

THE STARTING LINE

A Preview of the Biden EPA's Priorities, Challenges and Initiatives

April 6, 2021

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Agenda

- Introductions
- Key Biden EPA Cross-Media Priorities
 - Climate Change Issues
 - Environmental justice (EJ) issues
- Media Specific Issue Review
 - Clean Air Act
 - WOTUS
 - PFAS/PFOA
 - Universal Waste
- Enforcement Topics
 - TSCA/FIFRA
 - Return of SEPs
 - Enforcement Initiatives
 - Audit Policy
- Q&A

Who Are We?

- Pat Larkin, Practice Group Leader, Environment, Energy and Nat Resources BU, Clark Hill PLC
- Danielle M. Hazeltine, Senior Air Attorney, Environment Energy and Natural Resources BU, Clark Hill PLC
- Eric Massey, Environmental, Social, and Governance Policy and Reporting Director, Arizona Public Service (APS)
- Howard Berman, President, E4 Strategic Solutions, Inc., an Environmental Government Affairs Firm

Clark Hill PLC – *Environment, Energy & Natural Resources Law Business Unit*

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IRELAND & MEXICO



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Reputation Governance (RG) 360 Crisis Management
ASSET360 Cyber & Defense

ABOUT CLARK HILL

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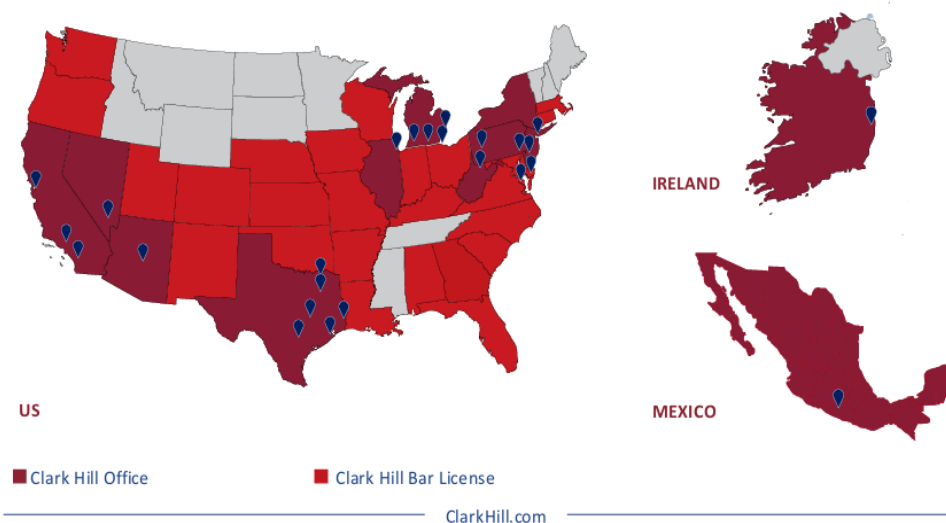
ABOUT DIVERSITY & INCLUSION AT CLARK HILL

- **CLARK HILL BOLD** - encourages the professional growth and promotion of women throughout the firm, the legal profession, and the global business community
- **CLARK HILL THRIVE** - emphasizes the value of multiculturalism to the firm, the legal profession, and the global business community
- **CLARK HILL PRIDE** - elevates our LGBTQ lawyers and fosters a culture that recognizes a fully present professional is a stronger client advocate

ABOUT CLARK HILL'S GLOBAL EXPANSION

- **2019.** Our presence in Dublin grows to almost 20 attorneys, reinforcing our position as the only US law firm with a full-service practice in Ireland.
- **2018.** Clark Hill and Strasburger & Price merged, bringing nationwide support and strength to both firm's clients.
- **2017.** Clark Hill merged with Morris Polich and Purdy LLP, providing clients with capabilities on the West Coast.

