



**The Biden Administration's First 100 Days
Priority Environmental Actions**

December 2020

Introduction

Waterkeeper Alliance is a 501(c)(3) not-for-profit environmental advocacy organization dedicated to protecting and restoring water quality to ensure that the world's waters are drinkable, fishable and swimmable. We are composed of more than 350 Waterkeeper Member Organizations and Affiliates based in 48 countries on 6 continents, covering over 2.75 million square miles of watersheds. In the United States, Waterkeeper Alliance represents the interests of more than 175 U.S. Waterkeeper Member and Affiliate Organizations, their individual members and supporters, as well as the collective interests of over 15,000 individual supporting members of Waterkeeper Alliance that live, work and recreate on or near waterways across the country – many of which are severely impaired by pollution. Our mission is to strengthen and grow a global network of grassroots leaders protecting everyone's right to clean water.

Over the past four years, we have collectively and tirelessly fought to stop the immeasurable damage that has been done by the outgoing administration, not just to our natural environment and all living things that depend upon it, but to the rule of law and the regulatory and legal infrastructure that Americans have collectively relied upon for decades to protect our public trust waters, air, lands, and climate.

While undoing years of systemic damage will not happen overnight, there are a number of actions that the incoming administration should prioritize during its first 100 days in office to hit the ground running and to begin as soon as practicable the lengthy processes to reverse the most egregious threats to our clean water and communities.

1. Revoke Trump's Worst Environmental Executive Orders.

From its outset in 2017, the Trump administration relied heavily on unprecedented and damaging executive orders and memoranda to empower political appointees at EPA and other executive agencies to carry out the Trump pro-polluter agenda. While there is a very long list of executive orders and actions that President-elect Biden will need to revoke and repeal, we highlight five here that should be of the highest priority for the new administration.

13771	1/30/2017	Reducing Regulation and Controlling Regulatory Costs	Arbitrarily directed all federal agencies to repeal at least two existing regulations for each new regulation issued. This requirement has significant potential to create impediments for the Biden regulatory agenda if not promptly rescinded.
13778	2/28/2017	Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule	Directed EPA and the Army Corps to review and replace the 2015 regulatory definition of "waters of the United States" with an unprecedented and extremely narrow jurisdictional definition, leaving vast swaths of the nation's waters completely unprotected under federal law from pollution and/or destruction. The resulting regulation, the 2020 " Navigable

			<p>Waters Protection Rule,” limits Clean Water Act protections to only large, commercially navigable waters, the territorial seas, and a small subset of the waters that feed into them.</p>
13783	3/28/2017	<p>Promoting Energy Independence and Economic Growth</p>	<p>Directed federal agencies to review and rescind and/or revise rules and agency actions that impede U.S. energy production. Resulted in numerous anti-environment regulatory actions, including:</p> <ul style="list-style-type: none"> • EPA’s review and rescission of the Clean Power Plan • Reduced public review, unlawfully streamlined, and dramatically expanded fossil fuel leasing on public lands across the western U.S. • Rescinding five energy- and climate-related executive actions taken by the Obama administration • Delaying, reviewing and rolling back the Steam Electric Power Plant Clean Water Act Effluent Limitations Guidelines
13795	4/28/2017	<p>Implementing an America-First Offshore Energy Strategy</p>	<p>Ordered the Secretary of Commerce to review all Marine National Monuments and Marine Sanctuaries designated or expanded since 2007 to assess opportunity cost associated with potential energy and mineral exploration and production from the Outer Continental Shelf. Resulted in numerous anti-environment regulatory actions, including:</p> <ul style="list-style-type: none"> • Numerous rollbacks of offshore oil and gas rules • Directed consideration of enormous increases in offshore lease sales, including potential extraction in new regions such as Western Gulf of Mexico, Central Gulf of Mexico, Chukchi Sea, Beaufort Sea, Cook Inlet, Mid-Atlantic, and South Atlantic
13868	4/10/2019	<p>Promoting Energy Infrastructure and Economic Growth</p>	<p>Directed EPA to review § 401 of the Clean Water Act (CWA) and related regulations and guidance. Instructed EPA to publish proposed rules revising these regulations consistent with the Trump energy dominance agenda within 120 days of the</p>

			<p>order. Instructed EPA to finalize these rules no later than 13 months after the order. EPA issued a final 401 rule on July 13, 2020 which stripped states and tribes of much of the statutory authority they have held under federal water pollution laws dating to before the passage of the modern CWA in 1972.</p>
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2. Issue a New Executive Order to “Restore the Clean Water Act.”

