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Impacts of the 2016 U.S. Election on Environmental Law, Policy, and Enforcement

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The 2016 election results will have wide-ranging impacts on the future direction of environmental law, policy, and enforcement in the U.S. With lawyers in offices around the U.S. focused on environmental and natural resource law and litigation, we help people navigate legal and business risks arising from this evolving legal landscape.

General Themes and Key Takeaways

1. Republicans will control Congress and the Executive Branch and as a result we could see environmental legislative activity – something that contrasts with the experience of the past two decades, TSCA reform notwithstanding. We do not expect dramatic actions such as repeal of the key environmental statues affecting air, water and waste. Rather, we expect targeted, focused legislative initiatives directed at specific issues Mr. Trump campaigned upon – for example, EPA's Clean Power Plan and the Waters of the U.S. Rule.

2. The Obama Administration can be expected to prioritize and promulgate a number of "Midnight Rules" ahead of the Inauguration. Examples include offshore oil and gas leasing, EPA's Accidental Release Prevention Program, and new NPDES regulations under the Clean Water Act. The Trump Administration and Congress may use the Congressional Review Act in efforts to pull back those rules.

3. The Trump Administration will appoint at least one Supreme Court Justice, and this will have a major impact on environmental laws, most notably the Clean Power Plan and the Waters of the U.S. Rule.

4. Obama Administration environmental actions taken by Executive Order, including several relating to climate change, may be reversed by President Trump without Congressional or agency action.

5. The Trump Administration may seek to change or reverse legal theories or doctrines that cut across numerous environmental laws. Examples include attacks on Chevron deference and on "regulation through consent decrees" and "regulation by guidance." The new Administration will also likely pursue far more friendly policies toward the exploration for, and

development of, coal and other fossil fuels, though market forces, such as the price of natural gas, will continue to exert their own pressures.

6. The Trump Administration may seek to shift the implementation or oversight of certain programs to federal agencies more in line with Mr. Trump's stated preferences, for example, expanding DOE authority over energy issues instead of EPA.

7. As with past changes in Presidential administrations, we do not expect significant impacts on enforcement for existing cases, but we expect to see shifts in enforcement priorities, targets and tactics over time.

8. States, localities, and NGOs will likely seek to fill any "voids" or "back-sliding" they perceive resulting from the Administration's environmental agenda, particularly relating to climate change. This could take the form of citizen suits, tort suits, and continued disclosure pressures. We may also see more extended producer responsibility legislation at the state level, and more challenges to infrastructure projects like pipelines.

9. While some environmental policy or legislative actions will take time to develop, given the Trump Administration's stated emphasis on infrastructure as a national priority, stakeholders' proposed permitting reforms for expediting construction projects may gain traction. Infrastructure projects that have been delayed may get a fresh look.

10. President Trump's expected reversal of U.S. leadership on climate change will signal a reset of U.S. international environmental priorities.

Infrastructure

President-Elect Trump's election night statement specifically called out infrastructure, above all other domestic policy concerns, as a focus of his new Administration. Despite some initial rumblings from the conservative wing of the Republican Party about more government spending, it seems likely that enough members of both parties could work with the Trump White House to pass a major infrastructure initiative. Unlike the financial stimulus bill passed in 2009 at the beginning of the Obama Administration, the volume of infrastructure investment Trump has advocated and the types of projects he has mentioned specifically will necessarily require attention to environmental and natural resources laws that govern project selection and delivery. The following substantive areas will be in play:

NEPA Reviews and Permitting

MAP-21 (The Moving Ahead for Progress in the 21st Century Act) and the FAST Act (Fixing America's Surface Transportation Act) included a great deal of new authority designed to streamline project review and approval. Expect the Trump Administration to go even further. Extending the authority to combine a Final Environmental Impact Statement (EIS) and Record of Decision to all agency National Environmental Policy Act (NEPA) reviews, not just transportation projects, is highly likely. And the Trump White House might support the inter-agency permitting committee created by the FAST Act, and extend the jurisdiction of that committee to a broader range of infrastructure projects.

