



GIBSON DUNN

Biden's EPA: The First
60 Days and Beyond

March 23, 2021

MCLE Certificate Information

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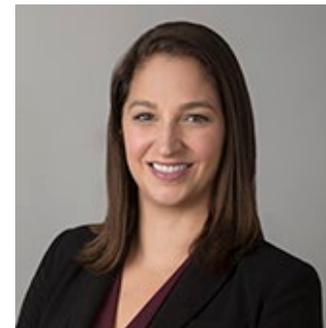
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Today's Discussion

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Outlook

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3

Environmental
Corporate Governance
and Technical
Compliance

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*EPA's Regulatory
Outlook*

Climate: Clean Power Plan / Affordable Clean Energy Rule

Why it matters: Energy sector is largest stationary source of GHG emissions in the United States.

How did we get here?

- **Aug. 3, 2015:** Obama Administration unveils Clean Power Plan (CPP)
- **Feb. 9, 2016:** SCOTUS stays implementation of CPP (*West Virginia v. EPA*)
- **June 19, 2019:** Trump Administration issues the Affordable Clean Energy Rule (ACE), repealing and replacing CPP
- **Jan. 19, 2021:** DC Cir. vacates ACE and remands to EPA (*American Lung Association v. EPA*)
- **Feb. 22, 2021:** Mandate withheld with respect to repeal of CPP until EPA addresses remand in new rulemaking

Where are we going?

- Potential **petition for certiorari** by intervenors power companies
- Likely **new Clean Air Act 111(d) regulatory proposal:** standards of performance for existing sources
- Potential for proposal to be based on **grid-wide best system** of emission reductions (BSER)

Climate: Regulating Methane Emissions from the Oil and Gas Sector

Why it matters: More than 25% of methane emissions in the U.S. come from the oil and gas sector.

How did we get here?

- **Aug. 16, 2012:** Obama EPA issues NSPS and NESHAP for oil and gas sector
- **June 3, 2016:** Obama EPA finalizes standards based on determination of BSER for reducing methane and VOC emissions across production, processing, transmission, and storage segments
- **Sept. 15, 2020:** Trump EPA amends 2012 and 2016 rules, removing and rescinding certain emission standards
- **Oct. 27, 2020:** DC Cir. denies summary vacatur or stay (*California v. Wheeler*)

Where are we going?

- **Jan. 20, 2021:** Biden issues EO directing EPA to review Sept. 2020 amendments and consider whether to propose new standards and guidelines for methane and VOCs from the oil and gas sector, including exploration and production, transmission, processing, and storage segments
- EPA likely to **reverse course** on Trump amendments, requiring notice and comment and potentially a new record

Climate: Regulating GHG Emissions from Light-Duty Cars & Trucks

Why it matters: Transportation sector is the largest source of GHG emissions in the United States.

How did we get here?

- **Oct. 15, 2012:** EPA/NHTSA establish GHG/CAFE standards for MY17-25 LDVs
- **Jan. 12, 2017 / Mar. 22, 2017:** Final determination and reconsideration
- **Sept. 27, 2019:** EPA/NHTSA issue SAFE I regarding CA waiver and preemption
- **Apr. 30, 2020:** EPA/NHTSA issue SAFE II emissions and FE standards for MY21–26
- **2019/2020:** Litigation over SAFE I and SAFE II ensues
- **Feb. 2021:** DOJ moves to hold SAFE I and SAFE II litigation in abeyance

Where are we going?

- **SAFE I:**
 - Likely reversal of waiver withdrawal; preemption path less clear
 - Process/grounds for reversal open—notice and comment required?
- **SAFE II:** Two potential paths
 - (1) Keep SAFE II and negotiate voluntary agreements
 - (2) Seek remand of SAFE II and reconsider standards

Climate: Other Rulemakings

- **Aircraft**

- On January 11, 2020, the Trump EPA issued GHG standards for certain new commercial airplanes, including passenger jets, aligning US standards with international CO2 standards set by the International Civil Aviation Organization.
- Open question: will the Biden EPA undertake reconsideration to adopt more stringent standards, which would require notice and comment?

- **Heavy-Duty Vehicles**

- On January 6, 2020, the Trump EPA solicited comments regarding the Trump EPA Cleaner Trucks Initiative—a planned rulemaking to update NOx emissions standards for highway heavy-duty vehicles and engines.
- Open question: will the Biden EPA seek to continue this effort or undertake new efforts aimed at reducing NOx and GHG emissions from the heavy-duty sector?

- **GHG NAAQS**

- On March 4, 2021, the Biden EPA withdrew the Trump EPA's denial of petitions to establish a NAAQS for GHGs.

Criteria Pollutants: NAAQS Reviews

Why it matters: Regulates criteria pollutants that can be harmful to public health and the environment.

How did we get here?

- **Jan. 15, 2013:** Obama EPA revises PM NAAQS
- **Oct. 26, 2015:** Obama EPA revises primary and secondary NAAQS for ozone, revising levels of both standards to 70 ppb
- **Aug. 23, 2019:** DC Cir. remands secondary ozone standard to EPA for reconsideration (*Murray Energy Corp. v. EPA*)
- **Dec. 18 & 31, 2020:** Trump EPA retains NAAQS for PM and ozone, without revision
- **Jan. 2021:** States and environmental groups file petitions for review

Where are we going?