In addition to immediately rescinding the Trump executive orders that attacked, and resulted in a dramatic regulatory weakening of, the Clean Water Act (CWA) (see orders 13778 and 13868, above), President-elect Biden should issue one or more executive orders within his first 100 days in office to expedite (1) repairing the tragically broken definition of “waters of the United States,” and (2) restoring state and tribal authority and public participation rights under the CWA section 401 water quality certification process. While these two vital actions could be taken individually, we believe they could also be efficiently addressed in a single “Restoring the Clean Water Act” executive order.

a. “Waters of the United States” definition.

Restoring Clean Water Act (“CWA”) protections for the nation’s waters must be an urgent priority for the Biden administration. The CWA mandates that federal agencies, states and tribal governments work cooperatively to eliminate water pollution at its source to achieve the Act’s objective, *i.e.*, to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Consistent with this objective, for more than four decades the CWA’s regulatory definition of “waters of the United States” broadly protected traditionally navigable waters, territorial seas, interstate waters, and intrastate rivers, streams, lakes, wetlands, canals, and other waters against pollution and destruction. However, [a series of deregulatory actions](#) by the EPA and Army Corps in response to Executive Order 13778 have now essentially rewritten the CWA to limit the law’s protections to only large, commercially navigable waters, the territorial seas, and a small subset of the waters that feed into them. These actions by the Trump administration leave vast swaths of the nation’s waters unprotected against dangerous pollution discharges and destructive dredging and filling that harm drinking water supplies, fisheries and recreational waters, as well as people and ecosystems exposed to dangerous levels of pollution in directly impacted and downstream waters. The next administration must restore unequivocal protections for our nation’s water resources, communities and economy by affirming its commitment to the objectives of the CWA and taking the following actions to ensure broad jurisdiction over the nation’s waters:

- Promptly issue a New Executive Order directing the EPA and the Army Corps of Engineers to repeal the [Navigable Waters Protection Rule](#), and to replace it with a new regulatory definition that will restore, protect, and maintain the “chemical, physical and biological integrity of the Nation’s waters,” and
 - Fully restore science-based protections for rivers, streams, lakes, wetlands, canals, and other waters, including protections for navigable-in-fact, interstate, and intrastate waters, for waters that have subsurface hydrologic connections to other waters of the United States, and for “other waters” that may lack connections to traditionally navigable waters,

where either (1) their use, degradation, or destruction would or could affect interstate or foreign commerce, or (2) they individually or cumulatively impact other waters of the United States.

- Protect fish and aquatic life and wildlife, recreational uses, drinking water supplies, and agricultural, industrial, and other uses in those waters and in downstream waters.
- Restore the cooperative federalism approach envisioned by Congress through a nationally applicable Clean Water Act implemented in true partnership with state and tribal governments.

b. CWA § 401 Water Quality Certifications.

Upon taking office, President-elect Biden should promptly direct EPA to review and repeal the Trump administration's unlawful 2020 rewrite of the agency's CWA § 401 regulations ([Trump § 401 Rule](#)) and guidance. To advance its "energy dominance agenda," the Trump administration purported to reject two binding Supreme Court opinions,¹ and dramatically narrowed the authority of states and many tribes² to implement the CWA within their borders. The Trump 401 rule is directly contrary to Congressional intent, will harm public health, water quality, and wildlife, and constitutes arbitrary, capricious, and unlawful agency action. It violates the plain, unambiguous meaning of the statute, and is inconsistent with decades of U.S. Supreme Court and myriad other federal court precedents.