CEQ Greenhouse Gas NEPA Guidance

A Trump White House Council on Environmental Quality will likely withdraw guidance on how and to what extent NEPA reviews should address greenhouse gas impacts. The new Administration may not be able to order that project sponsors not consider GHG impacts at all, but it could constrain the recommended scope of any such analysis, whether on a project-specific or planning level of analysis. The federal courts have largely written NEPA's history to date, and the handling of potential GHG impacts and application of any new federal policy will be no exception.

Government Funding of Infrastructure

The promotion of public-private partnerships (P3s) will return with a vengeance. Efforts by the Obama Administration to consolidate and streamline the process for approving federal grants supported in part by P3 investments will accelerate. A gasoline tax increase is highly unlikely, so the Trump Administration will rely heavily on P3s to avoid placing additional direct financial burdens on citizens. A Trump Administration Department of Transportation could consider tolling of new and existing highway assets a palatable option. President Trump will have to work with Congress to find the always challenging "pay-fors" to support public projects.

Selection of Infrastructure Projects

Expect an emphasis on high-profile, visible projects. LaGuardia Airport in New York City is high on any list. The new Gateway project connecting New Jersey and New York also falls in that category. Even large-scale transit projects may continue to see support. However, we anticipate a dramatic shift away from non-vehicular transportation, promotion of "livable communities," or other policies of the Obama Administration that tend to advance the transition to alternative mobility.

Also expect regulatory or policy reforms that give maximum flexibility to local and state governments to select which projects get funded and to identify highest priority projects from the policy standpoint. Expect reductions to competitive grant programs that gave the federal government decision-making authority.

Non-Transportation Infrastructure

Expect the Trump Administration to reverse policy decisions that slowed down or even cancelled major energy infrastructure projects (particularly controversial projects such as pipelines), but also continued efforts by opponents of traditional oil and gas developments to stop these projects. This again places a tremendous emphasis on expediting NEPA and permitting approval, and even standards for judicial review of challenges to these projects.

Clean Air Act and Climate Change

The most obvious immediate target for action by the Trump Administration is the Obama Administration's climate efforts. Candidate Trump questioned the science behind global warming and the Obama Administration's Climate Action Plan, vowed to withdraw the United States from the Paris Agreement, and stated that he would repeal the Clean Power Plan (CPP). We expect him to act on these initiatives, but what he will try to do, and what he can actually do, is far from certain. The Paris Agreement went into force on November 4 with the U.S. a party, and so withdrawal in theory would be governed by Article 28, which prescribes a four-year process. Dismantling the Obama Administration's greenhouse gas regulations could prove complicated because of the Supreme Court's opinion in *Massachusetts v. EPA*, and the fact that EPA made an "endangerment finding" for

power plants, which arguably compels some form of regulation. If the *en banc* DC Circuit court finds the CPP unlawful, the Trump Administration could decide not to appeal to the Supreme Court. The Trump Administration could, as long as it provided a reasoned explanation for doing so, reverse course on the legal theories that underpin the CPP in order to cut back the scope of the rule significantly. Similarly, and again, with a reasoned explanation, the new Administration could seek through notice and comment regulation to revise its carbon pollution standards for new power plants, which are also subject to litigation in the DC Circuit. Either of these administrative rulemaking processes would take significant amount of time, entailing public comment and subject to litigation challenges like any other rulemaking. Finally, if the CPP is upheld by the D.C. Circuit, the Trump Administration could appeal that decision, and could refrain from enforcement, leaving that action to NGOs and the states, many of which might also decline to enforce the CPP.

Many states, however, will pursue climate policies on their own. Notably, California's leadership has made clear that it will continue to pursue its GHG emission reduction policies. In August, the State adopted SB 32, which extends AB 32's mandate, requiring GHG emission reductions to 40% below 1990 levels by 2030. On November 8, the Democrats gained a supermajority in the State Assembly, which should make it easier for the State to pursue these policies, similar to what it did under the Bush Administration ten years ago.

