

COVID-19 Regulations and Their Effect on the Environment

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I. Introduction

The outbreak of the coronavirus disease 2019 (COVID-19) has affected citizens of the world in countless ways. Countries have taken various measures in attempt to curb the spread of the virus while also balancing the needs of the economy.¹ Throughout the world and in the United States (U.S.) particularly, many of these measures have indirect consequences that are detrimental to the environment.² President-elect Joe Biden is taking office at a unique and opportune time, as he will be in a position to lead the fight against COVID-19 while addressing and possibly reversing many of the pandemic-related choices made by the Trump administration that could have adverse effects on the environment.³ The country's response to COVID-19 and the environment are two platforms that the Biden campaign focused heavily on, so the president-elect can be expected to address the virus-related policies that affect the environment early on.⁴

This paper will discuss how the incoming presidential administration could address the changes in environmental regulations that have occurred in response to COVID-19. First, this paper will identify as a class active changes to environmental regulations that have been made due to COVID-19 under the order of an "economic emergency" and their effects on the environment. Next, it will explain the nature of the regulations and how they are enacted. Finally, this paper explores the possibilities of how the incoming presidential administration may address these policies and regulations at the start of president-elect Joe Biden's term.

¹ See Fred Pearce, *After the Coronavirus, Two Sharply Divergent Paths on Climate*, YALE ENV'T 360 (Apr. 7, 2020), <https://e360.yale.edu/features/after-the-coronavirus-two-sharply-divergent-paths-on-climate>.

² See *id.*

³ See David Malakoff, *A Biden Presidency Could Have a 'Remarkable' Impact on Science Policy—But Also Face Hurdles*, AM. ASS'N FOR ADVANCEMENT OF SCI. (Oct. 15, 2020), <https://www.sciencemag.org/news/2020/10/biden-presidency-could-have-remarkable-impact-science-policy-also-face-hurdles>.

⁴ See *id.*

II. The Policies

On March 13, 2020, President Trump declared that the US was in a state of national emergency due to the COVID-19 outbreak.⁵ The state of emergency was said to have been declared to help tackle the virus and reinforce the economy.⁶ After declaring a national emergency, a sitting president unlocks access to 123 emergency powers.⁷ Citing an economic emergency, President Trump used these emergency powers to sign an executive order on June 4, 2020, suspending environmental reviews and public comment periods for highways, pipelines, oil and gas projects, and other big infrastructure efforts, among other things.⁸ The order also allows for fast-tracking infrastructure projects.⁹

Among other concerns, the executive order disregards many of the requirements imposed by the Endangered Species Act (ESA)¹⁰ and the National Environmental Policy Act (NEPA)¹¹, regardless of the environmental impact this would create.¹² When they are followed, these acts require public input on projects that could have a significant impact on the environment, as well as a detailed examination as to how the environment may be affected if the project were to be approved.¹³ The cited reason for not requiring these standards is to help boost the economy during the pandemic by avoiding delays in job-creating projects; however, some believe it was

⁵ Proclamation No. 9994, 85 Fed. Reg. 15, 337 (Mar. 18, 2020).

⁶ *Id.*

⁷ *A Guide to Emergency Powers and Their Use*, BRENNAN CTR. FOR JUST. (Apr. 24, 2020), <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use>.

⁸ Exec. Order No. 13927, 85 Fed. Reg. 111, 35, 165 (Jun. 4, 2020).

⁹ *Id.*

¹⁰ Endangered Species Act of 1973, 16 U.S.C. § 1531 (2020).

¹¹ National Environmental Policy Act of 1969, 42 U.S.C. § 4331 (2020).

¹² See Juliet Eilperin & Jeff Stein, *Trump Signs Order to Waive Environmental Reviews For Key Projects*, THE WASH. POST (June 4, 2020), <https://www.washingtonpost.com/climate-environment/2020/06/04/trump-sign-order-waive-environmental-reviews-key-projects/>.

¹³ *Id.*

done so that the projects are not slowed by environmental laws and oversight.¹⁴ This viewpoint likely stems from the fact that President Trump had already attempted to limit the scope of these laws before the pandemic.¹⁵

Disregarding ESA and NEPA causes multiple issues, with one of the most obvious being that fast-tracking infrastructure projects essentially makes it easier for big polluters to slide past environmental review processes.¹⁶ Instead of conducting an environmental analysis, allowing for public scrutiny, and having to consider all possible project options, they may proceed with projects as long as they provide a summary report of the expedited work within thirty days.¹⁷

An executive order made by the President on May 19, 2020, furthered the power of agencies regarding these rollbacks.¹⁸ This order directs federal agency chiefs to review the regulations they have changed or paused during the pandemic crisis, such as those suspending environmental reviews, and determine which could promote economic recovery if made permanent.¹⁹ In other words, big polluters now have a way to permanently continue avoiding environmental analysis periods and public input before starting projects, so long as they can make it appear that the avoidance is economically beneficial.

