

RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

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I. FLOOD CONTROL

Abrupt Reversal by EPA on Controversial Mississippi Flood Project

In an “abrupt reversal,” a hotly contested pumping plant in the lower Mississippi Delta was resuscitated under the Trump Administration.¹ In 2008, the Yazoo Backwater Area Pumps Project appeared to receive its final death knell, when the U.S. Environmental Protection Agency (EPA) determined construction and operation of the plant would harm 67,000 acres of wetlands in the Yazoo Backwater Area—an ecologically rich land near the confluence of the Yazoo and Mississippi Rivers.² But in January 2021, former-EPA Administrator Andrew Wheeler reversed course and announced that the Corps could initiate construction of the controversial

1. See Complaint at 1, *American Rivers v. EPA*, Case 1:21-cv-00097 (D.D.C. filed Jan. 12, 2021), https://www.epa.gov/sites/production/files/2021-01/documents/yazoo_complaint.pdf (hereinafter *Complaint*).

2. Yazoo Backwater Area Pumps Project, 73 Fed. Reg. 54398, 54399-400 (Sept. 19, 2008) (final determination).

flood control project.³ In response, American Rivers, the National Audubon Society, and other environmental groups filed a complaint in the U.S. District Court for the District of Columbia, challenging the EPA's "last minute decision to revoke its decisive Clean Water Act veto issued in 2008 to protect some of the richest wetland and aquatic resources in the Nation."⁴ As noted in their Complaint, the EPA has never before revoked a veto.⁵

The Clean Water Act (CWA) authorizes the U.S. Corps of Engineers (Corps) to issue permits for the discharges of dredged or fill material into the navigable waters of the United States through a permit system under Section 404 of the Act.⁶ Section 404(c) of the CWA authorizes the EPA Administrator to overrule or reject Corps-issued permits in cases where—after public notice and comment—a discharge “will have unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.”⁷ The EPA may only prohibit permits through 404(c) if it ultimately determines that an activity “will have an unacceptable adverse effect.”⁸ In short, even if the Corps initially issues a permit, the EPA maintains the right to veto the permit if the discharge will have unacceptable environmental impacts.⁹ This provision, commonly known as the EPA's “veto authority,” has only been used thirteen times since 1972.¹⁰ In the case of the Yazoo Pumps Project, the EPA's limited invocation of its veto authority may suggest, as some scholars have noted, that there was a necessity to avoid “catastrophic wetland losses.”¹¹

The Yazoo Backwater Area is home to one of the last remaining bottomland hardwood forested wetlands in the Lower Mississippi River Alluvial Valley, includes at least 250,000 acres of conservation lands that

3. *Administrator Wheeler Wraps Up Visit to Mississippi, Highlights Agricultural Partnership*, EPA (Jan. 11, 2021), <https://www.epa.gov/newsreleases/administrator-wheeler-wraps-visit-mississippi-highlights-agriculture-partnership> [<https://perma.cc/TW8K-CLZZ?type=image>].

4. Complaint, *supra* note 1, at 1.

5. *Id.* at 2.

6. 33 U.S.C. § 1344(a) (2018).

7. 33 U.S.C. § 1344(c) (2018); *see also* Complaint, *supra* note 1, at 10.

8. 33 U.S.C. § 1344(c) (2018).

9. *Id.*

10. *Clean Water Act, Section 404(c) “Veto Authority,”* EPA (last accessed Feb. 19, 2021), <https://www.epa.gov/sites/production/files/2016-03/documents/404c.pdf> [<https://perma.cc/GLD8-7CSE?type=image>].

11. Michael C. Blumm & Elisabeth Mering, *Vetoing Wetland Permits Under Section 404(c) of the Clean Water Act: A History of Inter-Federal Agency Controversy and Reform*, 33 UCLA J. ENV'T L. & POL'Y 215, 304 (2015).

supports fish and wildlife, and provides recreational opportunities to the general public.¹² The proposed pumping station, which is 14,000 cubic feet per second, would “pump surface water out of the Yazoo Backwater Area during high water events on the Mississippi River.”¹³ The decades-long Yazoo Pumps Project was first authorized by Congress in the Flood Control Act of 1941¹⁴ and has an extensive history of delays, denials, and adjustments.

The Yazoo Backwater Area Pumps Project—the largest project that the EPA has ever vetoed¹⁵—was vetoed for the twelfth time in 2008.¹⁶ On September 19, 2008, the EPA gave notice of its Final Determination to prohibit the Corps from moving forward with the project, pursuant to its authority under Section 404(c).¹⁷ The EPA determined that “the discharge of dredged or fill material associated with the construction and operation of these projects would result in unacceptable adverse effects on fishery areas and wildlife.”¹⁸

Now, the Yazoo Pumps Project debate is being revived, in part due to the devastating Yazoo backwater flooding in 2019, highlighting a familiar battle of property rights versus environmental protection.¹⁹ The Corps, along with the state of Mississippi, is insisting on completing the Yazoo Pumps Project after making changes to the 2007 Environmental Impact Statement (EIS). On April 16, 2020, the Corps announced its Notice of Intent to prepare a Supplemental Environmental Impact Statement (SEIS) for the Yazoo Backwater Area, noting that “recent floods

12. See Complaint, *supra* note 1, at 1.

13. Yazoo Backwater Area Pumps Project, 73 Fed. Reg. 54398, 54398 (Sept. 19, 2008) (final determination).

14. Flood Control Act of 1941, Pub. L. No. 77-228, 55 Stat. 638, 642-44 (authorizing the use of levees, drainage structures, and pumping stations to reduce backwater flooding).