The Trump Administration likely will examine numerous other air pollution regulations, some of them existing, some proposed, some in a conceptual stage pre-proposal. These include: methane emission limits for new and modified sources in the oil and natural gas industry (final rule now in litigation); similar methane standards for existing sources (information collection request finalized); revisions to the Risk Management Program regulations (at OMB for review – Congressional Review Act proceedings are likely if this rule is issued before Mr. Trump is sworn in); HFC phaseout pursuant to the Kigali amendments to the Montreal Protocol (conceptual stage); GHG regulations implementing the endangerment finding for aircraft engines (pre-proposal); and various residual risk analyses currently being undertaken by EPA. In addition, as discussed above in the general principles section, the Administration may pursue targeted revisions to the Clean Air Act, such as allowing the consideration of costs in setting National Ambient Air Quality standards, thus overruling *Lead Industries* and *American Trucking*.

More generally, we anticipate that the Trump Administration will be more averse to imposing new regulatory requirements than the Obama Administration has been. Accordingly, we would expect a slowdown in the development of updated rules, such as EPA's ongoing Residual Risk and Technology Reviews under the Section 112 MACT program. At the same time, the Trump Administration's ability to "slow walk" any new rules is constrained by the Clean Air Act, which requires that various regulations be updated on a regular cycle. We anticipate significant litigation from Sierra Club, NRDC, and other citizens' groups to compel the Administration to comply with these statutory deadlines.

Environmental Litigation and Enforcement

Under a Trump administration, it is likely that environmental citizen suits, so-called impact litigation, private toxic tort, and state enforcement actions will increase, while new federal enforcement actions may plateau somewhat. Environmental NGOs will see few if any opportunities to advance their agendas via legislative or regulatory action; as a result, they are likely to increasingly turn to the courts. In particular, we expect activist groups to rely on the citizen suit provisions contained in major federal environmental laws (such as the Clean Air Act, the Clean Water Act and the Resource Conservation and Recovery Act) to enforce compliance with those laws and to compensate for any

perceived lack of enforcement by the federal government. Over the longer term, the impact of citizen suits may be tempered as the new Administration fills judicial vacancies in the federal district and appellate courts with more conservative jurists, particularly since Senate cloture motions for judicial and administrative nominations other than the Supreme Court require only 51 votes.

Likewise, we anticipate environmental groups, some Democrat-led states and municipalities, and other well-funded litigants will try to effect environmental policy change through impact litigation – such as lawsuits seeking to address climate change through common law tort or other creative theories. In addition, private parties (with the help of sophisticated plaintiffs' lawyers) can be expected increasingly to pursue toxic tort litigation: nuisance, trespass, negligence and similar tort theories provide a vehicle for monetary or injunctive relief based on alleged pollution impacts to groundwater, drinking water and air.

With respect to enforcement, much will depend on the personnel appointed by the Trump Administration at EPA and the Justice Department. We generally expect that existing enforcement matters will not be meaningfully affected, while the number of new enforcement actions will decline somewhat compared with the height of the Obama Administration. Lower-level administrative and civil enforcement actions may be prosecuted less frequently and aggressively, whereas higher-profile criminal enforcement actions are more likely to continue apace. With regard to enforcement negotiations, we believe there will be opportunities to roll back the inclusion of a number of types of provisions favored by the Obama administration, including mitigation projects, extensive third party auditing protocols, and "Next Generation" monitoring and reporting requirements. On the enforcement policy level, we may see some shifts in EPA's National Enforcement Initiatives, particularly for the oil and gas sector. Moreover, we anticipate curtailment of EPA efforts to "regulate by enforcement".

Businesses seeking to minimize the risk of exposure to enforcement should develop, implement and maintain robust audit and compliance programs. If such programs are effective, they not only reduce risks and liabilities but also satisfy the demands and expectations of various stakeholders.

Clean Water Act

The new Administration will likely take up EPA's Clean Water Rule (also referred to as the Waters of the U.S. Rule) among high priority Clean Water Act issues. That rule re-defines the extent of the Act's jurisdiction for both the National Pollutant Discharge Elimination System (NPDES) and the U.S. Corps of Engineers' dredge and fill permitting program, expanding it to the outer boundaries of Justice Kennedy's solo concurring opinion in a 4-1-4 split of the Supreme Court in *Rapanos v. U.S*. Currently stayed and under review by the United States Court of Appeals for the Sixth Circuit (and the subject of a welter of competing reviews in numerous other federal courts), the limited portions of the Clean Water Rule that have been challenged could be re-opened by any decision by the new Administration to no longer to defend it, or settlement of the case on terms favorable to the regulated community. More fundamental changes to the Rule, which are necessary to address its basic structural defects, would require significantly revised rulemaking on remand, a new decision by the Supreme Court, or a change in the legislative language.