- **Lawsuits** by Center for Biological Diversity claims EPA must conduct ESA review when setting NAAQS (*Center for Biological Diversity v. EPA*)
- Potential efforts to seek **remands of both standards** and relaunch the review process (ISA, REA(s), PA and Clean Air Science Advisory Committee) or focus on revisions to ozone (and potentially PM) secondary standards
- Potential **continuation** of the Trump EPA's announced intent to review lead NAAQS (last revised in 2008)

Criteria Pollutants: Other Rulemakings (1/2)

- **Cross-State Air Pollution Rule (CSAPR)**
 - Between 2011 and 2018, EPA finalized, updated, and closed out CSAPR.
 - On Sept. 13, 2019 the D.C. Circuit remanded the 2016 CSAPR Update after concluding that it did not adequately address upwind contribution to downwind nonattainment of the 2008 ozone NAAQS (*Wisconsin v. EPA*).
 - SDNY ordered EPA to finalize Revised CSAPR Update by March 15, 2021 (*New Jersey v. Wheeler*). On March 15, 2021, EPA issued a revised CSAPR Update rule.
 - Open question: How will Biden EPA address the transport obligation for the 2015 Ozone NAAQS?
- **Reclassification of Major Sources as Area Sources Under CAA Section 112**
 - Trump EPA reversed hazardous air pollutant “once in, always in” policy, allowing “major” sources to be reclassified as “area” sources after emissions reductions.
 - Open question: will the Biden EPA revert back to “once in, always in” through rulemaking?

Criteria Pollutants: Other Rulemakings (2/2)

- **Repeal or Revision of Rules Pertaining to Cost-Benefit Analysis**
 - May 22, 2020: final revision to 2016 supplemental cost finding for Mercury and Air Toxic Standards (MATS).
 - Dec. 23, 2020: final rule on Increasing Consistency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process.
- **NESHAP Risk and Technology Reviews (RTRs)**
 - The Trump EPA completed numerous RTRs between 2017 and 2021, and six more are due this year (including semiconductor manufacturing and primary copper smelting).
 - Open question: will the Biden EPA revisit any of these?

Chemicals: PFAS

Why it matters: PFAS subject of increasing regulation and enforcement actions at state and federal levels.

How did we get here?

- **May 25, 2016:** Obama EPA issues Lifetime Health Advisories and health effects guidance for PFOA and PFOS
- **Feb 14, 2019:** Trump EPA releases PFAS Action Plan
- **Dec. 18, 2020:** Trump EPA releases interim guidance on destruction of PFAS
- **Jan. 14, 2021:** Trump EPA issues ANPRM addressing potential future regulation of PFAS under CERCLA and RCRA (undergoing review per Biden WH Regulatory Freeze Memo)
- **Mar. 3, 2021:** Biden EPA re-issues determination to regulate PFOS/PFOA in drinking water under SDWA

Where are we going?

- Biden EPA to propose **max. contaminant levels** (MCLs) and **max. contaminant level goals** (MCLGs) for PFOS/PFOA
- Biden EPA may determine to regulate **other PFAS compounds** (e.g., PFBS, GenX)
- Biden EPA may seek to regulate PFAS under **CERCLA** and **RCRA** and/or seek to regulate under **CWA** or **TSCA**
- Biden EPA may revise the **Effluent Limitations Guidelines** (ELG) for Organic Chemicals, Plastics and Synthetic Fibers Point Source Category (ANPRM signed on Jan. 15, 2021)

Chemicals: TSCA Risk Evaluations

Why it matters: Under TSCA, EPA must eliminate unreasonable risk from existing chemicals.

How did we get here?

- **Jan. 2021:** Trump EPA completed the last of its first 10 risk evaluations of existing contaminants under the Lautenberg amendments to TSCA

Where are we going?

- Petitions filed seeking to **overturn Trump EPA's findings** on “unreasonable risks” posed by 1,4-dioxane, or force Biden EPA to expand the evaluation (*Ctr. for Env'tl. Health v. EPA; EDF v. EPA*)
- Notice of **intent to sue** re asbestos review also submitted
- For chemicals that present an unreasonable risk, EPA must start the **risk management process**
- EPA must also conduct **risk evaluations** on the next 20 existing chemicals
- Biden EPA announced plans to **change its scientific approach** to risk evaluations

Chemicals: Other Actions (1/2)

- **Risk Management Plan Regulations**

- On Dec. 19, 2019, the Trump EPA issued the Risk Management Program (RMP) Reconsideration final rule, repealing key portions of the 2017 RMP Amendments. A challenge to this action is pending before the D.C. Circuit (*Air Alliance Houston v. EPA*).
- Open question: will the Biden EPA seek a remand to restore the 2017 Amendments?

- **Perchlorate**

- On July 21, 2020, the Trump EPA determined not to regulate perchlorate under the SDWA. The Natural Resources Defense Council is challenging this action in the D.C. Circuit (*NRDC v. EPA*).
- Open question: will the Biden EPA revisit this determination, despite new science indicating lower risk and less prevalence in water systems?