Big polluters, particularly oil and gas companies, are also benefitting from pandemic-induced federal decisions by taking advantage of several government programs, including the bond buyback program.²⁰ As of September, 2020, close to sixty percent of the energy debt

¹⁴ Jeff Brady, *Trump Waives Environmental Reviews, Citing Pandemic Economic Emergency*, NAT'L PUB. RADIO (June 4, 2020), <https://www.npr.org/2020/06/04/870098279/trump-waives-environmental-reviews-citing-pandemic-economic-emergency>.

¹⁵ Eilperin, *supra* note 12.

¹⁶ Brady, *supra* note 14.

¹⁷ *Id.*

¹⁸ Exec. Order No. 13924, 85 Fed. Reg. 75720 (Nov. 25, 2020).

¹⁹ *See id.* at 75720.

²⁰ *See* Christina DeConcini & Jillian Neuberger, *Oil & Gas Win, Clean Energy Loses in U.S. Covid-19 Response*, WORLD RES. INST. (June 10, 2020), <https://www.wri.org/blog/2020/06/coronavirus-stimulus-packages-clean-energy>.

issuance from the federal government had gone to just nineteen oil and gas companies, and fifty-six oil and gas companies had issued \$99.3 billion in debt since the start of the program.²¹ This means that a significant portion of the program's money that was intended to bolster the economy during the pandemic has gone to help big oil companies.²²

Through the Coronavirus Aid, Relief, and Economic Security (CARES) Act²³, which temporarily raises the interest deduction cap and allows net operating losses to be deducted against income taxes, over thirty-five oil companies have claimed more than \$1.9 billion in tax benefits.²⁴ Occidental Petroleum Corporation alone expects a bailout of approximately \$195 million.²⁵ Additionally, after lobbying and pushback from the industry, a modification in the Main Street Lending Program now gives small and mid-sized oil companies access to the \$600 billion loan program through the Federal Reserve.²⁶ Finally, the royalty payments required of some energy companies to pay for the production of oil and gas on public lands have been cut significantly, saving some major producers in the industry millions of dollars, in addition to the other tax benefits and loans they are receiving through pandemic programs.²⁷

The combination of these various programs has benefitted big polluters in the industry significantly by discarding regulation requirements, forgiving their incredible debts, and creating more jobs in fossil fuels.²⁸ The structure of the programs and ease at which large oil companies

²¹ Lukas Ross et al., *Big Oil's \$100 Billion Bender: How the U.S. Government Provided a Safety Net for the Flagging Fossil Fuel Industry*, FRIENDS OF THE EARTH (Sept. 30, 2020), https://prismic-io.s3.amazonaws.com/bailout/1b1e1458-bbff-49bc-a636-f6cbd47a88af_Big+Oils+Billion+Dollar+Bender.pdf

²² *See id.*

²³ S. Res. 3548, 116th Cong. (2020) (enacted).

²⁴ Jennifer Dlouhy, *'Stealth Bailout' Shovels Millions of Dollars to Oil Companies*, BLOOMBERG (May 15, 2020), <https://www.bloomberg.com/news/articles/2020-05-15/-stealth-bailout-shovels-millions-of-dollars-to-oil-companies?sref=vdNmoUVL>.

²⁵ *Id.*

²⁶ Beth Gardiner, *Why COVID-19 Will End Up Harming The Environment*, NAT'L GEOGRAPHIC (June 18, 2020), <https://www.nationalgeographic.com/science/2020/06/why-covid-19-will-end-up-harming-the-environment/#close>.

²⁷ Ben Lefebvre, *Trump Administration Cuts Royalty Payments For Oil Companies*, POLITICO (May 21, 2020), <https://www.politico.com/news/2020/05/21/trump-administration-cuts-royalty-payments-for-oil-companies-273548>.