Other Obama-era Clean Water Act actions that bear re-evaluation in the light of a new Administration include the proposed rulemaking that would cement numerous Obama Administration interpretations into the NPDES regulations, making water quality-based permitting an exercise in which dischargers, not EPA, must bring science to the table to refute presumptions that would be built into the regulations. The comment period on this proposed rulemaking has now closed, making it a subject of

watchful waiting through the Inauguration and, if hastily adopted in that time, a subject ripe for a Congressional Review Act challenge. Similarly, an EPA proposal to treat "environmentally significant" NPDES permits that are up for renewal as proposed permits subject to primary review by EPA, rather than the already-delegated state that issued the permit, will likely be scuttled in an effort to avoid federal overreaching.

Expect a Trump EPA to revisit the Obama administration's intensified regulation of Municipal Separate Storm Sewer Systems (MS4s). Unable to develop an Effluent Limitation Guideline, and stung by a court opinion that declared the flow from such systems not to be a "pollutant" that the Agency could regulate, EPA has turned to guidance in lieu of regulations. To date, EPA has issued two major guidance documents and a raft of lesser "tools" that, if used, would result in regulatory control over MS4s that stakeholders have argued is both broader and far more demanding than anything mandated by the Clean Water Act. Slowing or reversing this "regulation by guidance" may be a trend, and would assist not just MS4s, but also all of the commercial and industrial activities that they control.

Finally, we anticipate more citizen suits under the Clean Water Act, both by environmental groups and private plaintiffs' lawyers, as they seek to rectify perceived shortfalls in federal and state regulation of discharges and to pressure EPA and state agencies on systemic issues. This trend developed with the EPA budget cuts of recent years and the new pressures on EPA resources will only encourage more of this type of litigation. We expect the recent upsurge in toxic tort suits regarding drinking water and groundwater (targeting lead and perfluorinated compounds) to continue.

Energy

The Obama Administration's energy policy was "all of the above" in name, but "some more than others" in practice. The Trump Administration likely will reemphasize development of more traditional sources of energy on federally-managed lands, including oil, natural gas, and coal, as well as less conventional fossil fuel sources. For example, President Trump likely will end the 3-year moratorium on new federal coal leasing and cease development of a Programmatic Environmental Impact Statement reviewing that program. We expect renewed efforts to promote oil and gas lease sales onshore. Adding new offshore oil and gas leasing areas such as the Atlantic and Alaska, however, may be a more complex proposition given that the Five-Year Leasing Plan intended to cover 2017-2022 might be completed before the Obama Administration departs—in any event, changes at this late stage would require the same multi-year process (including NEPA review) as the Plan itself. Nuclear energy may also receive renewed focus. Wind, solar, and other renewable energy development may no longer receive special emphasis at the White House level, particularly with expected abandonment of the Climate Action Plan, though the Republican-led government will likely remain supportive of these markets' continued growth. Recent legislative extensions of wind and solar tax credits remain in effect for the next few years. Finally, individual state interests and economic market conditions will be important factors in any future development.

Beyond the energy mix, we anticipate an uncertain fate for the many Obama Administration energy sector regulations, particularly by Interior Department agencies like the Bureau of Land Management (BLM), Bureau of Ocean Energy Management (BOEM), Bureau of Safety and Environmental Enforcement, and Office of Natural Resources Revenue. High-profile rules such as BLM's fracking rule (currently stayed in litigation), BLM's upcoming venting and flaring rule, and BOEM's forthcoming offshore air quality rule could face reversal. By contrast, new rules regarding financial assurance, royalty, valuation and measurement of production, and civil penalties may not receive immediate attention. The infrastructure environmental issue discussed elsewhere in this analysis

(NEPA, air, water, endangered species, cultural resources, etc.) also apply to many energy projects with a federal nexus. In addition, a Congress with unified control may issue a long-awaited comprehensive energy bill that has proven just out of reach in the current Congress.