Chemicals: Other Actions (2/2)

- CERCLA 108(b) Financial Assurance

- On Dec. 2, 2020, the Trump EPA determined not to impose CERCLA financial responsibility requirements for: electric power generation, transmission, and distribution facilities; petroleum and coal products manufacturing facilities; and chemical manufacturing facilities.
- Open question: will the Biden EPA revisit this determination? Doing so would require a change in legal interpretation because the D.C. Circuit determined this action was reasonable under *Chevron Step 2 (Idaho Conservation League v. Wheeler)*.

Clean Water: WOTUS & The Scope of Federal Regulatory Jurisdiction

Why it matters: WOTUS delineates scope of all Clean Water Act regulatory and permit programs.

How did we get here?

- **1986, 1988:** EPA and Army Corps define “waters of the United States”
- **Jan. 9, 2001:** SCOTUS, in *SWANCC v. Army Corps of Engineers*, finds “navigable waters” does not extend to isolated wetlands
- **June 19, 2006:** Justice Kennedy, in *US v. Rapanos*, concludes that wetlands with a “significant nexus” to navigable waters are jurisdictional
- **Dec. 2, 2008:** EPA issues guidance on *Rapanos* and “significant nexus” standard
- **June 29, 2015:** Obama EPA and Army Corps issue new definition expanding scope of federal jurisdiction
- **Oct. 9, 2015:** Sixth Circuit stays the 2015 rule (*In re EPA*)
- **Oct. 22, 2019:** Trump EPA and Army Corps repeal the 2015 rule and restore 86/88 definition on an interim basis
- **Apr. 21, 2020:** Trump EPA and Army Corps issue the Navigable Waters Protection Rule
- **June 19, 2020:** N.D. Cal. denies request for nationwide preliminary injunction of NWPR (*California v. Wheeler*)

Where are we going?

- Challenges to the 2015, 2019, and 2020 rules are **pending**
- Open question: will Biden EPA and Corps opt for a **third total rewrite** in a decade or use a targeted approach to expand reach of federal regulatory jurisdiction to some or all ephemeral streams and some or all non-abutting wetlands?

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*EPA's Enforcement
Priorities*

Enforcement Priorities

- Even prior to taking office, Biden indicated that **environmental justice** and **climate change** would be two key enforcement priorities.
- **Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity** proposed to:
 - Increase enforcement activity “to the fullest extent permitted by law,” to support other environmental priorities, including climate and environmental justice.
 - Establish new Environmental and Climate Justice Division within DOJ.

Establish an Environmental and Climate Justice Division within the U.S. Department of Justice. Under the Trump Administration, the U.S. Environmental Protection Agency (EPA) has referred the fewest number of criminal anti-pollution cases to the Justice Department (DOJ) in 30 years. Allowing corporations to continue to pollute – affecting the health and safety of both their workers and surrounding communities – without consequences, perpetuates an egregious abuse of power. Biden will direct his EPA and DOJ to pursue these cases to the fullest extent permitted by law and, when needed, seek additional legislation to hold corporate executives personally accountable –

Memorializing Enforcement Priorities (1/2)

- January 27, 2021 [Executive Order on Tackling the Climate Crisis at Home and Abroad](#) addresses both climate change and environmental justice, incorporating significant aspects of the Biden-Harris campaign platform.
- “We must hold polluters accountable for their actions. We must deliver environmental justice in communities all across America. The Federal Government must drive assessment, disclosure, and mitigation of climate pollution”

BRIEFING ROOM

Executive Order on Tackling the Climate Crisis at Home and Abroad

JANUARY 27, 2021 • PRESIDENTIAL ACTIONS

Memorializing Enforcement Priorities (2/2)

- Environmental justice is 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.
- As to **environmental justice**, the Executive Order directs EPA to:
 - “[S]trengthen enforcement of **environmental violations** with disproportionate impact on underserved communities through the Office of Enforcement and Compliance Assurance.”
 - “[C]reate a **community notification program** to monitor and provide real-time data to the public on current environmental pollution, including emissions, criteria pollutants, and toxins, in frontline and fenceline communities.”

Enforcement Spotlight: Environmental Justice

- Executive Order directs DOJ to coordinate with EPA OECA to “develop a **comprehensive environmental justice enforcement strategy**, which shall seek to provide timely remedies for systemic environmental violations and contaminations, and injury to natural resources.”
- Environmental justice considerations are **certain to shape Biden enforcement priorities**.

“If we can protect the least amongst us, we can create a rising tide that elevates the level of environmental protection and equity for every American.”

EPA Administrator Michael Regan

Implementation of Enforcement Priorities

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OECA-2018-0843; FRL-9988-78-OECA]

Public Comment on EPA's National Compliance Initiatives for Fiscal Years 2020-2023

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public comment period.

Current EPA Initiatives Target the Following Areas:

- Volatile organic compounds (VOCs) and hazardous air pollutants (HAPs) from stationary sources
- HAPs from RCRA TSD and LQG facilities
- Aftermarket defeat devices
- Drinking water standards for community water systems
- Clean Water Act NPDES permit compliances
- Risk of accidental releases at industrial and chemical facilities

- **Existing enforcement initiatives** can be used to advance Biden priorities.
- Compliance Advisories and Enforcement Alerts issued by the Office of Enforcement and Compliance Assurance also provide insight into potential **agency targets**.