WHERE CLARK HILL PRACTICES



KEY SERVICE AREAS

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- Employee Benefits/ERISA & Compliance
- Environment, Energy & Natural Resources
- Estate Planning & Probate
- Family
- Fidelity & Surety
- Food, Drug & Device
- Government & Regulatory Affairs
- Healthcare
- Immigration
- Insurance & Reinsurance
- Intellectual Property & Technology
- International Trade
- Labor & Employment
- Litigation
- Municipal
- Political
- Professional Ethics & Risk Management
- Public Finance
- Real Estate
- White Collar Criminal Defense

Environment and Natural Resource Law Practice

- We help our clients in five major areas:
 - 1) Transactional diligence and risk allocation in:
 - mergers and acquisitions,
 - transfer and leasing of real estate and
 - financing, distressed collateral management
 - 2) Regulatory compliance, permitting and enforcement
 - 3) Environmental remediation and contaminated site redevelopment
 - 4) Policy and rulemaking advocacy
 - 5) Liability and Cost Allocation Disputes

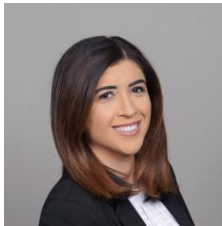
Environment and Natural Resource Law Practice, Clark Hill PLC

DC

Ken von Schaumburg



Maram Salaheldin



Chris Clare



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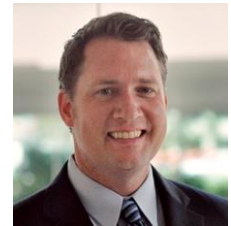
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Introduction

- US Environmental Protection Agency (EPA) established in 1970
- Long history and many lessons learned



Downtown Los Angeles, 1975



Cuyahoga River Fire, 1969

Regulatory Advocacy

- Rules
 - Formal
 - Informal
- Regulations
 - Takings
 - Opportunity
- Communication
 - Effective

US Environmental Protection Agency

- Headquarters
 - Air
 - Water
 - Waste
 - Toxics
 - Pesticides
 - Climate Change
 - Environmental Justice
- 10 Regional Offices
 - Air
 - Water
 - Waste
 - Toxics
 - Pesticides
 - Climate Change
 - Environmental Justice

EPA Regions Map



The Office of the White House

- Council on Environmental Quality
- Office of Information and Regulatory Affairs (OMB)
- National Climate Task Force
- Special Presidential Envoy for Climate John Kerry
- National Climate Advisor Gina McCarthy
- White House Environmental Justice Advisory Council
- White House Environmental Justice Interagency Council

US Congress

- House Committees

- Select Committee on Climate Crisis
- Energy & Commerce
- Natural Resources
- Transportation & Infrastructure
- Oversight and Reform

- Senate Committees

- Environment and Public Works
- Energy & Natural Resources
- Commerce, Science & Transportation
- Appropriations
- Transportation

BIDEN EPA'S CROSS-MEDIA PRIORITIES

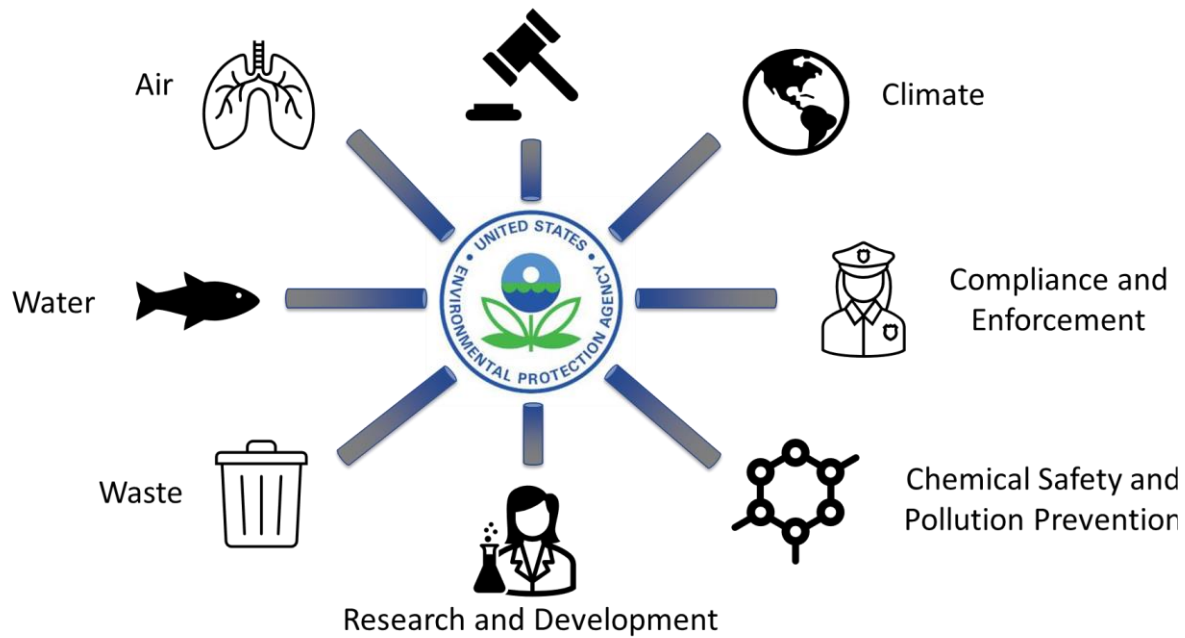
President Biden's Climate and Environmental Justice Priorities