15. *Id.* (final determination).

16. Anna Wolfe, *Controversial Decades-Old Yazoo Pump Project Included in Cochran-Led Appropriation Bill*, CLARION LEDGER (Dec. 25, 2017), <https://www.clarionledger.com/story/news/politics/2017/12/25/controversial-decades-old-yazoo-pump-project-included-cochran-led-appropriation-bill/930719001/> [<https://perma.cc/999E-Z3UV?type=image>].

17. Flood Control Act of 1941, Pub. L. No. 77-228, 55 Stat. 638, 642-44 (finding that “the discharge of dredged or fill material associated with the construction and operation of these projects would result in unacceptable adverse effects on fishery areas and wildlife.”).

18. *Id.* (“The EPA may prohibit discharges within specified areas when it determines—after notice and an opportunity for public hearing and consultation with the Corps—that there would be an ‘an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife or recreational areas.’”).

19. See Ann Dahl, *Finish the Yazoo Pumps: Fact vs. Fiction*, CLARION LEDGER (Aug. 22, 2019), <https://www.clarionledger.com/story/opinion/columnists/2019/08/22/finish-yazoo-pumps-fact-vs-fiction-mississippi-river-flooding-vicksburg-eagle-lake/2083143001/> [<https://perma.cc/5RW7-79V7?type=image>].

and new data on the environment in the Yazoo Backwater Area prompted this new project proposal.”²⁰

The Corps’ updated 2020 SEIS provides that the pumps would be moved to a new location, and re-examined the effects on Yazoo Backwater Area flooding and the impacts to wetlands.²¹ The SEIS also relied on Corps-sponsored research on soil moisture from 2019, which appears to be the data on which the SEIS’s reliability hinges.²² Former EPA Administrator Wheeler, along with Governor Tate Reeves and other state and federal leaders, went to the Corps headquarters in Vicksburg, Mississippi to announce the project approval after the SEIS outlined changes to the location and a new pump design.²³ Wheeler rationalized the reversal on the ground that “significant flooding that has caused hardship on lives and threatened property of people in the region.”²⁴ Residents and supporters of the project believe the pumps will keep backwater flooding to a height of eighty-seven feet.²⁵

However, opponents of the Yazoo Pumps Project claim this is an attempt by large landowners to increase agricultural production, which will drain the wetlands and harm “more than 450 species of birds, fish, and wildlife” that rely on the wetlands.²⁶ The lawsuit filed in January 2021 argues that the EPA’s decision to revoke the veto was arbitrary and capricious in violation of both the CWA and the Administrative Procedure Act,²⁷ and that the decision was not supported by a rational basis, nor does

20. Notice of Intent to Prepare Supplemental Environmental Impact Statement for the Yazoo Area Pump Project, 85 Fed. Reg. 21218 (Apr. 16, 2020), <https://www.federalregister.gov/documents/2020/04/16/2020-07966/notice-of-intent-to-prepare-supplemental-environmental-impact-statement-for-the-yazoo-area-pump> [<https://perma.cc/NHY7-SHBJ?type=image>].

21. U.S. ARMY CORPS OF ENG’RS DRAFT SUPPLEMENT NO. 2 TO THE 1982 AREA PUMP PROJECT FINAL ENVIRONMENTAL IMPACT STATEMENT 6 (Oct. 2020), <https://www.mvk.usace.army.mil/Missions/Programs-and-Project-Management/Project-Management/Yazoo-Backwater-Report/FileId/299705/> [<https://perma.cc/W9SP-5KP?type=image>].

22. *Id.*

23. EPA Press Release, *Administrator Wheeler Wraps Up Visit to Mississippi, Highlights Agricultural Partnership*, EPA (Jan. 11, 2021), <https://www.epa.gov/newsreleases/administrator-wheeler-wraps-visit-mississippi-highlights-agriculture-partnership> [<https://perma.cc/8XKB-RM-MC/?type=image>].

24. *Id.*, see also David Kenney, *Yazoo Pumps Project Receives Green Light After Clearing Environmental Hurdles*, WLBT, <https://www.wlbt.com/2021/01/11/yazoo-pumps-project-receives-green-light-after-clearing-environmental-hurdles>.