Enforcement Spotlight: Supplemental Environmental Projects (1/2)

- A **Supplemental Environmental Project** (SEP) is an “environmentally beneficial project or activity that is not required by law, but that a defendant agrees to undertake as part of the settlement of an enforcement action.” SEPs historically resulted in penalty reductions.
- **Trump Administration Actions**
 - Mar. 12, 2020: ENRD found that SEPs violate the spirit, if not the letter, of the Miscellaneous Receipts Act (MRA) and prohibited SEPs in settlements with the Division, ending long-standing practice.
 - Dec. 16, 2020: Final Rule re Prohibition on Settlement Payments to Non-Governmental Third Parties (85 Fed. Reg. 81409).
 - This rule formally codified a 2017 DOJ prohibition on third-party payments in settlement agreements (both cash and in kind) and states: “[I]n no case shall any settlement agreement require defendants in environmental cases, in lieu of payment to the Federal Government, to expend funds to provide goods or services to third parties for Supplemental Environmental Projects.”

Enforcement Spotlight: Supplemental Environmental Projects (2/2)

- On **February 4, 2021**, the Biden DOJ withdrew the March 2020 ban on SEPs as “inconsistent with longstanding [ENRD] policy and practice because [it] may impede the full exercise of enforcement discretion in [ENRD’s] cases.”
- Defendants should expect to see an uptick in efforts to **include SEPs in settlements**, especially in conjunction with environmental justice efforts.
- The reinstatement of SEPs in settlement actions, however, may still face **legal hurdles and challenges**.
 - The Biden Administration did not provide an argument that SEPs do not violate the MRA, leaving them open to attack based on the arguments made in the March 2020 ban.
 - The prohibition on payments to third parties in settlement agreements, including as SEPs, was formalized through rulemaking.

What Can You Do Now?

- To evaluate current environmental compliance, companies can take advantage of **federal and state audit** programs.
- EPA (and many states) also have **related self-disclosure policies** providing opportunities for penalty mitigation for prompt voluntary disclosure of violations identified during environmental audits.
- If the company's audit and related disclosure satisfies policy requirements, **EPA will reduce gravity-based penalties between 75% and 100%**, and will not refer the matter for criminal enforcement.
- Technical compliance programs (discussed later in this program) are a useful tool for companies to **enhance environmental compliance**—particularly in industries already subject to historical or ongoing enforcement activity.

**ENVIRONMENTAL PROTECTION
AGENCY**

[FRL-6576-3]

**Incentives for Self-Policing: Discovery,
Disclosure, Correction and Prevention
of Violations**

AGENCY: Environmental Protection
Agency (EPA, or Agency).

ACTION: Final Policy Statement.

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*Environmental
Corporate Governance*

ESG and Climate

THE WALL STREET JOURNAL.

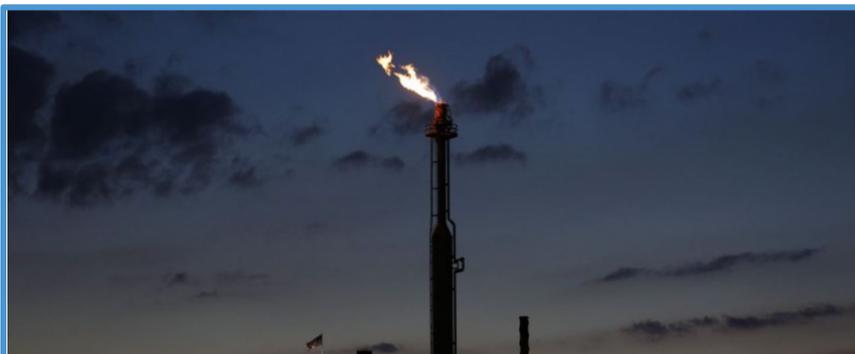
THE
NATIONAL LAW REVIEW

Companies Brace Themselves for New ESG Regulations Under Biden

Businesses and trade groups are hoping to get clarity about—and influence—expected rules on environmental, social and governance issues

≡ **TheStreet** | **ECONOMONITOR**

A Preview of ESG Regulation under the Biden Administration



Bloomberg Green

Biden Administration Considers Reversing Trump's ESG Rule Change

Investors Should Keep a Close Eye on Biden's Regulatory Stance on ESG Investing

What is ESG?

Environment

- Climate change
- Greenhouse gas emissions
- Sustainable resources
- Hazardous materials, waste and pollution
- Clean technology
- Deforestation
- Biodiversity and ecosystems
- Water management
- Land contamination

Social

- Human rights
- Modern slavery
- Working conditions and employee welfare
- Equality and diversity
- Employee relations
- Talent attraction and retention
- Local communities
- Information security
- Data governance
- Health and safety
- Product governance
- Supply chains
- Controversial weapons

Governance

- Financial planning/ reporting
- Systems and controls
- Board diversity
- Board structure
- Board independence
- Shareholder rights
- Anti-bribery and corruption
- Executive remuneration
- Political lobbying
- Political donations
- Tax strategy

What ESG Disclosures Are Required?

