

# EPA Enforcement, Environmental Justice Efforts Under Biden Won't Be Just a Sequel

By Dave T. Buente Jr., Justin A. Savage, Simone Jones, and Doug Parker

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Prepare to be surprised, say three Sidley Austin environmental attorneys, writing with Doug Parker, founder of environmental-risk firm RPO Strategies. A Biden administration's enforcement approach won't be identical to former President Obama's, but may be more aggressive in matters of climate change and environmental justice, they say. Here's how.

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The conventional wisdom seems to be that a Biden administration will largely reflect the environmental enforcement record and priorities of the Obama administration, but that is a mistake.

President-elect Biden's campaign featured environmental policies that often went beyond the Obama administration's more measured stances, particularly on climate change and environmental justice—issues that will inevitably influence the new administration's approach to enforcing the nation's environmental laws.

The Biden administration also comes into office with an Environmental Protection Agency enforcement program that has been subject to an unprecedented level of policy constraints. These include state deference, a policy generally prohibiting surprise inspections, and EPA headquarter restraints on information requests and investigation initiation.

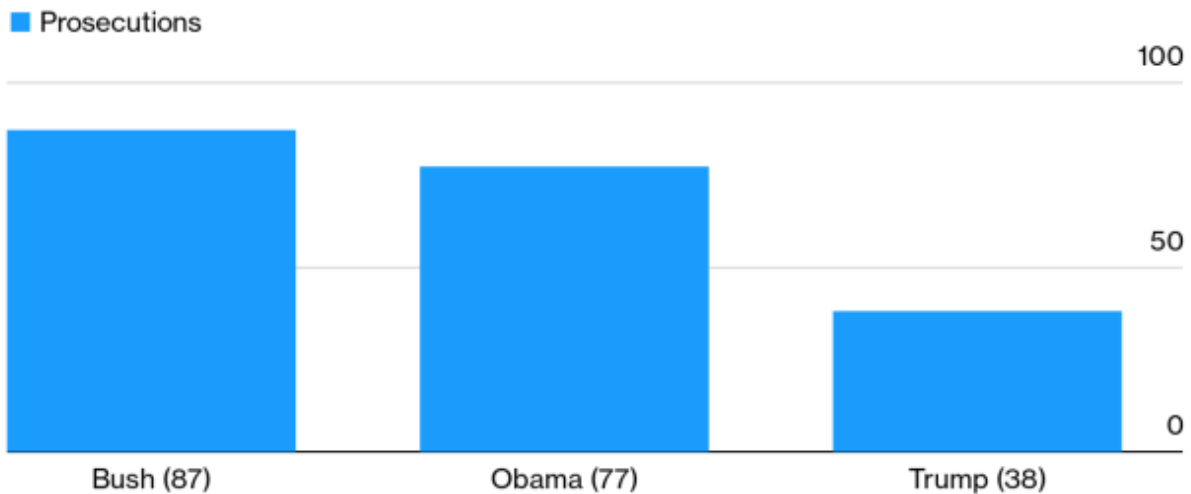
Once these constraints are removed, human nature suggests that EPA staff may “snap back” to address matters previously beyond their purview. And importantly, enforcement represents an area of environmental policy largely unrestricted by Congress, making it an appealing policy area for the Biden team to quickly demonstrate its different approach from the Trump administration.

Collectively, these factors suggest that the regulated community will face a re-energized, and more aggressive, federal government over the next four years.

**Numbers Tell The Story**

Disparate claims have been made about the trajectory of environmental criminal and civil enforcement, often with a partisan slant. A review of the data, however, reveals that the number of criminal and civil cases brought by the Department of Justice and the EPA, respectively, began declining during the Obama administration, with the number of case initiations reaching record lows under President Trump.

## Environmental Criminal Prosecutions Average per year by presidential administration



Source: Professor David M. Uhlmann, University of Michigan Law School

Bloomberg Law

This is best demonstrated by a comparison of the average number of environmental criminal prosecutions per year by presidential administration: 87 for Bush, 77 for Obama, and 38 for Trump. Although this number may be affected by President Trump's deference to the states, there is no tracking mechanism for the "state referrals," so cases may have resulted in any range of outcomes, including no actions.

Nonetheless, it is all but guaranteed that the number of enforcement matters will increase significantly during a Biden administration.

### Core Aims: Climate Change and Environmental Justice

During his campaign, President-elect Biden committed to tackling climate change, pledging to eliminate carbon emissions from electricity by 2035, and to achieve net-zero carbon emissions by 2050. With broad climate legislation unlikely in the near term, attention is now focusing on extensive regulatory and policy changes that the executive branch can implement, ranging from standard setting to government procurement policy.

This whole-of-government approach will certainly include environmental enforcement as one more tool to apply to this administration priority. In practice, this likely means a continued focus on investigations related to vehicle emissions, as well as prioritizing stationary source investigations that have a climate nexus, particularly against emissions-intensive industries such as the oil and gas sector.

It is also likely that the new administration will take a more data-driven approach to evaluating compliance with climate-related regulations. For example, the administration could prioritize the inspection of certain carbon-intensive sectors, as well as the analysis of required greenhouse gas reporting data to identify facilities that are suspected of providing inaccurate or incomplete information.

Look also for changes in policy at the DOJ that will once again allow for wider use of supplemental environmental projects, with a focus on climate-related projects where applicable.

### **Expect Focus on Environmental Justice**

President-elect Biden's focus on environmental justice—a central part of his environmental agenda—also is likely to produce an increase in environmental enforcement matters. The EPA has already developed extensive demographic data identifying communities that often experience a disproportionate pollution burden.

Expect environmental violations that occur in these geographic areas to receive greater attention, and where environmental justice was generally not a consideration in case selection in the past administration, it now will be.

President-elect Biden also has committed to establishing a new division at the Justice Department—the Environmental and Climate Justice Division—that will complement the existing Environment Division. It will be charged with increasing civil and criminal enforcement, supporting ongoing state/Non-governmental Organization climate litigation against industry, addressing legacy pollution to protect communities, and working with EPA's Office of Civil Rights to implement its efforts.

Further, the Biden administration also is expected to form two new councils within the Counsel on Environmental Quality—a White House Environmental Justice Advisory Council and White House Environmental Justice Interagency Council. Among other tasks, these councils will update a climate and economic justice screening tool through mandates for new emissions monitoring, while the EPA will be directed to create a community notification program to provide real-time information about releases to local communities.

Be ready to be surprised. Not only will Biden's enforcement approach not be a sequel, but we can expect innovative strategies that align with policy goals such as climate change and environmental justice.

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