25. U.S. ARMY CORPS OF ENG’RS, *supra* note 21, at 6 (Oct. 2020), <https://www.mvk.usace.army.mil/Missions/Programs-and-Project-Management/Project-Management/Yazoo-Backwater-Report/FileId/299705/> [<https://perma.cc/AR6N-EP35?type=image>].

26. Complaint at 2, *American Rivers v. EPA*, No. 1:21-cv-00097 (D.D.C. Jan. 1, 2021).

27. *Id.* at 32.

it address the significant adverse effects to the environment.²⁸ The complaint also alleges that the EPA's decision should have provided an opportunity for public notice and comment.²⁹

Government approval, however, is but one hurdle for the controversial project to move forward. The project still needs federal funding.³⁰ Further, the fate of the Yazoo Pumps Project is unclear under the new presidential administration, and it remains to be seen whether the EPA under President Joe Biden will continue to defend the decision to withdraw the veto on the permit.

Alexandra Hill*

II. NUCLEAR DECOMMISSIONING

Nuclear Power Plant Decommissioning: Who Pays the Cataclysmic Price?

Amongst scientists, nuclear energy has been seen as an alternative and environmentally safer source of energy as compared to fossil fuels for generations.³¹ Many countries, including France, use nuclear energy as a primary source of power to generate electricity for its own citizens.³² There are drawbacks, however, to using this otherwise excellent source of alternative greener energy. First and foremost, the infrastructure is aging, and operators lack sufficient funds to properly shut down some of these plants. Over the course of the next decade, nuclear power plants will begin

28. *Id.* at 27-28.

29. *Id.* at 30.

30. See, e.g., Emily Wagster Pettus, *Yazoo Backwater Flood Control Project Approved: But Will It Ever Get Built?*, CLARION LEDGER (Jan. 15, 2021), <https://www.clarionledger.com/story/news/local/2021/01/16/yazoo-flood-control-project-approved-funding-lawsuits/4183702001/> [<https://perma.cc/YX8P-EWX7?type=image>].

* © 2021 Alexandra Hill, J.D. 2021, Tulane University Law School; B.A. 2014, Sociology, University of California, Berkeley.

31. MATTHEW BUNN ET AL., *THE UNCERTAIN FUTURE OF NUCLEAR ENERGY: A RESEARCH REPORT OF THE INTERNATIONAL PANEL ON FISSILE MATERIALS* (Frank von Hippel ed., 2010), <http://fissilematerials.org/library/tr09.pdf> [<https://perma.cc/EDV9-FGR5?type=image>]; Essam E. El-Hinnawi, *Review of the Environmental Impact of Nuclear Energy*, 20 IAEA BULLETIN 32 (1977), <https://www.iaea.org/sites/default/files/20205083242.pdf> [<https://perma.cc/CN6X-CZY6?type=image>].

32. *Nuclear Power in France*, WORLD NUCLEAR ASS'N (last visited Feb. 8, 2021), <https://www.world-nuclear.org/information-library/country-profiles/countries-a-f/france.aspx#:~:text=France%20derives%20about%2070%25%20of,billion%20per%20year%20from%20this> [<https://perma.cc/N94Y-MW9R?type=image>].

decommissioning at a startling rate.³³ The decommissioning of nuclear power plants is an awfully dangerous business. Certain materials can be toxic and radioactive, decimating and blighting the environment for unprecedented amounts of time.³⁴ Processes for decommissioning these nuclear hotbeds have been established by the Nuclear Regulatory Commission (NRC), providing both a wide breadth and depth of necessary protocols demarked in detail for the decommissioning of nuclear plants. However, while protocols remain clear, the NRC's formula for calculating decommissioning costs may be woefully inadequate.³⁵ Scores of plants may severely lack the true necessary funds to decommission safely and effectively. Sadly, the most likely result will be that the burden falls upon the government to clean up the waste; i.e., we, the taxpayer, will be left to pick up both the debris and the bill. Moreover, aging nuclear facilities are neither economically nor physically equipped to handle a Fukushima or Chernobyl type event, which could further push the economic and ecologic burdens upon the unsuspecting American. In 1979, we had our own taste of the issues of nuclear power plants going haywire, leaving citizens with the ever-low total of \$1 billion in repair and cleanup charges;³⁶ what a bargain!