Product Stewardship and Supply Chains

Product Safety, Material Restrictions, Energy Efficiency and Extended Producer Responsibility

In recent years, we have seen a modest increase in federal rulemaking and standard-setting activity relating to core product stewardship issues including product safety requirements, material restrictions and energy efficiency standards. While these initiatives do not appear to be high on the radar of the incoming Trump Administration, it is not yet clear how or to what extent changes in agency leadership or potential funding cuts would impact the direction of agencies (particularly those other than EPA) with product environmental regulatory authority. For example, the Consumer Product Safety Commission's draft Strategic plan for 2016-2020 sought to step-up the agency's involvement in voluntary safety standard development, which may be a challenge in a funding-constrained environment to the extent it remains a priority at all. Similarly, the Department of Energy has initiated but not yet finalized rulemakings for several energy efficiency standards, test procedures, and import certification requirements for certain products. If these rulemakings are not finalized in the Obama Administration's wrap-up, progress could further stall or the rulemakings could be abandoned under the new administration.

During periods of federal inactivity, we have typically seen a significant uptick in product regulatory activity among bellwether states. We anticipate, for example, that states like California, Washington, Oregon, Maryland and Vermont will continue to pursue novel approaches to product regulatory issues. State and local governments are also likely to continue with the adoption of extended producer responsibility (EPR) laws for a wide-range of consumer products and this trend could accelerate if federal environmental policy making slows under a Trump Presidency. This carries compliance challenges for product manufacturers and importers since it can lead to greater variation among state-level requirements. For many companies, it is not feasible to segregate their products for compliance with individual state initiatives, so products intended for the U.S. will likely be designed to comply with the most stringent state requirements. At the same time, NGO monitoring and company rankings organizations may scale up efforts to pressure companies to improve product and supply chain social and environmental performance.

Conflict Minerals

President-elect Trump has promised to dismantle and replace the Dodd-Frank Wall Street Reform and Consumer Protection Act, raising questions as to whether the conflict minerals provision contained in that law will survive. This provision and the Securities and Exchange Commission (SEC) implementing rule have required public companies to annually disclose to the SEC certain information on "conflict minerals" (tin, tantalum, tungsten and gold), including whether such minerals may have originated in the Democratic Republic of Congo (DRC) or an adjoining country. Mr. Trump does not appear to have spoken directly about conflict minerals, but this provision may be "along for the ride" in wide-scale amendments or a full repeal of Dodd-Frank. In addition, while human rights-related initiatives have historically enjoyed bipartisan support in Congress, the conflict minerals provision and SEC rule have been widely criticized for imposing significant costs on businesses with little evidence of "on the ground" improvement in the DRC.

Any action by Mr. Trump with respect to Dodd-Frank will not likely impact conflict minerals disclosure obligations prior to the next reporting deadline of May 31, 2017. Accordingly, companies subject to these requirements (or in the supply chain of such companies) should continue to implement their conflict minerals inquiries and due diligence efforts for the current reporting year. In the meantime, we will continue to monitor the scope and potential impact of Mr. Trump's emerging policy proposals relating to Dodd-Frank. Even if the U.S. Congress ultimately repeals conflict minerals due diligence and disclosure obligations, many companies will continue to face private sector and NGO pressure to maintain programs for responsible mineral sourcing in support of the emerging EU conflict minerals initiative as well as downstream company "conflict-free" goals and expectations.

Endangered Species Act (ESA)

Activities under the ESA reached a fever pitch under the Obama Administration. The U.S. Fish & Wildlife Service (FWS/Service) issued far-reaching regulations and guidance on virtually every key aspect of the statute, settled a steady stream of lawsuits with environmental groups, and listed new species at a near-record pace. The Trump Administration will almost certainly scale back that activity, and a Republican-controlled Congress could take up ESA reform. The likelihood remains high, however, that the ESA will continue to play a major role in industrial and project development activities over the next four years.