Under section 401(a), Congress required that before any federal authorization to conduct any activity that may result in any discharge to waters, the applicant must first obtain from the state in which such discharge may occur a certification that the activity will not cause or contribute to water quality violations. Further, Congress plainly prohibited any such federal license or permit from being issued unless the state's certification is first obtained.³ Under section 401(d), Congress granted states broad authority to issue certifications that require satisfaction by applicants of specific conditions. The language that Congress chose plainly and unambiguously demonstrates that such conditioned certificates are entirely within the purview of the States, and that conditions incorporated by a State into a water quality certification "shall" become mandatory requirements in any federal license or permit.⁴

Notwithstanding this plain and unambiguous grant of authority to the states and tribes, the Trump 401 rule has dramatically weakened their authority by:

- Dramatically shrinking the scope of state section 401 authority to regulate only *point source discharges* despite the statute's plain requirement that certifications are required for "*any activity*" that may result in "*any discharge*" to waters;

¹ *S.D. Warren v. Maine Bd. of Env't'l Protection*, 547 U.S. 370, 374 (2006); *P.U.D. No 1 of Jefferson Cty v. Wa. Dep't of Ecology*, 511 U.S. 700, 715 (1994).

² Tribes with "treatment as state" (TAS) authority to implement Clean Water Act water quality standards are empowered to implement and administer the CWA 401 certification process on tribal lands. According to [EPA's website](#), [69 tribes](#) maintain TAS status for these purposes.

³ 33 U.S.C. § 1341(a)(1) (emphasis added).

⁴ 33 U.S.C. § 1341(d) (emphasis added).

- Codifying draconian new time limits and administrative “traps” whereby states may easily be found to have inadvertently waived their statutory authority despite good-faith efforts to comply, often leaving significant adverse environmental impacts completely unaddressed;
- For the first time giving federal agencies the ability to reject state section 401 denials and conditions based on purported defects in state processes, and to approve federal permits and licenses over state objection, shifting the burden to states to sue federal agencies to enforce clear statutory rights;
- Limiting the public’s ability to participate in federal permitting and licensing processes:
 - Through unprecedented draconian limits on state authority, the Trump 401 Rule restricts the protections that people can seek from the states when a federal permit or license is under review.
 - By imposing strict timetables on state review and starting the clock when the applicant first requests certification even if the applicant provides insufficient information about the proposed activity, the public has less time and inadequate information to comment on and request protective conditions for a proposed project.

At least five lawsuits have been filed in courts across the country challenging the Trump 401 rule.⁵ The Biden administration should not defend such a patently unlawful regulation that directly contravenes Supreme Court precedent and misappropriates to federal agencies the authority that Congress plainly vested in states and tribes. The Trump 401 rule irresponsibly and dangerously impedes the ability of states, tribes, citizens, other Federal agencies, and even the EPA itself, to protect waters and ecosystems and people who rely on, use, and enjoy them across the country. President-elect Biden should issue an executive order during his first 100 days in office directing EPA to review and repeal this rule.

3. Prioritize Environmental Justice.

President-elect Biden wisely and rightly included racial equity and climate change as two of the administration’s four [Build Back Better priorities](#), and has also [announced his intention](#) to revise and reinvigorate the [1994 Executive Order 12898](#) on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. As the president-elect astutely observed, “our nation’s environmental justice policy was developed more than twenty years ago and no longer addresses the needs of the present or future.”

Truth be told, our nation’s environmental justice policy has never been nearly robust enough to make meaningful differences in the lives and health of underserved people and communities across our nation. Consistent with President-elect Biden’s stated priorities, we urge him to expedite revising EO 12898 – or to issue a new and expansive executive order – to immediately prioritize reversing the grave systemic damage done to environmental justice policy and enforcement in the United States over the past four years. But the administration should not stop there. It must also do everything in its power to make up for lost time and bring our nation’s environmental justice policies and systems into the 21st century.