The 1954 Atomic Energy Act (AEA) requires nuclear power plants to provide financial assurance that they have the funds to afford decommissioning expenses.³⁷ However, the AEA's formula for closing

33. *Decommissioning Nuclear Power Plants*, NUCLEAR ENERGY INST. (last updated August 2016), <https://www.nei.org/resources/fact-sheets/decommissioning-nuclear-power-plants#:~:text=Nineteen%20commercial%20reactors%20are%20in,Fort%20Calhoun%20nuclear%20power%20plants> [<https://perma.cc/4LTE-82W9?type=image>]. The NRC only gives licenses for fifty-year time periods and then short extensions; and mainly due to the low cost of other energy sources, renewal and upkeep fees, many plants are being forced to shut down. *Id.*

34. Alan Taylor, *Photos From the 1986 Chernobyl Disaster*, ATLANTIC, (June 3, 2019) <https://www.theatlantic.com/photo/2019/06/chernobyl-disaster-photos-1986/590878/> [<https://perma.cc/C6PP-53AE?type=image>]. Depending on the level of the catastrophe or leak, it can take centuries for the land to completely recover and millennia for certain radioactive grade material to stabilize. *Id.*

35. Press Release, Ed Markey Senatorial Campaign, GAO Report Finds Inadequacy, Inaccuracy in NRC Oversight of Funds to Decommission Nuclear Power Plants (May 7, 2012), <https://www.markey.senate.gov/news/press-releases/gao-report-finds-inadequacy-inaccuracy-in-nrc-oversight-of-funds-to-decommission-nuclear-power-plants> [<https://perma.cc/UK6P-EDMG?type=image>].

36. Associated Press, *14-Year Cleanup at Three Mile Island Concludes*, N.Y. TIMES (Aug. 13, 1993), <https://www.nytimes.com/1993/08/15/us/14-year-cleanup-at-three-mile-island-concludes.html> [<https://perma.cc/LD8D-KEVR?type=image>].

37. 42 U.S.C. § 2011.

cost calculations has repeatedly missed the mark.³⁸ The government has been forced to step in for emergency cases and disasters, and it may be forced to step in to fund and facilitate even the non-emergent closings of several power plants.³⁹ Furthermore, due to unprecedented changes in climate, natural disasters continue to bewilder us at dizzying speeds. The AEA and NRC's preparations and protocols failed to account for the effect of natural disasters on nuclear facilities,⁴⁰ from hurricanes' constant barrage upon the Gulf and Atlantic states, to wildfires engulfing our Pacific seaboard. Failure to adequately account for these disasters and funds continues to leave a gaping hole in the armor of legislative protection for citizens. To add icing to the cake, many nuclear power plant corporations escape liability under current corporate structures by selling operations to certain companies that "specialize" in nuclear decommissioning.⁴¹

This phenomenon is not going unnoticed; certain scholars, politicians, and corporations are beginning to take note. One answer, proposed by Tulane Law Professor Robert Sloan⁴², was to use funds from the Price-Anderson Act. Sloan's proposal will not only help generate liability for these nuclear power plant companies in the form of assurance, but it will also create a fund pool that is normally used in the wake of a natural disaster to help when companies fail to adequately decommission. Sloan and others have also suggested using different storage utilities in order to buy time until technology is further along to provide for safer and cheaper decommissioning.⁴³

One cannot help but pontificate upon an even easier answer: have the NRC ameliorate the issue by requiring higher insurance and assurance for nuclear power plant decommissioning and create some sort of insurance

38. *Pennsylvania Nuclear Decommissioning Underfunded*, THREE MILE ISLAND ALERT (last visited Feb. 8, 2021) <http://www.tmia.com/old-website/industry/fundshortfall.html> [<https://perma.cc/HB8C-D4SZ?type=image>]; Government Accountability Office, *NRC Needs More Effective Analysis to Ensure Accumulation of Funds to Decommission Nuclear Power Plants*, Report to the Honorable Edward J. Markey, House of Representatives (Oct. 2003), <https://www.gao.gov/new.items/d0432.pdf> [<https://perma.cc/UQC6-K29J?type=image>].

39. *Id.*

40. *Id.*

41. HOLTEC DECOMMISSIONING INT'L, <https://holtecinternational.com/company/divisions/hdi/> [<https://perma.cc/3J6E-3NT2?type=image>].

42. Robert Sloan, *Multinational Storage of Spent Nuclear Fuel and Other High-Level Nuclear Waste: A Roadmap for Moving Forward*, AM. ACAD. ARTS & SCI. 26-27 (2016); see also Rebecca Lordan-Perret, Robert Sloan & Robert Posner, *Decommissioning the U.S. Nuclear Fleet: Financial Assurance, Corporate Structures, and Bankruptcy*, 154 Energy Pol'y § 3 (July 2021).

43. *The Back End of the Nuclear Fuel Cycle*, UNIV. OF CHI., <https://centerinparis.uchicago.edu/events/back-end-nuclear-fuel-cycle> [<https://perma.cc/MG2H-VKTR?type=image>].

pool, akin to a health insurance system whereupon all nuclear power plants pay into the fund and if something unforeseen happens these funds are used to mop up the mess.

If Congress does not amend the AEA, or if the NRC continues to allow lower levels of assurance funds, taxpayers and citizens will pay the price threefold. The environment will suffer cataclysmic harm, people may have negative health reactions, and all shall lament as we continue to grab for our wallets.