- **2010 SEC Climate Change Guidance** – Climate Change based disclosures triggered if the following are material to the business:
 - The impact of climate change legislation and regulation.
 - The impact of international climate change accords.
 - Indirect consequences of climate change regulation.
 - The physical impacts of climate change.
- **“Business and Financial Disclosure Required by Regulation S-K”** (April 13, 2016)

“In recent years, Congress has mandated new disclosure requirements that address specific public policy concerns. . . . Some investors and interest groups also have expressed a desire for greater disclosure of a variety of public policy and sustainability matters, stating that these matters are of increasing significance to voting and investment decisions. The Commission, however, has determined in the past that disclosure relating to environmental and other matters of social concern should not be required of all registrants unless appropriate to further a specific congressional mandate or unless, under the particular facts and circumstances, such matters are material.”

What is Coming? (1/2)

Statement on the Review of Climate-Related Disclosure



Acting Chair Allison Herren Lee

Feb. 24, 2021

Today, I am directing the Division of Corporation Finance to enhance its focus on climate-related disclosure in public company filings. . . . Ensuring compliance with the rules on the books and updating existing guidance are immediate steps the agency can take on the path to developing a more comprehensive framework that produces consistent, comparable, and reliable climate-related disclosures.

“Increasingly, investors really want to see—tens of trillion of dollars in assets behind it— climate risk disclosure,” Gensler told Brown. “Issuers would benefit from such guidance. So, I think through good economic analysis, working with the staff, putting out to the public to get public feedback that is something the commission, if I’m confirmed, would work on.”

Gensler quizzed on climate disclosure, mandatory arbitration in confirmation hearing



What is Coming? (2/2)

SEC Announces Enforcement Task Force Focused on Climate and ESG Issues

Washington D.C., March 4, 2021 — The Securities and Exchange Commission today announced the creation of a Climate and ESG Task Force in the Division of Enforcement. . . . Consistent with increasing investor focus and reliance on climate and ESG-related disclosure and investment, the Climate and ESG Task Force will develop initiatives to proactively identify ESG-related misconduct.

Public Input Welcomed on Climate Change Disclosures



Acting Chair Allison Herren Lee

March 15, 2021

In light of demand for climate change information and questions about whether current disclosures adequately inform investors, public input is requested from investors, registrants, and other market participants on climate change disclosure. . . . I am asking the staff to evaluate our disclosure rules with an eye toward facilitating the disclosure of consistent, comparable, and reliable information on climate change.

Other Es – Raw Material Sourcing



A Girl Scout calls out link to palm oil industry and child labor in Girl Scout cookies

Olivia, who earned a badge for selling more than 600 boxes of cookies, had spotted palm oil as an ingredient on the back of one of her packages, but was relieved to see a green tree logo next to the words "certified sustainable." She assumed that meant her Thin Mints and Tagalongs weren't harming rainforests, orangutans or those harvesting the orange-red palm fruit.

But later, the whip smart 11-year-old saw the word "mixed" on the label and quickly learned it meant exactly what she feared: Sustainable palm oil had been blended with oil from unsustainable sources. To her, that meant the cookies she was peddling were tainted.

Other Es – Water and Air



Returning every drop of water we use

We promised to return 100% of the water we use to make our drinks. We met that goal and continue to regenerate more water than we use each year.

[EXPLORE](#)



The Coca-Cola Company - Water Security 2020

Climate Change (1/2)



Other Items

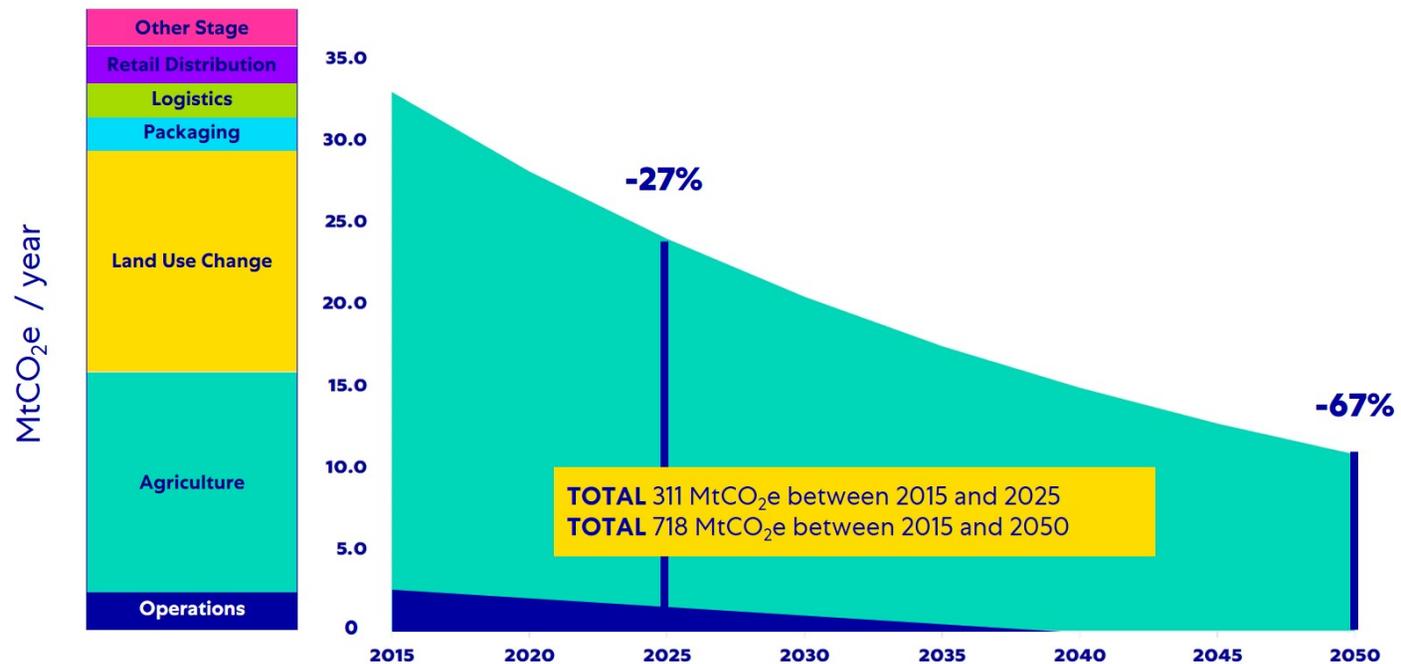
We believe that climate change is one of the most significant global challenges of our time. We have established a climate change strategy based on four dimensions: matching 100% of the electricity consumption of our operations with purchases of renewable energy; understanding the effect of climate change on the resiliency of our core business operations; being a vocal advocate for greening electrical grids worldwide; and empowering everyone—businesses, governments, nonprofit organizations, communities, and individuals—to use Google technology to help create a more sustainable and resource-efficient world. Google's approach to climate change and our broader sustainability efforts are provided in our annual sustainability reports.