We applaud the [Biden Plan](#) to Secure Environmental Justice and Equitable Economic Opportunity and urge the new administration to ensure that all of the elements of the plan be incorporated during his first 100 days in office into any operative revised or new executive order.

⁵ We note that Waterkeeper Alliance is a plaintiff in one of these lawsuits. *S. Carolina Coastal Conserv. League, et al. v. Andrew R. Wheeler, et ano.*, 2:20-cv-03062-DCN (D.S.C. filed Aug. 20, 2020).

4. Restore the National Environmental Policy Act (NEPA).

Since 1970, the National Environmental Policy Act (NEPA) has been a vital tool for the public to ensure that decisions made by federal agencies that impact the environment are made in a transparent, well-informed manner. NEPA requires that, before federal agencies take certain actions such as issuing permits or financing projects, they must first analyze the impacts of those actions on the human and natural environment, consider reasonable alternatives, and provide the public with a meaningful opportunity to learn about a proposal and to weigh in via notice-and-comment during the decision-making process.

In 2020, the Trump White House Council on Environmental Quality (CEQ) finalized revisions to its NEPA regulations which serve as a regulatory floor and model for agencies across the federal government. The [Trump NEPA rollback rule](#) limits the scope of actions to which NEPA applies, eviscerates the thorough environmental analysis that forms the backbone of the statute, reduces the ability of the public to participate in federal agency decision making, and seeks to limit judicial review of agency NEPA compliance. It upended a half century of precedent, and flies in the face of congressional intent as it has been interpreted by courts for decades. The rule has been challenged in several lawsuits in federal courts across the country.⁶ If it is not repealed or vacated it will have devastating public health, climate, environmental justice, water and air quality, and other environmental impacts for generations.

Among many other injuries to NEPA, the Trump NEPA rollback rule:

- Redefined “effects” to remove the requirement that agencies consider “cumulative” and “indirect” effects of their actions.
- Eviscerated public access to information and public participation requirements.
- Expanded reliance by agencies on categorical exemptions to allow many activities to completely evade NEPA review.
- Removed conflict-of-interest limitations to allow project proponents to prepare their own environmental impact statements and other NEPA analysis documents.
- Removed the requirement that agencies study impacts outside the United States.

The ability of our nation to address two of President-elect Biden’s key priorities – climate change and environmental justice – are inextricably tied to NEPA, and will be made much more challenging by the Trump NEPA rollback rule. As one example, a new power plant might not individually be expected to have an enormous impact on our planet’s climate, but when considered *cumulatively* with other emitters of greenhouse gasses, might be considered to have much greater impact. Similarly, if that new power plant is proposed to be constructed and operated in an environmental justice neighborhood that is already overburdened with industrial facilities polluting peoples’ water and air, the cumulative impact of the new pollution load upon the existing conditions in that community obviously should be assessed to understand the true environmental impact upon that community. Sadly, the Trump NEPA rollback rule essentially requires federal agencies to wear blinders to existing or expected environmental conditions, and to treat each new action as if the planet and the community are starting with a clean slate.

⁶ We note that Waterkeeper Alliance is a plaintiff in one of these lawsuits. *Iowa Citizens for Community Improvement, et al. v. Council on Environmental Quality, et ano.*, 20-cv-2715 (D.D.C. filed Sept. 23, 2020).

These draconian modifications to the NEPA regulations are arbitrary and capricious on their face, and are irreconcilable with plain Congressional intent when NEPA was passed a half century ago. To address the climate crisis, water quality and scarcity issues, environmental justice, and myriad other challenges, we need to strengthen NEPA, not weaken it. President-elect Biden should issue an executive order within his first 100 days in office directing CEQ to promptly repeal the Trump NEPA rollback rule and to replace it with new regulations that will effectuate the statute's purposes consistent with the administration's priorities.