²⁸ DeConcini & Neuberger, *supra* note 20.

have benefitted from them have allowed fossil fuel companies to carry on despite any previous vulnerabilities they may have experienced pre-pandemic, all while simultaneously taking available relief away from the clean energy sector.²⁹

II. Nature of the Policies

The first two COVID-induced policies discussed —suspending environmental reviews and directing agencies to determine what rollbacks to make permanent— were made by executive order. An executive order comes directly from the president and essentially has the power of any other federal law.³⁰ The president is given the authority to issue these written orders, so long as they are lawful, by Article II of the Constitution as well as by acts of Congress.³¹

Although permission by Congress is not required for a sitting president to make an executive order, Congress does have some power to limit this authority.³² First, by using its lawmaking powers, Congress may pass contradictory legislation that can make it difficult or sometimes impossible for the order to actually be executed.³³ However, if Congress attempts to block an executive order by passing a bill to do so, the president has the power to veto that bill.³⁴ Congress would then have to block this veto in order to overturn the order.³⁵ Second, Congress may overrule an executive order if the president did not have the constitutional authority to make

²⁹ *Id.*

³⁰ *Executive Orders 101: What Are They and How Do Presidents Use Them?*, NAT'L CONST. CTR. (Jan. 23, 2017), <https://constitutioncenter.org/blog/executive-orders-101-what-are-they-and-how-do-presidents-use-them/>

³¹ *Heritage Explains Executive Orders*, THE HERITAGE FOUND., <https://www.heritage.org/political-process/heritage-explains/executive-orders>

³² *Id.*

³³ *What is an Executive Order?*, AM. B. ASS'N (Oct. 9, 2020), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order/

³⁴ *How Laws Are Made and How to Research Them*, USAGOV, <https://www.usa.gov/how-laws-are-made#:~:text=Congress%20may%20try%20to%20overturn,declare%20an%20executive%20order%20unconstitio>
nal.

³⁵ *Id.*

it in the first place.³⁶ Finally, a sitting president also has power to limit or nullify executive orders by issuing an executive order for the sole purpose of overturning an existing one.³⁷

The remaining COVID-19 policies that were discussed did not come from executive orders, but rather from federal programs. These federal programs, which are created under specific acts, are passed by Congress and then signed into law by the president.³⁸

First, it is possible for these acts to be amended while still remaining good law.³⁹ This is done by Congress proposing and enacting bills that would either supersede or alter part or all of the earlier act that is currently considered to be law.⁴⁰ This can be done by adding new provisions, removing parts of the previous act, or a combination of both.⁴¹

It is also possible for acts that are at least partially temporary, such as the CARES Act, to simply expire.⁴² If this is the case, the parts of the act that have expired, whether due to usage of funds, dates of expiration set in the act, or any other reason, can be renewed or changed via a new act.⁴³ Relief from acts may also simply expire or run out without being renewed or replaced.⁴⁴

III. How a Biden Administration May Address the Policies

There are many immediate steps that the Biden administration may take upon entering office in January of 2021 to address the COVID-19 policies that are adversely affecting the

³⁶ AM. B. ASS'N, *supra* note 33.

³⁷ *Id.*

³⁸ *The CARES Act Works for All Americans*, U.S. DEP'T OF TREASURY, <https://home.treasury.gov/policy-issues/cares>

³⁹ *Id.*

⁴⁰ Richard Beth, CRS Report For Congress: How Bills Amend Statutes, FED'N OF AM. SCIENTISTS (Aug. 4, 2003), <https://fas.org/sgp/crs/misc/RS20617.pdf>

⁴¹ *Id.*

⁴² Michelle Fox, *Beware the Covid Cliff: Here Are the CARES Act Benefits Coming To an End This Year*, CONSUMER NEWS AND BUS. CHANNEL (Dec. 4, 2020), <https://www.cnbc.com/2020/12/04/here-are-the-cares-act-benefits-coming-to-an-end-this-year.html>

⁴³ Kenn Judd & Karl Schmedders, *Why the U.S. Government Needs a New Corporate Bailout Structure— One That Doesn't Rely on Loans*, FORTUNE (Apr. 16, 2020), <https://fortune.com/2020/04/16/coronavirus-economic-impact-government-bailout-business-loans-preferred-stock/>

⁴⁴ *Id.*

environment. The most straightforward step that the administration could take would be to overrule the executive orders suspending environmental reviews for new projects and allowing agencies to make their new and potentially damaging tactics permanent. There are several routes that the administration could take to prevent the environmental hazards of the executive orders from persisting.⁴⁵ Once Biden becomes the sitting president, he will have the ability to edit or revoke these executive orders made by President Trump.⁴⁶ The other available options would be for Congress to change or nullify these executive orders by passing a new bill, or for Congress to argue that President Trump did not have the authority from Congress or the Constitution to make them, if applicable.⁴⁷

If the Biden administration wishes to keep the remainder of the executive orders intact and simply address the aspects which are harmful for the environment, the president may choose for them to be amended rather than completely nullified. For this to be the case, Congress would have to pass a new bill that alters the executive orders to the effect that big polluters would not be able to avoid environmental reviews, certain industries would not be included in the waiving of reviews, or a bill similar in nature. However, success here could be very dependent on whether or not Democrats have control of the House of Representatives and the Senate, as control of the House and Senate can play a great role in passing Biden's agenda.⁴⁸ If the Democrats do not have control of both the House and the Senate, then Biden may choose instead to use his role as sitting president to create an entirely new executive order overriding the previous ones.