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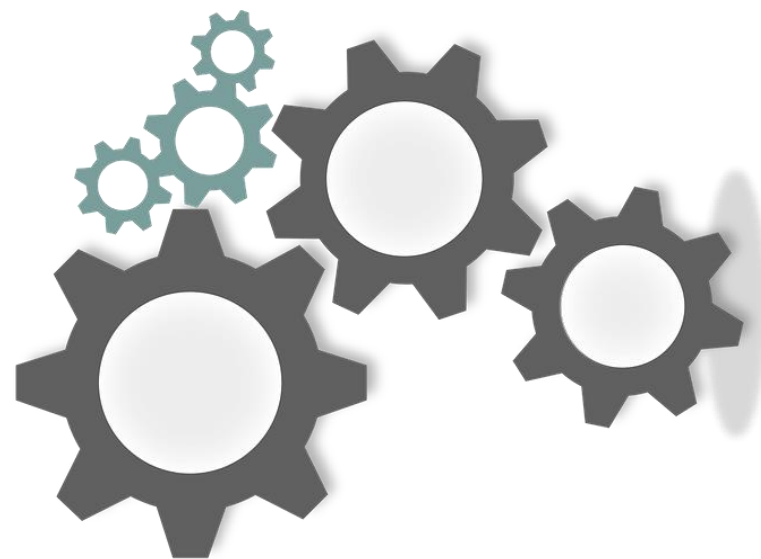


Federal Actions of Interest

- Executive Order on Tackling Climate Change at Home and Abroad – January 27, 2021
 - Climate Change (30 times)
 - Environmental Justice (24 times)
- Executive Order on the President's Council of Advisors on Science and Technology – January 27, 2021
- Climate Leadership and Environmental Action for our Nation's (CLEAN) Future Act – March 2, 2021
- Environmental Justice Advisory Committee – March 29, 2021
- Infrastructure Bill – March 31, 2021



ENVIRONMENTAL ACTION



ENVIRONMENTAL ACTION

Gina McCarthy – National Climate Advisor



- Former President and CEO of the Natural Resource Defense Council
- Former Administrator of the U.S. EPA under President Obama
 - Clean Power Plan
 - Set Ozone health-based standard to current levels
 - Coal Combustion Residuals regulations
- Role of Climate Quarterback for Biden Administration, coordinating all Federal agency actions; no need for Senate approval
- Overall positive response to her selection
 - Climate hawks like Sunrise Movement and Sierra Club support
 - Centrists like Al Gore like her for her blunt, direct manner of speaking and effectiveness.
- Ali Zaidi is the Deputy National Climate Advisor
 - Former Deputy Secretary for Energy and Environment in New York State
 - Helped to craft President-elect's "Build Back Better" platform

Highlighted Climate Priorities



- Government-wide climate response
 - Represent all agencies & policy councils, and act quickly
- 90-day Cabinet Taskforce to write and publish a new four-year Climate Ambition Action Agenda with “marching orders” on:
 - Green House Gas mitigation
 - Clean Energy Transition
 - Climate change adaptation and resilience
 - International climate diplomacy and development
- Move quickly to nominate and elevate key positions and look for climate leadership qualifications when filling the positions
- Quickly increase, reallocate and redeploy budget and staff resources to make up for lost time
- Issue early guidance to reinstate social cost of carbon analysis and incorporate social justice metrics in rulemaking

Climate Justice



“Climate justice” is a term, and more than that a movement, that acknowledges climate change can have **differing social, economic, public health, and other adverse impacts on underprivileged populations**. Advocates for climate justice are striving to have these inequities addressed head-on through long-term mitigation and adaptation strategies.

- Climate justice begins with recognizing key groups are differently affected by climate change.
- Climate impacts can exacerbate inequitable social conditions.
- Momentum is building for climate justice solutions.