It is reasonable to expect that the Trump FWS will discontinue work on many of the regulatory and policy proposals currently in development if not finalized before Inauguration Day and try to put the brakes on new listing decisions. That could well mean that species like the lesser prairie chicken will remain unlisted, and that the Service could scrap its recently-issued 2017 ESA National Listing Work Plan, which establishes a schedule for making listing decisions on 362 new species by 2023. But it almost guarantees that environmental groups will move forward with their planned lawsuit against FWS for failing to make timely listing decisions on 417 other species. It is difficult to imagine that suit resulting in anything other than a court order imposing deadlines on the Service for making those decisions irrespective of who holds the agency's reigns. And barring legislative intervention of some sort, which is conceivable but far from assured, a flood of new species listing decisions similar to that seen under the Obama Administration appears to be on the horizon.

Therefore, stakeholders should prepare for continued impacts from the ESA, comment on proposals that may affect their interests, and take steps to minimize their exposure to species-based restrictions that can delay and even bar their activities.

Occupational Safety and Health

The federal Occupational Health and Safety Administration (OSHA) inspects only about half the states. The new Administration will not likely impact ongoing federal OSHA enforcement actions, and we expect new OSHA enforcement of existing requirements to continue, though cuts to OSHA funding may reduce enforcement. OSHA will likely extend or drop certain ongoing rulemaking initiatives. For example, OSHA's planned revision of the process safety management (PSM) standard, driven by a presidential executive order, will not likely proceed to the proposed rule stage for some years, if ever. Accordingly, OSHA will not likely apply the PSM standard to oil and gas well drilling or servicing operations by repealing the current PSM exemption for that industry. OSHA may place a greater emphasis on voluntary programs, such as the Voluntary Protection Program.

EPA may promulgate a final rule amending its Accidental Release Prevention Program requirements, EPA's counterpart to the PSM standard under the Clean Air Act, before the end of the Obama

Administration. If not published before January 20, the new OMB may require additional review. If published by January 20 but before taking effect, the Trump Administration may seek to rescind and reconsider the rule.

Toxic Substances Control Act (TSCA)

The recent amendments to TSCA contain strict implementation deadlines and quotas for EPA actions. Moreover, the amendments passed with virtual unanimity in both Houses of Congress. Thus, we expect EPA implementation of the amended TSCA to continue apace given the Agency's obligations. If that does not happen, NGOs will bring citizen suits against EPA for missing statutory deadlines. New state restrictions on chemicals in products may emerge if states perceive EPA's implementation of the amended TSCA as ineffective or slow.

Affected stakeholders should continue to watch for controversial EPA interpretations of the amended TSCA, as they may find it easier to challenge such interpretations in the new Administration. Likewise, since EPA now has stricter standards for consideration of the best available science and basing decisions on the weight of scientific evidence, stakeholders may have more opportunity to advocate with EPA based on scientific arguments.

Pesticides & Biotechnology

The pesticide statutory framework implemented by EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Federal Food, Drug, and Cosmetic Act (FFDCA) has been stable since the passage of the Food Quality Protection Act two decades ago and we expect it to continue largely as is. That said, potentially significant EPA budget cuts could impact and complicate the day-to-day operation of the FIFRA regulatory program. Other federal statutes or regulatory programs with significant impacts on pesticide regulation, such as the ESA and its implementing regulations, will more likely receive early attention under the new administration. The potential for ESA reform ties closely to NGO agendas, as NGO lawsuits to try to force anti-pesticide action will likely intensify absent legislative reform that diminishes such litigation opportunities. We will continue to provide close guidance to clients in connection with these possible developments, as well as any other realignments or budgetary actions that may impact pesticide registration resources and schedules or the protection of innovating companies' interests.

We also will continue to closely assess EPA enforcement trends and policies, together with actions by state pesticide agencies, local government authorities, or NGOs, all of whom may seek to step in when they perceive the federal government is not regulating to their tastes.

We do not anticipate major shifts in the ongoing efforts by EPA, FDA, and USDA to modernize the coordinated framework for biotechnology, but we will carefully assess the continued work to modernize federal biotechnology regulation and evaluating the implications of any broader reforms to NEPA or other related regulatory actions that could impact biotech approvals more broadly.