Brian Daniel Mounce*

III. PIPELINE UPDATES

Dominion Energy and Duke Energy Cancel Construction of the Atlantic Coast Pipeline Following Years of Delays and Rising Costs

After years of legal challenges, Dominion Energy and Duke Energy (D&D) decided to cancel the Atlantic Coast Pipeline (ACP) in July, 2020.⁴⁴ The ACP was a proposed natural gas pipeline that would transport approximately 1.5 billion cubic feet per day about 600 miles from Harrison County, West Virginia, through Virginia, to Robeson County, North Carolina.⁴⁵ It was canceled due to increased costs, multiple delays, and economic uncertainty arising from various legal challenges, which had already raised the estimated costs from less than \$5 billion to more than \$8 billion.⁴⁶ The risk of continuing litigation along with other uncertainties prompted D&D to cancel the entire project instead of risking any more shareholder capital.⁴⁷

The ACP was originally proposed in 2014 in response to a lack of energy diversity throughout North Carolina and Virginia.⁴⁸ Although

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44. Press Release, Duke Energy, Dominion Energy and Duke Energy cancel the Atlantic Coast Pipeline [hereinafter Press Release] (July 5, 2020), <https://news.duke-energy.com/releases/dominion-energy-and-duke-energy-cancel-the-atlantic-coast-pipeline> [<https://perma.cc/YRS6-HE3S?type=image>].

45. DOMINION ENERGY, ATLANTIC COAST PIPELINE PROJECT OVERVIEW (Nov. 2016), archived at <https://web.archive.org/web/20170417155046/https://www.dom.com/library/domcom/pdfs/gas-transmission/atlantic-coast-pipeline/acp-pf1-project-overview.pdf> [<https://perma.cc/WL6Q-AY4K?type=image>].

46. Press Release, *supra* note 44.

47. *Id.*

48. *Id.*

D&D claimed there was a rising demand for more natural gas in this region, actual projections showed this claim was inflated, even illustrated by D&D's own Integrated Resource Plan.⁴⁹ Existing pipelines in the region could handle the projected demand, and there was no real need for a risky and expensive new pipeline.⁵⁰ Even two Federal Energy Regulatory Commissioners found no public interest for the project.⁵¹

The major obstacle for D&D, however, was to obtain permits on both the state and federal levels.⁵² These permitting challenges were largely self-inflicted by the project's design, since the proposed path ran through a national park, two national forests, and the thickly forested and steep central Appalachian mountains.⁵³ One of these permit battles even ended in the U.S. Supreme Court, where D&D actually won a major victory.⁵⁴ The issue in that case was whether the U.S. Forest Service had the authority to issue a permit for the ACP to cross the famous Appalachian Hiking Trail.⁵⁵ The Court reversed the Fourth Circuit Court of Appeals' decision, holding that although the Department of the Interior assigned *responsibility* of the land in question to the National Park Service, the land itself did not transform into land within the National Park Service, and the Forest Service thus retained the authority to issue the permit.⁵⁶

Although the Supreme Court ruled in D&D's favor, new challenges arose elsewhere.⁵⁷ In May of 2020, the U.S. District Court for the District of Montana overturned longstanding federal permitting authority for oil and gas pipeline crossings of water bodies and wetlands, which D&D feared would prompt similar challenges in the Fourth Circuit.⁵⁸ The Ninth

49. *In re* Virginia Electric and Power Company's Integrated Resource Plan filing pursuant to Va. Code § 56-597 et seq., No. PUR-2018-00065 at 7 (Va. State Corp. Comm. Dec. 7, 2018) <https://scc.virginia.gov/docketsearch/DOCS/4d5g01!.PDF> [<https://perma.cc/?type=image>].

50. SOUTHERN ENVIRONMENTAL LAW CENTER, THE CASE AGAINST THE ATLANTIC COAST PIPELINE [hereinafter SELC] (Nov. 25, 2019), https://www.southernenvironment.org/uploads/words_docs/11.25.19_Case_Against_the_ACP_Factsheet_.pdf [<https://perma.cc/7BKK-KDXD?type=image>].

51. *Id.*

52. Press Release, *supra* note 44; *see also* SELC, *supra* note 50.

53. SELC, *supra* note 50.

54. *See* U.S. Forest Serv. v. Cowpasture Preservation Ass'n, 140 S. Ct. 1837 (2020) (holding 7-2 that the U.S. Forest Service has authority to issue permits for pipeline crossings of the Appalachian Trail).

55. *Id.*

56. *Id.* at 1850.

57. Press Release, *supra* note 44.

58. *Id.*; N. Plains Res. Council v. U.S. Army Corps of Eng'rs, 460 F. Supp. 3d 1030 (D. Mont. 2020) (vacating a nationwide permit (NWP12) as it related to the construction of new oil and gas pipelines pending completion of the consultation process and compliance with all environmental statutes and regulations.)