The fair treatment and **meaningful involvement** of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. This goal will be achieved when everyone enjoys:

- The same degree of protection from environmental and health hazards, and
- Equal access to the decision-making process to have a healthy environment in which to live, learn, and work



Brenda Mallory – Chair, Council on Environmental Quality



- Former Director at Southern Environmental Law Center
- Former Attorney for the Council on Environmental Quality (CEQ) during Obama Administration
- Priorities:
 - Update 1994 Executive Order on Environmental Justice (EJ)
 - Convene EJ leaders and advancing EJ across government
 - Coordinating environmental matters among agencies

Highlighted Environmental Justice Priorities



- Use an inclusive and empowering all-of-government approach
 - Revise 1994 Executive Order 12898 on Environmental Justice
 - Reestablish Environmental Justice Advisory and Interagency Councils
 - Implement Senator Booker's Environmental Justice Act (2019)
 - Increase enforcement
- Make decisions that are driven by data and science
 - Create "Climate and Economic Justice Screening Tool"
 - More air quality monitoring in frontline and fence line communities
- Target resources consistent with prioritization of environmental and climate justice
 - 40% to be invested in clean energy in disadvantaged communities
 - Eliminate legacy pollution in most burdened communities
- Assess & address community risks from next public health emergency
 - Develop a national Crisis Strategy
 - Implement Senator Markey's Climate Change Health Protection Act

MEDIA-SPECIFIC PRIORITIES

Litigation, Air, WOTUS

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Regulatory Reform in the Biden Administration

- Executive Order 13992, January 20, 2021, Biden revoked certain Trump EO's concerning federal regulation and reform.
 - EO 13771 (Reducing Regulation and Controlling Regulatory Costs)
 - EO 13777 (Enforcing the Regulatory Reform Agenda)
 - EO 13875 (Evaluating and Improving the Utility of Federal Advisory Committees)
 - EO 13891 (October 9, 2019) (Promoting the Rule of Law Through Improved Agency Guidance Documents)
 - EO 13892 (October 9, 2019) (Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication).

EPA Regulatory Agenda

- March 31, 2021, EPA published its regulatory agenda.
- Some of the Section 610 reviews proposed:
 - Review of Renewable Fuels Standard Program
 - Review of National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers, 40 CFR 63, Subpart JJJJJ.
 - Review of National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial and Institutional Boilers and Process Heaters, 40 CFR 63, Subpart DDDDDDD.
- National Primary Drinking Water Regulations for Lead And Copper.

"SOCMI" Citizen Suit

- Earthjustice - Notice of Intent to Bring Clean Air Act Citizen Suit Concerning Unreasonably Delayed Emissions Guidelines for the Synthetic Organic Chemical Manufacturing Industry ("SOCMI")
- NSPS Subpart III, NNN, and RRR, more than 21 years have passed since EPA acted.
- NSPS Subparts VV and VVa, 14 years have passed since EPA acted.
- Alleging that EPA failed to promulgate emissions guidelines, thereby delaying required states' plans to establish, implement and enforce standards of performance for existing SOCMI sources.

NAAQS Petitions

- January 19, 2021 - National Parks Conservation Associations (NPCA) and 10 other conservation groups filed a petition for judicial review in the US Court of Appeals for the DC Circuit challenging EPA's decision to retain the NAAQS for fine particulate matter (PM 2.5).
- February 11, 2021 – Sierra Club and several other Associations filed a petition for judicial review in the US Court of Appeals for the DC Circuit challenging EPA's decision to retain the Ozone NAAQS.

Regional Haze

- Currently in the “second implementation period” (2018-2028). Plans must be submitted by July 31, 2021.
- Trump Administration RH guidance gave states the lead in the planning process and sought to leverage emissions reductions achieved through other programs under the CAA.
- Environmental groups claim the Trump guidance does not give adequate direction to states on how to develop a SIP and ignores polluters and modern controls.
- Environmental groups have petitioned EPA to reconsider the guidance and are challenging several states’ agency-approved RH SIPs.
- During the Obama Administration, EPA found many SIPs not stringent enough and imposed FIPs, however, Trump’s EPA allowed states to resubmit SIPs, which offered alternatives to source-specific emissions controls otherwise required under BART.

