to impact the rules governing such discourse.

"Any business that is making claims or representations concerning climate change issues — including claims related to GHG emissions — needs to be aware of the panoply of federal and state rules that govern such issues, keeping an eye on quickly changing trends," Perch-Ahern said. "We should expect that, with new regulations, enforcement precedent and other evolving guidance, climate change disclosures will be a critical issue."

Species

Some major changes to the way the Endangered Species Act and Migratory Bird Treaty Act are implemented are likely coming in 2022, in reversals of Trump-era policies that were seen as less protective.

The Biden administration has already proposed rescinding two rules; one issued jointly by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service that created a formal definition for the ESA term "habitat," and a second FWS rule that gave the service the greater leeway in granting exclusions when designating critical habitat — a separate term — for animals and plants.

But the services could do more — the Trump administration also issued five other ESA rules that cover important issues such as how "habitat" and "critical habitat" are defined, and whether the same protections afforded to species listed as endangered should be granted to those listed as threatened, which denotes a less imperiled status. The Biden administration has already said it is reviewing those rules.

And since the administration revoked a Trump-era rule that curtailed the federal government's power to prosecute companies that kill federally protected migratory birds, the door is now open for a new permitting program to provide certainty for industry.

Environmental Justice

President Joe Biden established the first-ever White House Environmental Justice Advisory Council in an executive order on his first day in office and tasked it with increasing the federal government's efforts to address current and historic environmental injustice.

Brian D. Israel, a partner at Arnold & Porter Kaye Scholer LLP and chair of the firm's environmental practice group, said this administration is focused on environmental and climate justice more than any other in history and is determined to be comprehensive, concrete and effective in developing policy initiatives.

"Among other things, the Biden administration is expected to significantly ramp up environmental justice considerations in making enforcement decisions, conducting permitting reviews and allocating infrastructure spending," Israel said.

And Kerry McGrath, a partner at Hunton Andrews Kurth LLP, said that in 2022, there are likely to be several developments that would affect how environmental justice is addressed in environmental permitting, including potential revisions to the NEPA regulations that may allow for broader reviews of cumulative impacts, a revised Federal Energy Regulatory Commission policy statement on the certification of new interstate natural gas facilities that may provide specific requirements for FERC's evaluation of environmental justice impacts, and the release of a new/enhanced tool to track and monitor environmental justice communities at the EPA.

"As a result of these developments, some project proponents and agencies may have to conduct broader, more extensive efforts to address environmental justice impacts in environmental reviews for energy and infrastructure projects," she said.

--Additional reporting by Keith Goldberg, Clark Mindock and Al Barbarino. Editing by Janice Carter Brown.