We may experience supply shortages and price increases driven by raw material availability, manufacturing capacity, labor shortages, industry allocations, natural disasters, the effects of climate change (such as sea level rise, drought, flooding, wildfires, and increased storm severity).

Climate Change (2/2)

MARS

GLIDEPATH FOR GREENHOUSE GAS (GHG) EMISSION REDUCTION TARGETS



Litigation Preview?

- **Potential Liability Under Federal and State Securities Laws**
 - Statements potentially actionable as false or misleading.
- **Potential Liability Under Federal and State Consumer Protection and Anti-fraud Laws**
 - Consumers must plausibly allege, and ultimately prove, that they relied on a material misrepresentation in making their decision to purchase from the company.
- **New Class Action Complaints**
 - Recently challenging representations of humane treatment of animals.
- **Books and Records Requests**
 - Looking for additional information relating to mismanagement and breach of fiduciary duties.
- **State and Municipal Investigations and Lawsuits**
 - Thus far focused on the energy sector and climate change.

What Can You Do Now? (1/2)

- **Review the existing process for assessing the materiality of climate change and ESG matters** and determine whether any additional disclosures should be included in future SEC filings.
- **Assess the company's other public climate change and ESG disclosures** (e.g., state- and EPA-mandated disclosures, voluntary disclosures in sustainability reports and to third-party organizations like the CDP, and disclosures on websites and in investor presentations).
- **Evaluate whether additional disclosure controls are needed** around the company's other public climate change and ESG disclosures, particularly with respect to voluntary disclosures.
- **Monitor regulatory and legislative developments on greenhouse gas and climate change matters** at the international, federal, state, and regional levels, and assess the potential impact of such developments on the company's business.
- **Prepare for additional SEC disclosure requirements** related to climate change and ESG matters.

What Can You Do Now? (2/2)

- Include **disclaimers** alongside ESG disclosures.
- Set up **internal controls and review procedures** to confirm the accuracy of ESG disclosures. Great place to integrate your EHS counsel!
- Consider using **aspirational language** and **estimates** in ESG disclosures.
- Understand that the **location** of ESG disclosures matters.
- **Educate internally** on litigation and related trends relevant to ESG disclosures.
- Encourage appropriate **internal collaboration** in developing and confirming ESG disclosures, including legal review.
- Evaluate **board practices** for overseeing and evaluating ESG efforts, including ESG disclosures.

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Technical Compliance

Technical Compliance (1/2)

- Technical compliance programs are a useful tool for companies to **safeguard and enhance environmental compliance**—particularly in industries already subject to historical or ongoing enforcement activity.
- Implementing and strengthening a company’s technical compliance system will enable the **detection of potential violations** so that they can be addressed before they become the subject of federal or state enforcement.
- Indeed, in addition to more traditional compliance areas such as anti-corruption, DOJ itself has recently begun to emphasize **technical compliance** in recent **enforcement resolutions**.
 - Several recent major CAA enforcement settlements dealing with mobile source emissions contain significant technical compliance obligations.
 - These resolutions have increased DOJ’s ability to judge and compare technical compliance programs.

Technical Compliance (2/2)

- To safeguard environmental compliance, companies may wish to evaluate whether their **technical compliance systems** contain certain **key elements**:
 - Continuous and detailed risk assessments.
 - Evaluations of effectiveness of compliance measures and associated remedial steps to address lack of effectiveness.
 - Effective design *and* effective operation.
 - Awareness and understanding of both legal requirements and relevant compliance processes (*e.g.*, through detailed and consistent training).
 - Competency of personnel regarding both legal requirements and technology.
 - Individualized and specialized compliance tools and measures based on specific industry and technology at issue.
 - Comprehensive and objective self evaluation through, *e.g.*, internal audit.
 - Segregation of duties.