Circuit Court of Appeals indicated that an appeal would likely be unsuccessful for that case, and D&D feared a new wave of litigation.⁵⁹ Instead of risking any more investor money and what was shaping up to be even more significant delays, they decided to cancel the project altogether.⁶⁰

The cancellation of the ACP is a major victory for many communities that would have been affected by its construction and operation, many of which would have been historically Native American and African American communities.⁶¹ It is also a victory for environmental groups and wildlife advocates since they no longer need to worry about potential leakage from this pipeline, destruction from the construction process, or the resulting harm to endangered species and other organisms. Appalachian Trail hikers are likely relieved as well since the trail probably would have been altered to build the ACP, especially after the Supreme Court's decision.

Robert Wear*

IV. POLITICS

President Biden's Inauguration and Early Executive Orders

On January 20th, 2021, Joseph R. Biden, Jr. took the oath of office and was inaugurated as the forty-sixth President of the United States. President Biden's staff indicated that he would take swift action on four crises: the COVID-19 pandemic, the economic fallout of the pandemic, racial inequity, and climate.⁶² Biden followed through by signing a flurry

59. Press Release, *supra* note 44.

60. *Id.*

61. Ryan E. Emanuel, *Flawed Environmental Justice Analyses*, Science Magazine, July 21, 2017 at 260, <https://science.sciencemag.org/content/357/6348/260.1> [<https://perma.cc/232R-CERS?type=image>]; LAKSHMI FJORD, UNION HILL HOUSEHOLD STUDY 12 (Jan. 2, 2019), https://www.southernenvironment.org/uploads/words_docs/JG04_Union_Hill_Household_Study_January_2019.pdf#page=12 [<https://perma.cc/H8HP-E9WZ?type=image>]; SARAH WRAIGHT ET AL., ENVIRONMENTAL JUSTICE CONCERNS AND THE PROPOSED ATLANTIC COAST PIPELINE ROUTE IN NORTH CAROLINA (2018) <https://www.ncbi.nlm.nih.gov/books/NBK556154/> [<https://perma.cc/3N2Z-4N4G?type=image>].

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62. Gregory Korte, *Biden Plans 10 Days of Action on Four 'Overlapping' Crises*, BLOOMBERG (Jan. 16, 2021), <https://www.bloomberg.com/news/articles/2021-01-16/biden-plans-first-day-moves-to-roll-back-trump-policies-nyt> [<https://perma.cc/2JDV-DYXB?type=image>].

of executive orders in his first days in office concerning these crises and other areas of policy concern.⁶³ In addition, the Biden administration took administrative action to begin the process of unwinding President Trump's regulatory policies.⁶⁴

In one of his first-day actions, President Biden fulfilled a campaign promise and rejoined the Paris Agreement on Climate Change.⁶⁵ The landmark agreement was originally made in 2015, more than two decades after the first major international climate agreement in Kyoto.⁶⁶ The 1992 Kyoto Protocol was, arguably, "fatally wounded" by the nonparticipation of the United States.⁶⁷ Under the Paris Agreement, each country made a specific, albeit unenforceable, commitment to reduce their greenhouse gas emissions by a certain amount.⁶⁸ If achieved, the cumulative reductions of the countries are thought to be enough to limit long-term warming of the earth to under two degrees, although even this amount is likely to cause significant sea-level rise, and experts view at least some detrimental impact to human welfare to be "locked in" already.⁶⁹ After President Trump withdrew from the Paris Agreement, a coalition of American cities announced their intention to work toward the emissions reductions independently of federal inaction.⁷⁰ Unfortunately, poor tracking and inconsistent methodologies have hampered efforts to track the cities' progress on this front and made cumulation of their contributions virtually

63. See generally *Today Explained: Biden's First 17 Actions (in 17 Minutes)*, VOX MEDIA PODCAST NETWORK (Jan. 21, 2021), <https://podcasts.apple.com/zw/podcast/bidens-first-17-actions-in-17-minutes/id1346207297?i=1000506134712>; *Today Explained: Biden's Latest 13 Actions (in 13 Minutes)*, VOX MEDIA PODCAST NETWORK (Jan. 29, 2021), <https://podcasts.apple.com/us/podcast/bidens-latest-13-actions-in-13-minutes/id1346207297?i=1000507054998>.

64. Helgi C. Walker et al., *Biden Administration Issues Rulemaking Freeze and New Orders Governing the Regulatory Process*, GIBSON DUNN (Jan. 21, 2021), <https://www.gibsondunn.com/biden-administration-issues-rulemaking-freeze-and-new-orders-governing-the-regulatory-process/> [https://perma.cc/34AM=G69C?type=image].

65. Statement on Acceptance of the Paris Agreement on Climate Change on Behalf of the United States, 2021 DAILY COMP. PRES. DOC. 49 (Jan. 20, 2021).

66. Hari Osofsky et al., Panel Discussion, *The 2015 Paris Agreement on Climate Change: Significance and Implications for the Future*, 46 ENV'T L. REP. NEWS & ANALYSIS 10267, 10268 (2016).

67. *Id.* at 10269.

68. *Id.*

69. *Id.* at 10271.