5. Protect Our Public Lands and Waters from Fossil Fuel Extraction.

We applaud President-elect Biden's promise to begin to address the enormous impacts of fossil fuel mining and extraction on federal lands and waters as a "[Day 1](#)" priority":

On day one, Biden will use the full authority of the executive branch to make progress and significantly reduce emissions. Biden recognizes we must go further, faster and more aggressively than ever before, by ...

Protecting America's natural treasures by permanently protecting the Arctic National Wildlife Refuge and other areas impacted by President Trump's attack on federal lands and waters, establishing national parks and monuments that reflect America's natural heritage, ***banning new oil and gas permitting on public lands and waters***, modifying royalties to account for climate costs, and establishing targeted programs to enhance reforestation and develop renewables on federal lands and waters with the goal of doubling offshore wind by 2030.

Fossil fuels extracted from federal lands are responsible for [about one quarter of all U.S. greenhouse gas emissions](#). Peer-reviewed science [estimates](#) that a nationwide federal fossil fuel leasing ban would reduce carbon emissions by 280 million tons per year, ranking it among the most ambitious federal climate-policy proposals in recent years.

In addition to withdrawing Executive Orders 13783 and 13795 (see section 1, above), President-elect Biden should follow through on his commitment to ban new fossil fuel permitting and leasing on publicly-owned federal lands by issuing a new executive order directing all relevant agencies to pursue such a ban within his administration's first 100 days. At a minimum, the executive order should (1) set forth a policy to stop expansion and facilitate the managed decline of federal fossil fuels in order to constrain warming to 1.5 °C, (2) end new federal fossil fuel leasing and permitting onshore and offshore, and (3) cancel improperly issued leases.

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Waterkeeper Alliance would welcome a meeting with the incoming administration to discuss any or all of these "First 100 Days" requests. We congratulate President-elect Biden for winning the 2020 election and thank him for his consideration of these priorities.

Waterkeeper Alliance and U.S. Waterkeeper Group Endorsers:

Waterkeeper Alliance, New York, NY
Black Warrior Riverkeeper, Birmingham, AL
Cahaba Riverkeeper, Birmingham, AL
Choctawhatchee Riverkeeper, Troy, AL
Coosa Riverkeeper, Birmingham, AL
Hurricane Creekkeeper, Tuscaloosa, AL
Little River Waterkeeper, Fort Payne, AL
Mobile Baykeeper, Mobile, AL
Tennessee Riverkeeper, Decatur, AL
Friends of the Santa Cruz River, a Waterkeeper Alliance Affiliate, Tubac, AZ
White River Waterkeeper, Harrison, AR
CA Urban Streams Alliance - the Stream Team, a Waterkeeper Alliance Affiliate, Chico, CA
Coachella Valley Waterkeeper, La Quinta, CA
Humboldt Baykeeper, Arcata CA
Inland Empire Waterkeeper, Riverside, CA
Los Angeles Waterkeeper, Santa Monica, CA
Orange County Coastkeeper, Costa Mesa, CA
Russian Riverkeeper, Healdsburg, CA
San Diego Coastkeeper, San Diego, CA
San Francisco Baykeeper, San Francisco, CA
San Luis Obispo Coastkeeper, San Luis Obispo, CA
Yuba River Waterkeeper, Nevada City, CA
Animas Riverkeeper, Durango, CO
Boulder Waterkeeper, Boulder, CO
Colorado River Waterkeeper Network/Save the Colorado, Fort Collins, CO
Poudre Waterkeeper, Fort Collins, CO
Upper Colorado River Watershed Group, a Colorado Riverkeeper Affiliate, Grand Lake, CO
Long Island Soundkeeper, New Haven, CT
Anacostia Riverkeeper, Washington, DC
Potomac Riverkeeper Network, Washington, DC
Apalachicola Riverkeeper, Tallahassee, FL
Calusa Waterkeeper, Fort Myers, FL
Collier County Waterkeeper, Naples, FL
Kissimmee Waterkeeper, Orlando, FL
Lake Worth Waterkeeper, Lake Worth, FL
Matanzas Riverkeeper, St. Augustine, FL
St. Johns Riverkeeper, Jacksonville, FL
Tampa Bay Waterkeeper, St. Petersburg, FL
Altamaha Coastkeeper, Brunswick, GA
Chattahoochee Riverkeeper, Atlanta, GA
Flint Riverkeeper, Albany, GA
Ogeechee Riverkeeper, Savannah GA
Satilla Riverkeeper, Nahunta, GA
Savannah Riverkeeper, Hephzibah, GA