Resource Conservation & Recovery Act (RCRA)

Although hazardous waste regulation under RCRA has generally been much less of a political issue than other types of environmental regulation, the new Administration may lead to some significant changes in this area. For example, the EPA Administrator recently signed a final rule that completely overhauls the requirements for all generators of hazardous wastes. The new political landscape may

offer new avenues for blocking or modifying certain highly controversial aspects of the rule. The new Administration may also shift enforcement priorities in the hazardous waste area. However, enforcement initiatives by certain states, such as California, against non-traditional hazardous waste generators outside of the manufacturing sector will likely continue.

Legacy Contamination & Remediation - CERCLA and Brownfields

Little attention was devoted to environmental remediation during the presidential campaigns. In the short term, clean-up under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and associated EPA policies may continue without formal change. We expect current enforcement to continue and remain focused on having responsible parties pay for cleanup and EPA's costs, more frequent use of removal action authority, and closing out sites that are currently in progress. However, EPA's plans to support more community engagement may stall, as may portions of Brownfields redevelopment support. Over time, however, we may see gradual change in EPA policy and practices, reflecting reduced EPA funding and a potential willingness by EPA leadership to revisit policies that inform which sites get attention and risk assessment and abatement.

With funding cuts, we may see an even greater emphasis on the use of administrative order authority and similar tools providing relatively few procedural protections for responsible parties. EPA might address a smaller pool of new sites, in effect deferring more to states with strong clean-up programs. For states that lack clean-up programs and typically refer enforcement to EPA, federal backup may become more selective and generally less available. Watch the area of natural resource damage (NRD) claims: on the one hand, NRD activity may decrease along with other environmental programs; on the other hand, such damages may be attractive to agencies facing budget cuts as a potential source of funding.

Questions also remain about whether, with reduced funding, EPA will still provide influential chemical screening values for use in risk assessment. Portions of the debate over "how clean is clean" and what constitutes due care concerning legacy contamination might shift more to state and judicial forums. Private litigation over remediation may increase, and we can expect private transactions to continue to drive the timing of many environmental investigations and some remediation activity and disputes.

International Environmental Agreements

The Trump Presidency will likely prompt a reset of U.S. environmental policies and priorities at the international level.

Among President Obama's most significant diplomatic achievements are several international accords and initiatives to combat climate change, including the Paris Agreement and the Kigali Amendment to the Montreal Protocol. Under a Trump Administration, U.S. participation and leadership across a range of multilateral environmental agreements is subject to change. In the case of the Paris Agreement, it is possible that the United States will withdraw its acceptance, threatening the future of the Agreement.

More than 190 nations adopted the Paris Agreement in December 2015 at the twenty-first session of the Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC). Under the Agreement, all nations agreed to take actions through "nationally determined contributions" (NDCs). Although each Party has certain procedural obligations (including the

submission of an NDC), the United States succeeded in ensuring that the national commitments to reduce emissions of GHGs would themselves not be binding under international law.

The constitutional requirements for which international agreements require Senate advice and consent are fluid and largely a function of precedent and custom. As a general matter, the President enjoys broad authority to negotiate and accept as binding executive agreements that are in accordance with existing legislation or treaties. The Obama Administration has expanded the precedents for unilateral Executive Branch action. For example, President Obama, without Senate advice and consent, deposited an instrument of acceptance for the Minamata Convention on Mercury in 2013 using his Executive authority.

President Obama also chose to "accept" the Paris Agreement (i.e., make it binding under international law) without Senate advice and consent. The United States joined the Agreement through the President's deposit of an instrument of acceptance with the U.N. on September 3, 2016. The U.S. action corresponded with China's ratification of the Agreement on the same day. The Agreement entered into force on November 4th (less than a week before Election Day) following ratification by 55 Parties to the Convention accounting for 55 per cent of the total global greenhouse gas emissions.

In choosing to accept the Paris agreement without Senate advice and consent, the Administration appears to have relied on the President's constitutional powers, existing Clean Air Act authorities and the Senate's previous advice and consent to the 1992 Framework Convention on Climate Change.

