



MEMORANDUM

TO: SLDMWA BOARD OF DIRECTORS
FROM: DAN KEPPEL, EXECUTIVE DIRECTOR
SUBJECT: EXECUTIVE DIRECTOR'S REPORT
DATE: FEBRUARY 1, 2021

This memo is intended to keep you apprised as to what is happening behind the scenes on policy issues the Family Farm Alliance is engaged in. In the past month, our efforts have focused on preparing for the new Bidens administration, tracking water legislative developments in Congress, engaging in federal agency rulemaking efforts, and planning for our 2021 "virtual" annual conference. These issues and other matters important to our members are further discussed in this memo.

TRUMP ADMINISTRATION ERA CLOSING ACTIONS

In the final days of his Administration, President Trump issued two executive orders that aim to restrict federal regulations and to limit the incoming Biden team. The first order would prevent career staff from signing off on rulemakings. The second executive order would "protect Americans from overcriminalization through regulatory reform." It follows several Trump Administration actions intended to rein in administrative enforcement, including related to environmental crimes. Neither order is expected to survive the initial days of a Biden Administration. The Family Farm Alliance was involved in two other actions undertaken in the last days of the Trump presidency, as further described below.

1. EPA Clean Water Act Rulemaking

A draft memo from Environmental Protection Agency (EPA) Assistant Administrator for the Office of Water David Ross appears to provide some clarity to industry follow the Supreme Court opinion in *County of Maui v. Hawaii Wildlife Fund*, on how permits would be required under the Clean Water Act (CWA) for pollution that moves through groundwater. Recall that the Family Farm Alliance was part of a group of eight national agriculture organizations that joined in an *amicus curiae* ("friend of the court") brief that was transmitted to the U.S. Supreme Court in May

2019. This amicus effort was intended to protect routine agricultural operations from a potentially limitless expansion of the CWA National Pollution Discharge Elimination System (NPDES) program.

In the opinion, the Supreme Court justices said such a determination hinges on several factors, including time and the distance the pollution travels, as well as the nature of the material through which the contaminants move. Some indirect paths, the court wrote, may have the ability to dilute or chemically alter pollution that travels through them. The Court added the term “functional equivalent” as a test whether pollutants moving through groundwater to CWA jurisdictional “navigable waters” are a direct discharge into such waters. The draft memo offers several recommendations to the regulated community and permitting authorities on how to implement the *Maui* opinion as part of the NPDES permit program.

EPA late last year solicited public comments on the draft memorandum, which were due earlier this month. We sent a brief letter to EPA that clarifies that the existing exemptions from the NPDES permit requirements in the CWA, such as for irrigation return flows and for water transfers, are not negated or otherwise impacted by the *Maui* decision. The Alliance and other industry organizations are generally supportive of EPA’s proposed guidance. Others are not so supportive of the proposed guidance. The Center for Biological Diversity (CBD) in its comment letter says “EPA must abandon the guidance immediately” because it misinterprets Supreme Court precedent, ignores the plain text of the CWA, and includes agency decision making that can only be legally accomplished through notice and comment rulemaking under the Administrative Procedure Act (APA).

2. President Trump’s Executive Order on Water

Donald Trump last October signed Executive Order (EO) 13956 on “Modernizing America’s Water Resource Management and Water Infrastructure”, which formally established the Water Subcabinet. The Water Subcabinet in January 2021 completed several actions proposed in EO 13956 relative to reducing inefficiencies and duplication, improving water resource management, integrated infrastructure planning and the water sector workforce. The Family Farm Alliance worked with staff for the Subcabinet in the last months of the Trump Administration to elevate nutrient management and water quality strategies as referenced in the EO. Alliance representatives last fall conducted a ZOOM meeting with senior level EPA officials on this matter.

The most recent Report & Recommendations related to the EO was posted in the waning days of the Trump Administration on the White House CEQ website. The report lays out plainly the many opportunities and challenges the nation faces in water, highlighting paths forward. We hope the Biden Administration will continue to support the Water Subcabinet concept. It’s simply good government. In fact, the Western Agriculture and Conservation (WACC) last week sent a letter to Interior Secretary nominee Deb Haaland, intended to introduce her to the coalition, and to advance four recommendations. Importantly, the WACC also sees the value in the Water Subcabinet created by President Trump, and recommends that the new administration maintain it. The Alliance helped create the WACC nearly ten years ago, with the hopes that we could get constructive conservation groups on board with agriculture on certain issues. This is a great example of that.