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Questions?

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Raymond Ludwiszewski is a partner in the Washington, D.C. office. He joined the firm's Environmental Litigation and Mass Tort Practice Group after spending eight years in senior legal positions in the United States government dealing with environmental regulatory issues and litigation in the Environmental Protection Agency and the Justice Department.

Under EPA Administrator William Reilly, Mr. Ludwiszewski served as General Counsel at the United States Environmental Protection Agency in Washington. Before assuming that position, he served as Assistant Administrator for Enforcement at EPA. Earlier, Mr. Ludwiszewski held a number of senior positions at the United States Department of Justice, with an emphasis in environmental litigation. First, he was Special Counsel to the Assistant Attorney General for the Environment and Natural Resources Division. Subsequently, Mr. Ludwiszewski was Associate Deputy Attorney General.

Some significant matters he has handled include the defense of complex toxic tort "contaminated community" cases, the defense of important environmental civil enforcement cases; the successful challenge of major environmental regulations; the defense of large environmental criminal matters; and the prosecution of litigation against the United States. Additionally, he has handled noteworthy Supreme Court litigation, including *Nollan v. California Coastal Commission* and *First English Evangelical Church v. Los Angeles*.

Mr. Ludwiszewski was a member of the Administrative Conference of the United States. He has written and spoken extensively on administrative law and environmental issues. Mr. Ludwiszewski was Vice Chairman of the National Environmental Enforcement Council and of the American Bar Association Committee on Environmental Crimes and Enforcement. He has been listed in *Washingtonian* magazine's Best Environmental Lawyers List, the *Washington Post* magazine's *Best Lawyers in America*[®], and *Chambers USA*. In August 2009, he was also named as a finalist for the top Environmental lawyer in Washington by *The Washington Business Journal*. Mr. Ludwiszewski is a member of the Environmental Law Institute's Board of Directors. Additionally, he served for seven years on the seventeen-person Executive Committee responsible for managing the Firm.

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Stacie B. Fletcher is a litigation partner in the Washington, D.C. office. She practices in the firm's Litigation Department and is Co-Chair of the Environmental Litigation and Mass Tort Practice Group. Ms. Fletcher has handled a wide variety of cases under federal and state environmental statutes, including serving as lead counsel on numerous enforcement defense matters with U.S. EPA and state agencies.

In 2018 and 2019, Ms. Fletcher was recognized as a *Euromoney* LMG "Rising Star" in the area of Environmental Law. From 2017 to 2020, she also was recognized by *US Legal 500* as an up-and-coming "next generation" lawyer in the area of Environmental Litigation and, from 2014 until 2017, as a *Super Lawyers* "Rising Star" in Environmental Litigation for the Washington D.C. area. *Law360* named Gibson Dunn one of its five Environmental Groups of the Year for its high-profile victories in 2018.

Representative engagements include:

- Represented Mercedes-Benz and Daimler in an investigation relating to compliance with Clean Air Act requirements governing emissions after-treatment and in related settlement of civil claims with the U.S. Department of Justice, the U.S. Environmental Protection Agency, the California Attorney General, the California Air Resources Board, and U.S. Customs and Border Protection. *United States v. Daimler AG et al.*, No. 02564 (D.D.C. 2020) & *California v. Daimler AG*, No. 02565 (D.D.C. 2020).
- Obtained summary judgment for a pulp and paper manufacturer in a series of lawsuits alleging that air emissions from the client's facilities have caused personal injuries and property damage. *International Paper v. Brantley*, 09-cv-230, 2017 WL 2292767 (M.D. Ala. May 24, 2017). In 2018, *Euromoney* LMG recognized this victory as a "Matter of the Year."
- Successfully prosecuted a \$250 million CERCLA cost recovery action against the United States represented by the Department of Justice Environment and Natural Resources Division. During a two-week bench trial in federal district court, Ms. Fletcher cross-examined key government experts and directed examination for a critical fact witness on the government's affirmative defenses. The court entered declaratory judgment requiring defendant United States to pay 29% of the client's future remediation costs. *Lockheed Martin Corporation v. United States* (D.D.C.).

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David Fotouhi is a partner in the Washington, D.C. office. He practices in the firm's Litigation Department and is a member of the firm's Environmental Litigation and Mass Tort practice group. Mr. Fotouhi joined the firm after nearly four years at the U.S. Environmental Protection Agency (EPA), where he served as Acting General Counsel, Principal Deputy General Counsel, and Deputy General Counsel.

Mr. Fotouhi combines his expertise in administrative and environmental law with his litigation experience and a deep understanding of EPA's inner workings to represent the firm's clients in enforcement actions, regulatory challenges, and other environmental litigation. He has provided legal counsel and managed defensive litigation under the Administrative Procedure Act (APA) and every major environmental statute, including the Clean Air Act (CAA), Clean Water Act (CWA), Safe Drinking Water Act (SDWA), Resource Conservation and Recovery Act (RCRA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Emergency Planning and Community Right-to-Know Act (EPCRA), Oil Pollution Act (OPA), Toxic Substances Control Act (TSCA), Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and Endangered Species Act (ESA).

