



Emissions rise from a smokestack in Ohio

Photographer: Dane Rhys/Bloomberg

## Biden EPA Ponders ‘Hail Mary’ Move on Greenhouse Gas Air Limits

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- EPA opens door for national air quality limits on GHGs
- Experts say move sends signal, but carries legal risk

The Biden administration likely will face a tough climb in the courts and on the ground if it tries to push for national ambient air limits on greenhouse gases, experts and lawyers say.

Acting Environmental Protection Agency Administrator Jane Nishida [wrote](#) last week that the agency “did not fully and fairly assess the issues raised” by a 2009 petition to set National Ambient Air Quality Standards, or NAAQS, for carbon dioxide. The standards are the cornerstone of air pollution law under the Clean Air Act.

Then-EPA administrator Andrew Wheeler denied the petition from the Center for Biological Diversity and 350.org on Jan. 19, the penultimate day of Donald Trump’s presidency.

Nishida's letter makes no promises beyond reconsidering the petition. But observers have long been split over concerns that the proposed air quality standards for carbon dioxide are too complicated to be pragmatic and would result in heavy legal scrutiny of EPA's authority over greenhouse gases as a criteria air pollutant.

Using national air standards to regulate carbon has been floated as a regulatory option since the George W. Bush years, but has never made it on the books.

"Other approaches will provide greater benefits, faster," said Paul Billings, senior vice president of advocacy for the American Lung Association.

## Too Messy?

Regulating carbon emissions for power plants in section 111(d) of the Clean Air Act, for instance, remains a more viable option for clean air experts who see state-by-state NAAQS as too messy of a system to regulate greenhouse gases rooted in the atmosphere all over the U.S.

National air standards for GHGs "would be a real Hail Mary if nothing else is working," University of California-Berkeley law professor Dan Farber said.

Given the complexities, chances are "minuscule" that Biden will set NAAQS limits on carbon after reconsidering the proposal, but the promise to reexamine the issue could be part of a broader messaging strategy, said Jeff Holmstead, a partner at Bracewell LLC who led the EPA's air and radiation office during President George W. Bush's first term.

"Either it was sort of an automatic response to the last-minute Trump decision, or they're sending a signal that they're really open to anything, that they don't want to reject any ideas that environmental groups have about how to deal with climate change," he said.

## Legal Hurdles

A 2014 Supreme Court [decision](#) on power plant permitting rules offers a clue as to how courts may treat legal brawls over potential carbon air standards.

Justices ruled in [Utility Air Regulatory Group v. EPA](#) that even though greenhouse gases are included under the definition of "air pollutant," greenhouse gas regulations aren't automatically triggered every time the Clean Air Act mentions air pollutants.

The decision is a "strong signal" the Supreme Court is unlikely to uphold standards declaring carbon a regulated criteria air pollutant, Farber told Bloomberg Law.

"That's also not even taking into account the fact that the court has gotten more conservative in the meantime," he said.

## Complicated Process

Putting national air standards into motion is a lengthy process that's contingent on more than 50 state and tribal plans that take years to implement from proposal to approval. States must then reach "attainment" once the EPA approves plans to control the six regulated criteria air pollutants—a goal that would be difficult to reach for carbon dioxide limits.

But the individual state plans are part of the appeal of the approach for environmentalists who support the carbon dioxide pollutant limits, according to Maya Golden-Krasner, deputy director of the Center for Biological Diversity's Climate Law Institute.

"It requires states to prepare state implementation plans that would operate optimally reduce emissions across all sectors and sources and therefore achieve much more in less time," she said.

But Holmstead said the process is too cumbersome of an undertaking to be an ideal option.

"This would be a huge, huge change in the way EPA authority operates, it would certainly go to the Supreme Court, and I don't think there's any way it would be upheld," he said.

## Clean Air Tools

The EPA, under President Joe Biden, withdrew the petition denial on March 4 and plans to continue considering the petition's "important issues" before responding further, an agency spokesperson said in [response to the letter](#).

Regulating carbon under NAAQS harnesses the "most far-reaching tool" under the Clean Air Act, Golden-Krasner noted.

"Existing NAAQS have achieved huge pollution reduction for listed pollutants like ozone, particulate matter, and lead, and has led to trillions of dollars in net economic benefits," Golden-Krasner said in explaining the center's support for this route.

Regardless of the outcome, Biden's decision to reconsider the standards is indicative of how the new administration is balancing risk-taking with more "tailored" approaches reflecting knowledge gained from a decade of regulation turnover, said Hana Vizcarra, a staff attorney with the Harvard Law School's Environmental & Energy Law Program.

"This whole-of-government approach, I think, gives them a little more flexibility to decide where they can push and try something new," she said.

To contact the reporter on this story: Jennifer Hijazi in Washington at [jhijazi@bloombergindustry.com](mailto:jhijazi@bloombergindustry.com)

To contact the editor responsible for this story: Rebecca Baker at [rbaker@bloombergindustry.com](mailto:rbaker@bloombergindustry.com)