BIDEN ADMINISTRATION DEVELOPMENTS

3. A Slate of Executive Orders

President Biden's first ten days in office were marked by numerous executive actions focused on tackling his Administration's top priorities: the COVID-19 pandemic, the related economic crisis, racial justice, and the threat of extreme climate events. One of the new President's first actions was signing an Executive Order (EO) detailing a long list of Trump Administration environment and energy policies the incoming Biden team will scrutinize in its first days in office. Within minutes of entering the Oval Office on January 20, the newly inaugurated president signed a total of 17 executive orders. On Day 2, he issued an additional 10 orders related to the coronavirus pandemic. The following week, President Biden signed a slew of new executive actions, with each day adhering to a theme, including "Buy American", equity, climate, health care, and immigration. However, Republicans criticized the quick action, suggesting that they are counter to Mr. Biden's campaign pledge to promote unity once assuming office. While Congressional Republicans may be limited in how they can fight these measures, the National Republican Congressional Committee (NRCC) said polling it commissioned in key battleground congressional districts shows voters are less likely to support a candidate who backs policies like the Paris Agreement, the Green New Deal, and stopping new oil and gas leasing on federal land.

a. Trump Administration Regulations in the Sights

One of the first EOs signed by President Biden on his first day in office was entitled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis". This order details a long list of Trump Administration environment and energy policies the incoming Biden team will scrutinize in its first days in office. Biden Administration officials said the order includes a "nonexclusive" list of actions. It spans several agencies, from the Environmental Protection Agency (EPA) to the Departments of the Interior, Commerce and Justice. Included on that list (among others) are regulations and opinions issued by the Trump Administration on the implementation of the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Clean Water Act (including the controversial "waters of the U.S." and Section 401 regulations), and the Migratory Bird Treaty Act.

b. A 'New Direction' on Regulation

President Biden also signed a memo called "Modernizing Regulatory Review," which states that regulations are critical to fighting tangible problems. The memo keeps in place the basic structure of regulatory review calls for the Office of Management and Budget (OMB) to create procedures to ensure "regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities." The document also called for the Office of Information and Regulatory Affairs in OMB to be more open and transparent. Progressives were not thrilled the memo did not go further, but they were cautiously optimistic while conservatives said the memo guts the regulatory restraint of the past four years.

c. Suspension of Lawsuits Targeting Trump-Era Rules

The Biden Administration has taken a step toward pausing legal proceedings challenging several Trump-era environmental rules. President Biden's top lawyer at the Environmental Protection Agency has asked the Department of Justice (DOJ) for stays of proceedings in pending litigation involving any challenge to a regulation promulgated by the agency under the Trump Administration, a move that would provide new Administration leadership with time to review the rule and any underlying issues. In a letter obtained by *E&E News*, EPA acting general counsel Melissa Hoffer instructed DOJ's Environment and Natural Resources Division to request a pause in litigation involving any rule the agency issued under President Trump's leadership.

d. "Boy, that escalated quickly."

Alliance board members and contractors like Mark Limbaugh and his team at the Ferguson Group in Washington, D.C. spent much of the latter half of January assessing the slate of executive orders and important agency appointments generated by the White House, which was breathtaking in its scope. One Western water attorney I talked to said it all reminded him of the battle scene in the movie "Anchorman", where Ron Burgundy looks around and says, "Boy, that escalated quickly."

Importantly, we are beginning to get a clearer sense of the list of agency actions that the Biden Administration will review and potentially change. Of note, rulemaking associated with "Waters of the U.S." (WOTUS), ESA critical habitat, NEPA and the Central Valley Project Biological Opinion for Delta Operations will all be scrutinized. The Alliance, its members and many of our allies spent many hours and placed high priority in helping to influence these efforts with the previous Administration. Many more hours may be needed, working with policymakers and discussing the importance of some of these current rules to Western irrigators and water managers. For the time being, we'll keep our members apprised as further policy developments and Biden Administration appointments are announced.

e. Climate Change Orders

The president's climate change executive actions – especially those policies that halt petroleum leasing on federal land and commit to a controversial "30 x 30" plan that seeks to conserve 30% of the nation's land and waters by 2030 – are raising alarms in Republican Congressional offices who represent rural Westerners.