Suwannee Riverkeeper, Hahira, GA
Upper Coosa Riverkeeper, Rome, GA
Snake River Waterkeeper, Boise, ID
Lower Ohio River Waterkeeper, New Albany, IN
Quad Cities Waterkeeper, Davenport, IA
Kansas Riverkeeper, Lawrence, KA
Atchafalaya Basinkeeper, Plaquemine, LA
Casco Baykeeper, South Portland, ME
Friends of Penobscot Bay, a Waterkeeper Alliance Affiliate, Rockland, ME
Assateague Coastkeeper, Berlin MD
Baltimore Harbor Waterkeeper, Baltimore, MD
Gunpowder Riverkeeper, Monkton, MD
Patuxent Riverkeeper, Upper Marlboro, MD
Severn Riverkeeper, Annapolis, MD
Choptank Riverkeeper, Easton, MD
Miles-Wye Riverkeeper, Easton, MD
Chester Riverkeeper, Easton, MD
South, West & Rhode Riverkeeper, Edgewater, MD
Waterkeepers Chesapeake, Tahoma Park, MD
Buzzards Baykeeper, New Bedford, MA
Detroit Riverkeeper, Taylor, MI
Pearl Riverkeeper, Madison, MS
Big Blackfoot Riverkeeper, Greenough, MT
Hackensack Riverkeeper, Hackensack, NJ
NY/NJ Baykeeper, Hazlet, NJ
Raritan Baykeeper, Keasbey, NJ
Rio Grande Waterkeeper, Santa Fe, NM
Buffalo Niagara Waterkeeper, Buffalo, NY
Hudson Riverkeeper, Kingston, NY
Peconic Baykeeper, Hampton Bays, NY
Seneca Lake Guardian, a Waterkeeper Alliance Affiliate, Watkins Glen, NY
Cape Fear Riverkeeper, Wilmington, NC
Catawba Riverkeeper, Charlotte, NC
Crystal Coast Waterkeeper, Morehead City, NC
Green Riverkeeper, Hendersonville, NC
Haw Riverkeeper, Bynum, NC
Lower Neuse Riverkeeper, New Bern, NC
Pamlico-Tar Riverkeeper, Washington, NC
Upper Neuse Riverkeeper, Raleigh, NC
White Oak-New Riverkeeper Alliance, Morehead City, NC
Lake Erie Waterkeeper, Toledo, OH
Grand Riverkeeper, Vinita, OK
Tar Creekkeeper, Vinita, OK
Columbia Riverkeeper, Hood River, OR
Rogue Riverkeeper, Ashland, OR
Tualatin Riverkeepers, Tualatin, OR

Willamette Riverkeeper, Portland, OR
Lower Susquehanna Riverkeeper Association, Wrightsville, PA
Three Rivers Waterkeeper, Pittsburgh, PA
Narragansett Bay Riverkeeper, Providence, RI
Narragansett Baykeeper, Providence, RI
South County Coastkeeper, Westerly, RI
Charleston Waterkeeper, Charleston, SC
Congaree Riverkeeper, Columbia, SC
Waccamaw Riverkeeper, Conway, SC
San Antonio Bay Estuarine Waterkeeper, Seadrift, TX
North Sound Baykeeper, Bellingham, WA
Puget Soundkeeper Alliance, Seattle, WA
Spokane Riverkeeper, Spokane, WA
Twin Harbors Waterkeeper, Cosmopolis, WA
Milwaukee Riverkeeper, Milwaukee, WI