The Clean Air Act and Climate Change

- Climate advocates are again pushing EPA to use the NAAQS to limit emissions of greenhouse gases.
- Early in March, EPA issued a brief retraction of the Center for Biological Diversity and 350.org's petition.
- It is unclear whether EPA is actively considering standards for CO₂ and other climate pollutants.

Refrigerants

- Since CFCs were phased out, HFCs became the common gases used for refrigeration. More than 85% of HFCs are used in refrigeration and AC equipment.
- Biden directed by E.O. to prepare to send the Kigali Amendment phasing down HFCs to the Senate.
 - Senate will decide whether to move forward with the Kigali ratification.
- The “American Innovation and Manufacturing Act” gives the authority to carry out the phasedown.

WOTUS – Background

- Clean Water Act (CWA) has been a source of conflict, confusion, and litigations since it's enactment in 1972.
- Supreme Court has repeatedly recognized that defining “navigable waters” as “waters of the United States” indicates Congress’ intent to reach beyond those waters that are navigable-in-fact.
- Rapanos v. United States – Waters of the US only extends to those waters and wetlands that have a “significant nexus” to truly navigable waters and are “inseparably bound up with ‘waters’ of the United States.”

Obama Administration WOTUS Rule

- The 2015 WOTUS rule seemed to maximize environmental conservation under the CWA by maximizing federal regulatory authority.
 - Asserted jurisdiction over traditional waters, such as those capable of navigation, interstate waters, and territorial seas.
 - Also asserted an expansive definition of tributaries and waters “adjacent” to navigable waters. Rule enjoined in a dozen states as a federal court concluded that EPA/Army Corps had exceeded their statutory authority.
- By September 2018, the rule was enjoined from operation in 28 states.

Trump Administration WOTUS Rule

- In 2017, Trump issued an E.O. calling upon EPA/Army Corps to reconsider the 2015 rule.
- Encompasses waters traditionally considered to be “navigable waters,” included tributaries that contribute perennial or intermittent flow to such waters, some lakes, ponds, and ditches and wetlands adjacent to all such waters.
- Does not include “interstate waters,” waters that flow only in response to precipitation, or waters merely within a specified distance from navigable waters.
- Expressly excludes various categories of waters subject to regulation under the prior rules.
- Does not presume a “significant nexus” between water features and wetlands within a specified distance.

WOTUS Rule Issues

- Proponents of the 2020 Rule argue that it provides regulatory certainty, which is beneficial for the regulated community and may help facilitate environmental conservation efforts by non-federal actors, including state and local governments.
- Others argue it will create a “race to the bottom.”
- Some states have filed lawsuits contending the rule.
- Recessions and COVID-19 ha impacted agency funding, staffing, and general capacity, creating an issue for states who want to “gap-fill.”
- The Biden Administration has targeted the April 21, 2020 Navigable Waters Protection Rule (2020 rule).
- The level of opposition to the rule, it is expected that the Biden Administration will dismantle the rule and propose a broader rule to replace it, perhaps similar to the 2015 rule.

BIDEN ENFORCEMENT PRIORITIES AND CHALLENGES

PFAS, Environmental Justice and COVID Recovery

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Drinking Water Policy and Enforcement

- **Significant EPA HQ, Regional and State Resources will focus on per- and polyfluoroalkyl substances (PFAS)**
 - Risk Assessment and Regulation Development (e.g., 3/17 ANPRM for OCPSF ELG)
 - Development of NPDES and SDWA Permit control limits
 - Less discussed but crucial will be – Treatment cost funding and Cost Recovery
- **PFAS Issue Summary**
 - Uses/sources/risk identification:
 - AFFF, Teflon, Food packaging;
 - bio-accumulative;
 - carcinogenic and reproductive toxicity associations identified – variety of scientific gaps/concerns
 - Legal liabilities have been focused in MDL cases targeting (1) PFAS coatings/users; (2) AFFF user sites (airports/large fire event sites); and (3) PFAS manufacturing sites
 - Science showing that PFAS are ubiquitous: suggests that discrete-source identification won't cutoff exposure
 - EPA published a *PFAS Action Plan* in 2/2020
 - States have taken most direct regulatory action –
 - Many States have focused on assessing and protecting drinking water sources; and targeted assessment of remediation sites and disposal sites.
 - EPA and some states have evaluated PFAS concentrations in the context of lifetime exposures and issued a health advisory level of 70ppt; other states have adopted health advisory levels as low as 7ppt
 - a few have issued enforceable drinking water supply Maximum Concentration Level (MCL) (e.g., NYSDEC MCL of __ppt)