President Trump would have wide latitude to abandon the Paris Agreement under U.S. law but would not have the ability to immediately withdraw from the Agreement under international law. Article 28 of the Paris Agreement provides that a party must wait 3 years from the date of entry into force before withdrawal, and that such a withdrawal is then effective only after one year from notice to the depositary. Article 28 allows for a faster withdrawal route only if the President withdraws the United States from the UNFCCC, which would take effect one year after notice to the depositary. Withdrawal from the UNFCCC, however, would prove highly controversial with both industry and environmental groups as it would result in the U.S. having no voice in future climate change discussions. (A third approach – a claim that President Obama's unilateral acceptance of the Paris Agreement was procedurally defective – might allow the United States to claim withdrawal from the Agreement earlier, but would likely lead to disputes under international treaty law. It would also undermine President Trump's own executive branch authority, which seems unlikely to appeal to the new Administration in principle.)

A fourth option for President Trump would be to gradually dismantle over time many of the Obama Administration's domestic measures on climate change through executive action and rulemaking, gutting the U.S. ability to achieve its (non-binding) NDCs, without formally requiring abandonment of the treaty. Although this approach might allow him to achieve his domestic policy objectives (avoiding climate finance commitments and rejecting restrictions on coal consumption) while keeping the United States at least nominally within existing international climate framework, this approach may not politically satisfy Mr. Trump's campaign promises to withdraw from the agreement.

In another important (but much more politically low-key) climate development, parties to the Montreal Protocol adopted the Kigali Amendment in October, expanding the scope of the Montreal Protocol from its original focus on ozone depleting substances (ODSs) to include the phasing down of production and consumption of certain hydrofluorocarbons (HFCs) with high global warming potential

(GWP). It will enter into force on January 1, 2019, provided that at least 20 parties to the agreement have ratified it.

All previous amendments to the Montreal Protocol have been submitted to the Senate for advice and consent (which requires a two-thirds vote of the Senate). This past practice and the significant expansion of Protocol scope to include non-ODS substances would suggest a similar path for the Kigali Amendment. However, in light of the election results and because EPA has already exercised its authority to regulate HFCs under Title VI of the Clean Air Act, it is possible that President Obama will assert the Executive prerogative to accept the Kigali Amendment by Executive action only.

Although the Kigali Amendment enjoys the support of many in the business community, President Trump could withdraw U.S. ratification through routes similar to those discussed above for the Paris Agreement. However, it is not clear whether President Trump would seek to do so: he appears not to have addressed the Amendment during his campaign; the Amendment has not attracted domestic political opposition (unlike the Paris Agreement), and U.S. implementation of the Amendment does not appear to threaten any of the key Trump voting constituencies. Instead, a Trump Administration might ignore (or even embrace) the Amendment in the near term.

There would appear to be less uncertainty with regard to U.S. implementation of a third global agreement on climate change - the first to focus on a single sector. In October, 191 countries working under the auspices of ICAO reached an agreement on a global market-based measure (GMBM) for greenhouse gas emissions for the aviation sector. The carbon offsetting system is to be phased in starting in 2021 on a voluntary basis and will become mandatory for all countries, excluding the least developed countries and nations with very low levels of aviation activity, in 2027. The ICAO agreement can be expected to be followed by a corresponding aircraft engine GHG rulemaking under the Clean Air Act that will likely begin in 2017. However, because ICAO’s treaty mechanisms predate the UNFCCC and proceed separately under the auspices of the Chicago Convention, the political and regulatory considerations associated with the adoption of the new ICAO agreement and its implementation in the U.S. should not face the same headwinds as those associated with the Paris Agreement.

The U.S. has signed but not yet ratified or implemented several other important multilateral environmental agreements. These include the Basel Convention on the transboundary movements of hazardous wastes, the Stockholm POPs Convention and the Rotterdam Convention. Each of these agreements enjoys support among U.S. industry and environmental stakeholders, although important questions concerning the details of U.S. implementing legislation remain unresolved. Although these accords are not likely to be an early focus of the new administration, with a Republican-controlled Congress and a Trump White House, all could be implemented through rather modest amendments to U.S. legislation.

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