At EPA, Mr. Fotouhi led an office of 245 attorneys and staff. He played a critical role in developing the litigation strategy to defend the Agency's actions from judicial challenge, including leading successful efforts to defend EPA's Risk Evaluation Rule under TSCA, EPA's decision not to impose Superfund financial assurance requirements on the hardrock mining industry, EPA's rule postponing compliance dates for the 2015 Effluent Limitations Guidelines for steam electric power plants under the Clean Water Act, EPA's 2017 Annual Volumetric Rule under the Clean Air Act's Renewable Fuels Program, and EPA's registration decisions under FIFRA for certain pesticides. He also led the EPA team that defended the repeal of the Clean Power Plan (CPP) and promulgation of the Affordable Clean Energy (ACE) Rule to replace the CPP. In each of these matters, Mr. Fotouhi worked directly with DOJ's Environment and Natural Resources Division.

Before joining EPA, Mr. Fotouhi practiced in the firm's Environmental Litigation and Mass Tort practice group. In that role, Mr. Fotouhi was a member of litigation teams on a broad range of environmental matters, including CERCLA cost recovery actions, Clean Air Act enforcement cases, and environmental mass tort litigation in state and federal courts. In addition, Mr. Fotouhi represented clients as part of internal investigations, agency adjudications, and petitions for review of final agency actions.

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Abbey Hudson is a partner in Gibson Dunn's Los Angeles office. Her practice focuses on environmental matters and complex trial litigation. She devotes a significant portion of her time to helping clients navigate environmental and emerging regulations and related governmental investigations.

Ms. Hudson has handled all aspects of environmental and mass tort litigation and regulatory compliance. She has provided counseling and advice on environmental and regulatory compliance to clients on a wide range of issues, including supply chain transparency requirements, comments on pending regulatory developments, and enforcement counseling. She has experience handling California environmental matters that involve the California Air Resources Board, the South Coast Air Quality Management District, the California Geologic Energy Management Division, and the Regional Water Quality Control Board – Los Angeles Region.

Some of Ms. Hudson's most recent non-confidential matters include:

- *Tellez v. Dole Food Co.*: securing dismissal with prejudice of U.S.-filed toxic tort claims alleging that DBCP caused reproductive harm.
- *Manspeaker v. Intel*, *Meyers v. Intel*, *Rodriguez v. Intel*: multi-jurisdictional transgenerational tort disputes.
- *Hollingsworth v. Perry*: the federal constitutional challenge to California's ban on same-sex marriage, Proposition 8.

Ms. Hudson served on the firm's associates committee, and currently services on the firm's community affairs and diversity committees. Additionally, Ms. Hudson helped launch and helps run the firm's LGBT Women's initiative. In 2017, Ms. Hudson was named one of the 40 Best LGBT Lawyers Under 40 by the National LGBT Bar Association. Ms. Hudson also has an active pro bono practice.

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Rachel Levick Corley is an associate in the Washington, D.C. office. She practices in the firm's Litigation Department and is a member of the Environmental Litigation and Mass Tort Practice Group. Ms. Corley has represented clients in a wide range of federal and state litigation, as well as agency enforcement actions, cost recovery cases, and administrative rulemaking challenges.

Representative engagements include:

- Represented Daimler AG and Mercedes-Benz USA, LLC in investigation and civil enforcement action regarding compliance with Clean Air Act requirements governing emissions controls and in related settlement of civil claims with the U.S. Department of Justice, the U.S. Environmental Protection Agency, the California Attorney General, the California Air Resources Board, and U.S. Customs and Border Protection. *United States v. Daimler AG*, No. 20-2564 (D.D.C.).
- Represented a coalition of major automotive manufacturers as intervenors in several consolidated challenges to NHTSA's September 2019 rulemaking finding that state greenhouse gas emissions regulations are preempted by federal law, and to EPA's parallel rulemaking revoking California's Clean Air Act preemption waiver. *Union of Concerned Scientists v. NHTSA*, No. 19-1230 (D.C. Cir.); *California v. Chao*, No. 19-2826 (D.D.C.).
- Successfully represented the Association of Global Automakers as intervenors in obtaining dismissal by the D.C. Circuit of consolidated challenges to the EPA's withdrawal of a prior agency determination regarding light-duty vehicle greenhouse gas emission standards. *California v. EPA*, 940 F.3d 1342 (D.C. Cir. 2019).

Ms. Corley was an associate at Gibson Dunn from 2013 to 2014. From 2014 to 2016, she served as a law clerk to the Honorable Amy Berman Jackson of the United States District Court for the District of Columbia. She rejoined the firm in 2016.

Ms. Corley received her law degree *cum laude* from the University of Pennsylvania Law School in 2013, where she was a recipient of the Levy Scholarship. During law school, she served as a Senior Editor of the *University of Pennsylvania Law Review* and as a Louderback Legal Writing Instructor. Ms. Corley earned her Bachelor of Arts degree *summa cum laude* from the University of Pennsylvania in 2010.

Additional Resources

Recorded Webcasts (Available for CLE Credit)

Environmental Litigation and Mass Tort Practice Group

Law360: 3 Key Environmental Takeaways From Biden's First 30 Days

Client Alert: U.S. EPA Releases Final Rule Tightening Emissions Limits for Power Plants in 12 States

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