

## Biggest Environmental Regulations To Watch In 2024

By Juan-Carlos Rodriguez

*Law360 (January 1, 2024, 8:02 AM EST)* -- As President Joe Biden's term draws to a close in 2024, executive branch agencies won't slow down their efforts to finalize important environmental regulations, from new controls on greenhouse gas emissions at power plants to stricter Endangered Species Act protections and chemical standards.

The Biden administration has a host of other regulatory priorities on tap, including environmental justice measures and Clean Water Act rules.

Here are some of the biggest environmental policy actions to watch in 2024.

### Power Plant Rule

The U.S. Environmental Protection Agency in May proposed regulating GHG emissions at power plants, making the Biden administration the third in a row to attempt to get a rule on the books and through the courts. The Obama- and Trump-era regulations were lightning rods for controversy, and this one appears no different.

Close to 1.4 million comments were filed in response to the proposal, and the EPA faces a minefield of legal and technical issues on the way to delivering a final version in 2024.

The proposal focuses on reducing carbon dioxide emissions through a variety of control methods, including carbon capture and storage, low-GHG hydrogen co-firing and natural gas co-firing.

But groups like the National Rural Electric Cooperative Association said the rule would exceed the agency's authority, and relies too much on technology like CCS, which it characterized as unproven at a large scale.

On the other side of the question, the Clean Air Task Force, Natural Resources Defense Council and Nature Conservancy said the "fundamental structure" of the proposed rule is strong, but characterized the proposed standards as "modest and incremental" and urged the EPA to go further.

Tom Lorenzen, a partner at Crowell & Moring LLP, said he anticipates legal challenges to the rule if it's finalized as it was proposed. He said that under Section 111 of the Clean Air Act, rules for new and existing sources require the EPA to determine the best system of emission reduction that has been adequately demonstrated.

"The problem with the proposed rule is that two of the elements of the new source standard — low carbon hydrogen and nationwide CCS — are not yet adequately demonstrated," he said. "And that gives rise to the legal challenge, which is, can the EPA, in a rule that requires the technology to have been adequately demonstrated, anticipate that that technology will be adequately demonstrated by some date in the future?"

He said other components of the rule are on firmer ground, such as incentivizing existing fossil fuel plant retirements by offering to defer some requirements for technological upgrades if owners and operators commit to earlier closures.

"I think the thing to watch for is, do all of these elements emerge in the final rule? Or does EPA take into account the legal vulnerability of some of them and cut them out or cut them back? Because they're going to be facing potentially a new administration, and a hostile Supreme Court, one way or the other."

## **Chemicals**

Some major chemicals rules are set to be finalized in the coming year, beginning with the first-ever drinking water standards for per- and polyfluoroalkyl substances, or PFAS, which are known as "forever chemicals" due to their tendency to persist in the human body and the environment.

Regulating ethylene oxide, which is used to make antifreeze, textiles, plastics, detergents and adhesives, as well as to sterilize items including medical equipment, is also on the EPA's to-do list. In August, the EPA told a Washington, D.C., federal judge that it will finalize a rule cracking down on ethylene oxide emissions from medical device sterilizers by March 1. The rule would require new emission control measures for the 86 commercial sterilizers across the country.

The EPA has also proposed banning most uses of perchloroethylene, or PCE, a chemical solvent mainly used in dry cleaning, and for brake cleaners and adhesives, which the agency said is known to cause serious health risks like neurotoxicity and cancer.

And it wants to ban all uses of trichloroethylene, or TCE, which is used in cleaning and furniture care products, degreasers, brake cleaners and tire repair sealants. The agency said it's "an extremely toxic chemical" that's known to cause cancer, neurotoxicity and reproductive toxicity, among other things.

In 2024, the EPA is also expected to finalize a proposal banning all consumer uses and most industrial and commercial uses of methylene chloride, broadening the scope of prohibitions that were instituted during the Trump administration.

## **Clean Water Act**

In July, the EPA proposed clarifying and streamlining the process for states and Native American tribes to assume authority over the Clean Water Act's Section 404 permitting program for discharges of dredged and fill material.

The law allows states and tribes to take over the program with the federal agency's approval, but to date, only Michigan, New Jersey and Florida have gained that right.

The EPA said its proposal is intended to ease that process, but Duke McCall, a partner at Morgan Lewis &

Bockius LLP, said there are some hurdles.

"The agency's refusal to allow tribes and states to assume only parts of the Section 404 program (e.g., for only certain water bodies or types of projects), combined with continuing uncertainty and potential future changes regarding the water bodies that are [waters of the U.S.] subject to the Section 404 program, is likely to dampen the interest of tribes and states in pursuing assumption," he said.

Implementation of the EPA and U.S. Army Corps of Engineers' waters of the U.S. jurisdictional regulation will also be an issue to watch, Steven Russo, a shareholder at Greenberg Traurig LLP and co-chair of its environmental practice, said.

He said he's particularly interested in seeing whether the agencies will limit jurisdiction to instances where regulators find continuous surface connections within the wetlands, or continue to map entire wetland systems with intermittent or ephemeral connections as long as they identify a single continuous surface connection between the wetland system and a jurisdictional water body.

"Early indications are that the agencies will likely settle on an interpretation that continues to give a broad sweep to their jurisdiction over areas exhibiting wetland functions, despite the Supreme Court's desire to find a clear line of demarcation between federally regulated and non-regulated wetlands," Russo said.

### **Endangered Species Act**

ESA regulations are always contentious, and there are three rules set for finalization in 2024 that reflect some of the conflict over the past couple presidential administrations.

In June, the U.S. Fish and Wildlife Service and National Marine Fisheries Service proposed strengthening protections for plants and animals under the ESA by rolling back or revising three Trump-era regulations.

The 2019 rules that are targeted for updates include one that did away with what's known as the "blanket 4(d) rule," named after Section 4(d) of the ESA, which automatically extended protections for endangered species to threatened species. The other two targets changed regulations for listing species and designating critical habitats, and revised regulations for interagency cooperation.

The new rules are set to be finalized in 2024, but a variety of advocacy groups are urging the agencies to go back to the drawing board and finalize either more or less stringent rules.

The Center for Biological Diversity, for example, said it "strongly supports" reinstating the blanket 4(d) rule. But the National Endangered Species Act Reform Coalition, made up of industry groups including the American Farm Bureau Federation, Edison Electric Institute and National Alliance of Forest Owners, said reinstating the rule would mean the FWS is not aligned with the NMFS regarding "take" prohibitions for threatened species.

--Editing by Kelly Duncan and Alyssa Miller.