70. *One Year After Trump Decision to Withdraw from Paris Agreement, U.S. Cities Carry Climate Action Forward*, C40 CITIES (May 30, 2018), https://www.c40.org/press_releases/one-year-after-trump-decision-to-withdraw-from-paris-agreement-u-s-cities-carry-climate-action-forward [https://perma.cc/Y5V7-YWR2?type=image].

impossible.⁷¹ With reinvigorated federal leadership, ongoing efforts to mitigate climate can be bolstered, and their successes and weaknesses more comprehensively evaluated.

President Biden also revoked several executive orders that hamstrung the regulatory state.⁷² Perhaps the most controversial of these revoked orders was Executive Order No. 13771, Reducing Regulation and Controlling Regulatory Costs.⁷³ That order imposed three new restrictions on agencies exercising their regulatory authority, summarized as a “two-for-one” policy, an “offset” requirement, and an “annual cap.”⁷⁴ The “two-for-one” policy required that when an agency proposed a new regulation, it simultaneously identify two regulations to be repealed.⁷⁵ Similarly, the “offset” requirement provided that the agency estimate the cost of the new regulation, and that such cost should be offset by the savings associated with repealing regulations.⁷⁶ Finally, the order required that agencies not exceed an “annual cap” on the total costs of new regulations adopted, the amount of which (be it positive, zero, or negative) was to be set by the director of the Office of Management and Budget.⁷⁷ Although controversial, this regulation avoided legal challenge for want of a plaintiff with Article III standing.⁷⁸ The Biden administration revoked these regulations, along with other limitations on agency action (such as a budgetary restriction on discretionary agency action known as administrative PAYGO),⁷⁹ thereby unshackling the regulatory state.

71. John Schwartz, *U.S. Cities Are Vastly Undercounting Emissions, Researchers Find*, N.Y. TIMES (Feb. 2, 2021), <https://www.nytimes.com/2021/02/02/climate/cities-greenhouse-gas-emissions.html> [<https://perma.cc/S7PG-85TM?type=image>].

72. Exec. Order No. 13992, 86 Fed. Reg. 7049 (Jan. 20, 2021).

73. *See generally* 82 Fed. Reg. 9339 (Jan. 30, 2017) (revoked by Exec. Order No. 13992).

74. *California v. Trump*, No. 19-1960, 2020 WL 1643858, at *2 (D.D.C. Apr. 2, 2020).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* (dismissing challenge by California, Minnesota, and Oregon for lack of standing); *see also* *Pub. Citizen, Inc. v. Trump*, 435 F. Supp. 3d 144, 146 (D.D.C. 2019) (dismissing, after discovery, amended complaint of associations comprising “several hundred-thousand members” with “wide-ranging interests in government regulation in areas relating to consumer protection, public health and safety, the environment, and workers' rights” for lack of standing).

79. This policy requires agencies to “include one or more proposals for reducing mandatory spending whenever an agency proposes to undertake a discretionary administrative action that would increase mandatory spending.” Exec. Order No. 13893, 84 Fed. Reg. 55487 (revoked by Exec. Order No. 13992). A similar policy is imposed by statute on congressional action and is under scrutiny in the early days of the Biden Administration. *See* Sahil Kapur, *Democrats Risk Unintended Medicare Cuts if They Pass Partisan Covid Relief*, NBC NEWS (Feb. 1, 2021), <https://www.nbcnews.com/politics/congress/democrats-risk-unintended-medicare-cuts-if-they-pass-partisan-covid-n1256375> [<https://perma.cc/Y6RJ-RL52?type=image>].

President Biden further ordered agencies to begin revising the substance of environmental regulations.⁸⁰ Agencies were directed to consider “suspending, revising, or rescinding” rules that rolled back environmental protections.⁸¹ Among the actions to be reviewed are the withdrawal of a Clean Air Act waiver that allowed California to impose its own more stringent fuel economy standards.⁸² This waiver allowed California to enforce stricter fuel economy standards, and its restoration firms up the legal footing for Governor Gavin Newsom’s plan to transition the state to zero-emission vehicles.⁸³

Another executive order directed agencies to consider the impacts their own operations have on the climate and the stress that a changing climate will have on their work.⁸⁴ The order envisions a “government-wide approach to the climate crisis” and broadly describes a suite of progressive policies across many issues, such as renewable energy, fossil fuel subsidies, and investing in sustainable infrastructure at home and abroad.⁸⁵ While largely written in broad terms and general goals, two aspects of the order speak to very specific policies: first, the order establishes an interagency working group to “coordinate the identification and delivery of Federal resources to revitalize the economies of coal, oil and gas, and power plant communities,” which includes the Federal Co-Chair of the Appalachian Regional Commission, along with many cabinet officials.⁸⁶ This aspect of the order demonstrates an awareness of the disparate economic consequences that climate action may have, especially as coal-fired power becomes increasingly economically and environmentally untenable.⁸⁷ Second, the order instructs the Council on Environmental Quality to develop a plan to decarbonize the electricity

80. Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021).