On January 26, the Department of the Interior imposed a 60-day moratorium on oil and gas leasing, drilling permits, and lease extensions on federal land. Republicans representing Western states with energy-based economies were outraged. Western Republicans are concerned that the moratorium imposed by Executive Order will negatively impact the economies, jobs, and local communities of the rural West while threatening America's energy security. The day after President Biden signed the ban on new energy leases in federal lands and waters, Republic members of Congress introduced the *Protecting our Wealth of Energy Resources (POWER) Act of 2021*. The POWER Act would prohibit the president or his secretaries of the Interior, Agriculture

and Energy Departments from blocking energy or mineral leasing and permitting, or from issuing mineral withdrawals on federal lands and waters without congressional approval.

The Biden Administration announced several other climate-and conservation-related executive actions, including the goal of conserving at least 30% of national lands and oceans by 2030. The move was nervously anticipated by some Westerner producers, and the initial gushing reaction to the so-called 30 x 30 executive action by some of the most litigious critics of ranching in the country did little to soothe those concerns. While the 30x30 initiative has raised many questions and concerns with Western producers, the Biden Administration has committed to a process to engage agricultural and forest landowners, fishermen, Tribes, States, Territories, local officials, and others to “identify strategies that will result in broad participation.” The Secretary of Agriculture was also directed to “collect input from farmers, ranchers, and other stakeholders on how to use federal programs to encourage adoption of climate-smart agricultural practices that produce verifiable carbon reductions and sequestrations and create new sources of income and jobs for rural Americans.”

The Western Landowners Alliance (WLA) - a non-profit organization that advances policies and practices that sustain working lands, connected landscapes, and native species - has been working closely with the Biden team to ensure that the 30x30 initiative is an inclusive process that engages landowners. “We are particularly heartened to see an emphasis in the administration's announcements today on engagement with farmers, ranchers and foresters and the interest in creating good jobs in land stewardship and restoration in rural communities and on working lands,” the WLA said in a statement. The National Cattlemen’s Beef Association (NCBA) in a similar statement said it looks forward to working with the Biden Administration as they “recognize the positive role agriculture plays in addressing climate concerns”.

f. Environmental Justice Order

One of the orders creates an environmental justice initiative called “Justice40”, pledging to deliver “40 percent of the overall benefits of relevant federal climate investments to disadvantaged communities,” and it launches a scorecard to track the progress. The EO also creates a new “Civilian Climate Corps,” which is modeled on the Franklin Roosevelt Administration’s “New Deal” job creation program during the Great Depression.

4. Appointments

The Biden Administration has announced the appointment of several officials at the departmental and agency levels of leadership. The Family Farm Alliance and its Western membership interact most closely with leaders from the Departments of Interior and Agriculture, as well as the Environmental Protection Agency (EPA).

a. Department of Interior

At the Department of the Interior, there is still no timeline for Rep. Deb Haaland (D-NM) to be

confirmed as the next Interior secretary, but her congressional chief of staff, Jennifer Van der Heide has already moved over to serve in the same capacity at Interior. Some Republicans in Congress are becoming increasingly vocal with their criticisms of President Biden's Interior pick. Ms. Haaland in her confirmation process will also likely bear the burden of the ire felt by Republicans over President Biden's recent executive orders to halt the issuance of new leases for oil and gas drilling on federal lands.

Meanwhile, several Interior appointees have been announced by the Biden Administration. Elizabeth Klein, who has been named as Deputy to the Interior Secretary, has held roles with Interior before. During the Obama Administration, she was principal deputy assistant secretary for policy, management and budget; associate deputy secretary; and counselor to the deputy secretary. In the President Clinton-era, Ms. Klein served as an assistant to the secretary. Since 2017, she has been the deputy director of the State Energy & Environmental Impact Center at New York University School of Law, where she has worked alongside Executive Director David Hayes, a former deputy Interior secretary in the Obama Administration who is now President Biden's incoming special assistant for climate policy. In that role, she has been an outspoken critic of the Trump Administration. During the Bush years, Ms. Klein served as the director of communications and government relations for the National Park Foundation and an associate at the firm Latham & Watkins, specializing in energy and environment law issues.