Drinking Water Policy and Enforcement *(cont'd.)*

- **The Biden Administration has not explicitly modified the PFAS Action Plan issued by the Trump Administration EPA**
 - current formal visible steps include
 - NPDES/Stormwater permitting guidance to monitor and control PFAS at “expected” discharge sites
 - ANPRM to support an ELG in the chem/fabrics industrial sector
- **The most impactful and very likely PFAS action will be to establish a federal MCL**, setting allowable concentration limits for drinking water suppliers, and also used as closure standard in many groundwater cleanups.
- Numerous ‘knock-on’ issues are decided or driven by a PFAS MCL
 - Which PFAS? --How many of the dozens of per and poly-fluorinated compounds will have to be monitored and removed from raw water supplies?
 - How low will the concentration(s) be set? –the bio-accumulative nature and existing bio-load of PFAS in Americans could arguably set the MCL at a # reflecting the very low rate of elimination from the body
 - How will treatment facilities treat PFAS impacted water? –How will accumulated PFAS media be disposed? (not land-farming: bio-uptake and accumulation makes former revenue sources a liability)

Drinking Water Policy and Enforcement (*cont'd.*)

- **Most important/complex: how will new PFAS treatment & disposal costs be funded?**
 - Increased water user fees? [v. COVID shutoff bans]
 - Tax-based PWS/PFAS cleanup fund – source?/apportionment? Any volunteers?
 - Courts/litigation - Two probable paths for PWS cost recovery:
 - Ubiquitous impact/difficulty of proof source makes class-action type suits unattractive
 - State AGs pioneered aggregation of PWS plaintiffs in MTBE cases, where source was difficult to establish but the few manufacturers were a visible target; allowed suits against both mfgs and “negligent” users.
 - State AG/ cases inherently limited in Mfg assets and few cases of provable negligence
- **Most likely path to PWS/PFAS cost recovery:** CERCLA cost-recovery and contribution litigation (“Back to the Future”)
 - EPA or Congressional designation of PFAS as a CERCLA Hazardous Substance
 - Release reporting duties would apply immediately; if we assume an MCL is established, cleanup consequences would be clear;
 - all US companies with PFAS history have exposure where release and connection to water supply can be proven
 - With high stakes, EPA rulemaking = years of litigation; BUT OMB/OIRA issued a PFAS ANPRM in Fall 2020
 - Legislative designation = full-court-press/high-stakes Govt affairs sausage-making, with fine-tuned exemptions and ambiguities that leave trap doors for future disputes.
 - e.g., in the November 2020 National Defense Authorization Act, provisions exempting “civilian users of defense facilities” [find/check quote] effectively immunized these “users” from AFFF-related liability, i.e., airports and municipal owner/operators, fire-fighter training facilities.
 - While some equity in mitigation of liability for DOD-mandated users of AFFF, that simply means a larger “orphan share” is created for RPs and for Govt-funded/DOD-controlled cleanups.
 - **PUNCH-LINE:** industrial manufacturers (including paper, fabrics, electronics) and AFFF-users need to risk-assess their facilities, analyze watershed to assess “Run-On” impacts to site effluent; locate potential impacts on PWS supplies; implement strategies to establish severability of PFAS impacts from PWS impacts.

Drinking Water Policy and Enforcement (cont'd.)

- **Another waste-related development will be driven by Biden Admin Policy Priorities – Management of Renewables Decommissioning Wastes**

- California's solar/Photovoltaic (PV) mandate – requires either PV or renewable source electricity for every new-built home
- Nationwide, electric utilities have subsidized roof-top solar as a vehicle for meeting Renewable % Portfolio Standards – millions of panels are nearing end of useful life, being replaced with more cost-effective sells
- Prior to Jan 2021 – all retired PV was subject to RCRA Toxicity Characteristic testing requirement
- Specified PV waste components have been designated California Universal Waste
- USEPA and several states have participated in stakeholder studies of expanded UW for PV
 - Jan 6, 2021 Briefing Paper Jan. 6, 2021 Briefing Paper *Renewable Energy Waste Streams: Preparing for the Future*
- Examines waste impacts from solar panels, lithium ion batteries, and windmills
- Discusses photovoltaic (PV) solar panels being considered hazardous waste under RCRA based on toxicity characteristics
- Suggests partnering with DOE to address
Briefing paper now archived by new administration, pending further review

PUNCHLINE – If your company has responsibility for (or cost-exposure to) PV/renewables, don't assume that a GOOD solution to the end-of-life question is being developed; you may wish to support a solution in your state to mitigate the cost of export of Haz Waste to be managed in another distant state as U-Waste.