⁴⁵ THE HERITAGE FOUND., *supra* note 31.

⁴⁶ *Id.*

⁴⁷ AM. B. ASS'N, *supra* note 33.

⁴⁸ Mara Liasson, *How Biden's Agenda Can Advance Without Control of the House, Senate*, NAT'L PUB. RADIO (Nov. 17, 2020), <https://www.npr.org/2020/11/17/935655825/how-bidens-agenda-can-advance-without-control-of-the-house-senate>.

As for the COVID-19 federal programs that have adverse effects on the environment, there are several different methods that the Biden administration could utilize to eliminate the environmental concerns while still maintaining any economic integrity of the programs. For any programs that might still be active by the time the Biden administration takes over, Congress can create a bill amending them to remove the environmental concerns.⁴⁹ This could be done by simply prohibiting certain sectors from accessing the emergency relief granted by the current programs.⁵⁰ By eliminating or at least conditioning assistance for fossil fuel companies and eliminating bonds of big polluters, the administration could greatly reduce the long-term environmental risks of current COVID-19 relief programs.⁵¹ As with amending the executive orders, control of the House and Senate could play a role in how this turns out.⁵²

As mentioned earlier, many of the programs, including the Main Street Lending Program, have expired on their own.⁵³ Notwithstanding any possibility that Congress could retroactively apply conditions to the bond buyback program and tax benefits already received, the Biden administration can make sure that the next bailout package does not contain the same environmentally detrimental aspects.⁵⁴ Policymakers can both create a new relief package with

⁴⁹ AM. B. ASS'N, *supra* note 33.

⁵⁰ Gregg Gelzimis, Michael Madowitz & Divya Vijay, *The Fed's Oil and Gas Bailout Is a Mistake*, AM. PROGRESS (July 31, 2020) <https://www.americanprogress.org/issues/economy/reports/2020/07/31/488320/feds-oil-gas-bailout-mistake/>.

⁵¹ Ross, *supra* note 21.

⁵² Liasson, *supra* note 48.

⁵³ *The Federal Reserve's Main Street Lending Program*, FED. RES. BANK OF BOS., <https://www.bostonfed.org/supervision-and-regulation/supervision/special-facilities/main-street-lending-program/main-street-lending-program-overview.aspx#:~:text=The%20Federal%20Reserve's%20Main%20Street%20Lending%20Program&text=All%20Main%20Street%20loan%20facilities,25%2C%202020%2C%20FAQ%20L.>

⁵⁴ *What You Need to Know About the CARES Act Bailouts*, AM. ECON. LIBERTIES PROJECT (Apr. 2020), https://static1.squarespace.com/static/5df44e0792ff6a63789b5c02/t/5e973cdcb00b992d1ceb9b50/1586969820773/Corporate+Power+Quick+Takes_1_CARES+Act+Explainer.pdf.

different lending tactics and tax benefits and condition emergency support so that relief is limited to certain industries, specific functions, companies without government support, etc.⁵⁵

Specifically, Congress can exclude any further assistance from federal relief programs to fossil fuel companies, as well as other big polluters.⁵⁶ This would prevent oil and gas companies from being bolstered by the federal government and from sliding past necessary measures meant to prevent big polluters from using an environmentally-lenient government to begin long-term infrastructure projects with adverse effects on both the environment and specific communities.⁵⁷ Additionally, it would make more relief readily available to assist the small businesses and individuals who most need financial assistance to survive the pandemic, as well as to clean energy workers.⁵⁸

IV. Conclusion

The Biden administration is entering the White House at a time that is absolutely critical for saving the economy, as well as for saving the environment. It is crucial that the administration also consider the long-term effects that any policies made due to the national emergency could inadvertently have on the environment. Particularly, the administration must look into the executive orders of President Trump regarding environmental reviews and infrastructure projects, as well as the aid of the current relief programs to see both how big polluters have benefitted from COVID-19 relief programs and how they can be prevented from these unfair advantages moving forward.

⁵⁵ *Id.*

⁵⁶ Ross, *supra* note 21.

⁵⁷ See *Trump's Corporate Bailout Spurs \$100B Fossil Fuel Borrowing Binge*, FRIENDS OF THE EARTH (Sept. 30, 2020), <https://foe.org/news/trumps-corporate-bailout-spurs-100b-fossil-fuel-borrowing-binge/>.

⁵⁸ See *id.*