Other key appointees at Interior include:

- Laura Daniel Davis as Principal Deputy Assistant Secretary for Land and Minerals Management (previously chief of staff to Obama-era Interior Secretaries Sally Jewell and Ken Salazar);
- Shannon Estenoz as Principal Deputy Assistant Secretary for Fish and Wildlife and Parks (currently chief operating officer and vice president of policy at the nonprofit Everglades Foundation);
- Martha Williams as Principal Deputy Director for the Fish and Wildlife Service; and
- Rachael Taylor as Principal Deputy Assistant Secretary for Policy, Management and Budget.

In a secretarial order issued on Inauguration Day, Scott de la Vega, the acting secretary of Interior, bestowed on eight appointees the "decision-making authority associated with the duties and responsibilities" of presidentially appointed and Senate-confirmed (PAS) positions. The new temporary leadership team includes Tanya Trujillo to be acting assistant secretary for water and science and Camille Touton to be acting Deputy Commissioner of Reclamation, two faces familiar to the Family Farm Alliance. Tanya Trujillo will fill the position vacated by Trump appointee Tim Petty, who is returning to work for his previous boss, Senator Risch (R-IDAHO). Ms. Trujillo is a leading expert on the Colorado River, and is an experienced former Hill committee staffer and Obama Administration official. Camille Touton previously served as a Deputy Assistant Secretary for Water and Science in the Obama Administration and also has considerable Hill experience, working for multiple water committees. Ms. Trujillo and Ms. Touton will both be speaking at the virtual 2021 Family Farm Alliance conference in February (*see below*).

b. Department of Agriculture (USDA)

Jewel H. Bronaugh, Virginia commissioner of agriculture and consumer services, was nominated this month to be deputy secretary of agriculture, second in command at USDA to nominated secretary Tom Vilsack, who returns to the position after serving 8 years as Secretary under President Barack Obama. If confirmed by the U.S. Senate, she would be the first African American woman to serve in the USDA's No. 2 position, tasked with day-to-day operations of a nearly-100,000-employee department.

USDA has announced several senior level appointments since Inauguration Day:

- Gregory Parham, D.V.M., was named Interim Deputy Assistant Secretary for Administration. Dr. Parham served as Assistant Secretary for Administration from 2013-2016. Previously, he served as Administrator of Animal and Plant Health Inspection Service.
- Katharine Ferguson was named Chief of Staff in the Office of the Secretary. Most recently, Ferguson served as Associate Director of the Aspen Institute Community Strategies Group. Before joining the Aspen Institute, Ferguson served in the Obama Administration as Chief of Staff for the White House Domestic Policy Council and as Chief of Staff for Rural Development at USDA.
- Robert Bonnie was named Deputy Chief of Staff for Policy and Senior Advisor, Climate, in the Office of the Secretary: Most recently Bonnie served as an executive in residence at the Nicholas Institute for Environmental Policy Solutions at Duke University. During the Obama Administration, he served as Under Secretary for Natural Resources and Environment and as a Senior Advisor to Secretary Vilsack for climate and the environment.
- Sara Bleich, PhD was named Senior Advisor, COVID-19, in the Office of the Secretary: Previously, Bleich served as a Professor of Public Health Policy at the Harvard T.H. Chan School of Public Health. Her research centers on food insecurity, as well as racial injustice within the social safety net.

The Alliance reached out to Mr. Vilsack and Mr. Bonnie in recent months in their leadership roles on the Biden-Harris Transition team. Other recent appointments include: Stacy Dean as Deputy Under Secretary for Food, Nutrition, and Consumer Services; Justin Maxson (CEO of the Mary Reynolds Babcock Foundation) as Deputy Under Secretary for Rural Development; and Mae Wu (Senior Director at the Natural Resources Defense Council) as Deputy Under Secretary of Marketing and Regulatory Programs.

c. Environmental Protection Agency (EPA)

At EPA, President Joe Biden has nominated North Carolina DEQ head Michael Regan for the top Administrator position. He also selected Radhika Fox, Biden transition advisor and CEO of the nonprofit U.S. Water Alliance for the EPA's Principal Deputy Assistant Administrator - Office of Water position. Before joining the U.S. Water Alliance in 2015, Fox served for four years as

Director of Policy and Government Affairs for the San Francisco Public Utilities Commission, and prior to that was Director of Federal Policy at PolicyLink in Oakland, Calif., where she developed and coordinated the organization's federal policy agenda, crafted, and executed the political strategy for shaping legislation being considered by Congress, worked on annual appropriations, and advised the White House. She has a master's degree in city and regional planning from the University of California, Berkeley. While the Family Farm Alliance has not worked directly with Ms. Fox, I served on the board of directors for the U.S. Water Alliance a decade ago, prior to Ms. Fox employment. Ms. Fox and the U.S. Water Alliance have a good reputation for advocating about the importance of the nation's water infrastructure. There is a lack of public awareness and understanding of water infrastructure and water services in our country, and the U.S. Water Alliance under Ms. Fox's leadership did a good job of building public and political will for investment in sustainable water infrastructure and water resources. We look forward to working with her in her new role.