81. *Id.* at 7037-38.

82. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51310-11; *see also* in re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prod. Liab. Litig., 959 F.3d 1201, 1209 n.9 (9th Cir. 2020), *petition for cert. filed* (U.S. Jan. 21, 2021) (No. 20-994) (“[Prior to the withdrawal], California was authorized to ‘adopt and enforce’ its own ‘standards relating to control of emissions from new motor vehicles.’”).

83. Emily C. Dooley & Ellen M. Gilmer, *California Zero-Emission Goal May Get Caught in EPA Waiver Fight*, BLOOMBERG L. (Sept. 24, 2020), <https://news.bloomberglaw.com/environment-and-energy/california-zero-emission-goal-may-get-caught-in-epa-waiver-fight> [<https://perma.cc/V5V8-MQZK?type=image>].

84. Exec. Order No. 14008, 86 Fed. Reg. 7619, 7621-25 (Jan. 27, 2021).

85. *Id.* at 7622.

86. *Id.* at 7628.

87. Mason Adams & Dustin Bleizeffer, *What’s Next for Coal Country?*, ENERGY NEWS NETWORK (June 23, 2020), <https://energynews.us/2020/06/23/west/whats-next-for-coal-country/> [<https://perma.cc/84J9-YXH9?type=image>].

sector and the fleet of federal vehicles by 2035, and specifically “includ[es] vehicles of the United States Postal Service.”⁸⁸ While federal government spending on vehicles is a paltry portion of the annual budget, shifting the purchasing power of the government firmly toward electric alternatives (and green technologies generally) creates powerful market incentives for firms to invest in these new technologies and ultimately make them more available and affordable for ordinary consumers.⁸⁹

Thomas Frederick*

Climate Change Provisions Tucked into COVID-19 Relief Bill

On December 21, 2020, in the final days of the 116th Congress, the legislative body authorized key environmental protection measures as part of the COVID-19 Relief Bill backed by a bipartisan group of Republicans and Democrats. While not every climate change fighting measure in the bill is certain to pass, the inclusion is a momentous shift away from the events of the last four years. The bill has “effectively creat[ed] the first significant climate change law since at least 2009.”⁹⁰

The bill provides an opportunity for the Federal Government, especially with imposed limits on refrigerants, to “signal to the rest of the world that the United States is ready to rejoin the global effort to slow the warming of the planet.”⁹¹ The bill would require the phasing down of the production and use of hydrofluorocarbons (HFCs), a greenhouse gas used as a coolant or refrigerant.⁹² While small in terms of the percentage of greenhouse gases in the atmosphere when compared to carbon dioxide, HFCs “have 1,000 times the heat-trapping potency of carbon dioxide.”⁹³ The bill was even sponsored by Republican John Kennedy of Louisiana,

88. Exec. Order No. 14008, 86 Fed. Reg. at 7624.

89. David Roberts, *A No-Brainer Stimulus Idea: Electrify USPS Mail Trucks*, VOX (Apr. 22, 2020), <https://www.vox.com/energy-and-environment/2020/4/22/21229132/usps-coronavirus-electrify-postal-trucks> [<https://perma.cc/?type=image>].

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90. Coral Davenport, *Climate Change Legislation Included in Coronavirus Relief Bill*, NY TIMES (Dec. 21, 2020), <https://www.nytimes.com/2020/12/21/climate/climate-change-stimulus.html> [<https://perma.cc/KLR6-46RT?type=image>].

91. *Id.*

92. *Id.*

93. *Id.*

representing a state with a great number of chemical manufacturing jobs.⁹⁴ Senator Kennedy commented that “to create thousands of jobs, save billions of dollars and safeguard the environment, we must invest in alternatives to HFCs.”⁹⁵ The bill additionally authorizes \$35 billion in government funds to be used toward clean energy programs over the next five years.⁹⁶ Senator John Barrasso of Wyoming celebrated the legislation as “protect[ing] both American consumers and American businesses . . . [w]e can have clean air without damaging our economy.”⁹⁷

While only a small provision, another section of the bill appropriated \$10 million for the Department of Agriculture to begin a pilot program to provide financial assistance to rural communities to further develop renewable energy.⁹⁸ Section 3104 of Title III requires that no later than September 2022, the Secretary of Interior and Agriculture to “establish national goals for renewable energy production on Federal land.”⁹⁹

President Biden signed the bill into law on March 11, 2021.¹⁰⁰ While environmental provisions have been significantly pared down, the Senate bill nevertheless represented an incredible shift in our nation’s priorities in the face of climate change. The support shown by familiar opponents of environmental protection is momentous in its own right and marks a more hopeful future in the eyes of climate change advocates.

Taylor Trumbower*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. House Amendment to the Senate Amendment to H.R. 133, 116th Cong. § 781 (2020).

99. House Amendment to the Senate Amendment to H.R. 133, 116th Cong. § 3104 (2020).

100. American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. (2021).

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