Enforcement Policy & Initiatives:

- **Expect Two Key Themes to be Evident:**
 - EJ-Weighted Case Targeting , Enforcement Response and Resolution
 - COVID Recovery & Response
- **Environmental Justice Outcomes to be Material Factor in Several Phases of Enforcement** – As Eric discussed, the series of Exec Orders and public statements by the President and staff make clear that progress in EJ is second only to progress on Climate Change as a central objective of the Admin.– and that these objectives will be pursued across the administration (as opposed to creation of a stove-piped/boutique “Office of...”)
 - There are several likely practical impacts from this policy:
 - Compliance investigations/inspections will prioritize EJ communities
 - Enforcement response may be elevated by enhanced risk of impacts to EJ communities
 - Corrective actions may seek to offset historic impacts to EJ communities
 - Corrective actions and settlements may be actively reviewed with communities
 - The return of SEPs as a settlement tool will almost certainly prioritize/value SEP proposals with EJ benefits
 - These EJ impacts all contemplate *reaction* to a new enforcement case
 - An alternative lens to view EJ/Enforcement could be to view EJ-focused Community Relations strategies as a tool that is productive outside the more common setting of permit proposals, e.g., asking for expansions
 - Community Relations investment might be justified as investment the success of future public meetings where the company is asking for support for a SEP or for endorsement of a reduced penalty in recognition of proactive EJ programs.
- **COVID Recovery & Response: Perfect storm of compliance management challenges**
 - all of the key change-management factors that increase compliance risk have been in play in 2020
 - pandemic’s initial disruptions, social-distancing and limits on compliance activities, together with change from Trump to Biden Administration raise likelihood of mistakes and consequences of enforcement.

Enforcement Policy & Initiatives: Expect Two Key Themes *(cont'd.)*

- **So – a key 2021 Enforcement-risk driver will be the policies controlling how companies detect and correct violations.**
 - During early months of COVID a very direct path was attempted, the EPA and State enforcement deferral policies that were mis-characterized as blanket grant of “force majeure”
 - these policies were criticized by both industry critics (“too easy”) and defense counsel (“F.M. is too uncertain/fact-intensive”)
 - The combined uncertainties of COVID conditions and new Administration call for a higher degree of certainty
 - Best (only?) reliable path to a clean slate is through Self-Audit/Self-Disclosure programs.
 - There are numerous variations of SA/SD policies and statutes, but the penalty-reduction return on investment makes it worthwhile to critically compare the prerequisites and limitations among the EPA, state options.
 - **An extremely simplified compare/contrast of the EPA program and common State analogues would note:**
 - Unless the audited facility is newly-acquired, or facilities in multiple states or regions are to be audited, the EPA SA/SD program fails to provide legal resolution of violations (except certain EPCRA matters)
 - Many states provide full penalty immunity and highly flexible corrective action timelines for self-disclosed violations – some informally, as an exercise of enforcement discretion.
 - BUT – some states do NOT: California took down its EPA-analogue Policy that had been on its website since approx. 2000.
 - There is some hope that the Biden EPA will commit additional resources to SA/SD case resolution; unfortunately, in March 2021 the EPA OECA published a “Program Spotlight” that celebrated the E-disclosure portal as a “Major Milestone in the Audit Policy Program.”
 - **So – the future and usefulness of the EPA’s SA/SD programs remain uncertain, and auditing and SD decisions need to be carefully planned to optimize penalty immunity.**

Advice for EHS Leaders on how to feel good
about 2021 (looking back in 2022)?

Questions ?

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Legal Disclaimer

This document is not intended to give legal advice. It is comprised of general information.

Businesses facing specific issues should seek the assistance of an attorney.

To help provide perspective and education on COVID-19 and to assist clients through this difficult and rapidly-changing time, Clark Hill attorneys have produced thought leadership : clarkhill.com/pages/covid-19.