DEVELOPMENTS IN CONGRESS

Ten Republican senators have unveiled a \$600 billion COVID-19 relief package as part of a push to win bipartisan support for another COVID bill. Senators Susan Collins (R-ME), Lisa Murkowski (R-AK), Bill Cassidy (R-LA), Mitt Romney (R-UT), Rob Portman (R-OH), Shelley Moore Capito (R-WV), Todd Young (R-IN), Jerry Moran (R-KS), Mike Rounds (R-SD) and Thom Tillis (R-NC) have requested a meeting with President Biden to discuss the proposal. Their proposal comes as House and Senate Democrats this week will launch the obscure process known as budget reconciliation, which allows certain legislation to bypass the 60-vote threshold usually needed to advance in the Senate. The controversy surrounding the use of reconciliation to advance legislation along party lines is that the procedure would strike a non-conciliatory partisan tone early in the 117th Congress and the Biden Administration.

5. Confirmation Hearings

The full Senate will vote this week to confirm several Biden Administration Cabinet choices, including Alejandro Mayorkas to lead the Department of Homeland Security and former South Bend, IN Mayor Pete Buttigieg to lead the Department of Transportation. Also, several Senate committees will vote this week on Cabinet nominees, including the Senate Commerce, Science and Transportation Committee vote on Wednesday on Rhode Island Governor Gina Raimondo (D) to lead the Commerce Department, and a Senate Energy and Natural Resources Committee vote on Energy Secretary nominee former Michigan Governor Jennifer Granholm (D). The Senate Environment and Public Works Committee will hold a confirmation hearing this week on the nomination of Michael Regan, a North Carolina regulator, for EPA Administrator, and the Senate Agriculture Committee will hold a hearing this week on the nomination of Tom Vilsack for Secretary of Agriculture.

6. Senate ENR Committee to Hold First Climate Hearing

The Senate Energy and Natural Resources (ENR) Committee will hold its first hearing on climate change in the new Congress this week. The hearing will look at climate trends and examine progress in addressing climate change. The hearing could also set the stage for the next two years about climate change particularly due to the potentially symbiotic relationship between new ENR Chairman Joe Manchin (D-WV) and incoming Ranking Member John Barrasso (R-WY), who both hail from fossil energy producing states and could foster similar views on what appears to be an aggressive Biden Administration climate initiative over the production and use of fossil fuels.

ALLIANCE INITIATIVES

7. Western Water Infrastructure Initiative

Over 200 urban and rural water districts urged President-elect Joe Biden and congressional leadership earlier this month to address aging Western water infrastructure in any potential infrastructure or economic recovery package. The coalition includes organizations from 15 states that collectively represent \$120 billion in agricultural production, nearly one-third of all agricultural production in the country, and tens of millions of urban and rural water users. The effort was spearheaded by the Family Farm Alliance, Association of California Water Agencies, California Farm Bureau, National Water Resources Association and Western Growers Association. In separate letters to President-elect Biden and congressional leaders, the coalition said existing Western water infrastructure is in desperate need of rehabilitation and improvement. Most of the federal water projects in the West were built more than 50 years ago and were not designed with the present and future population demands and climate conditions in mind. Without immediate attention, the coalition said, the Western water system will quickly prove inadequate to meet the needs of urban and rural users and the environment.

The coalition encouraged the federal government to invest in a diversified water management portfolio that enhances water supply and quality for urban and environmental uses while keeping water flowing to Western farms. Specific recommendations include funding for:

- Water conservation.
- Water recycling, reuse and desalination projects.
- New water storage facilities, both surface and groundwater.
- Watershed management, fish passage and recovery, and habitat restoration.
- Federal financing mechanisms for water projects.
- Loans for local districts operating and maintaining federally owned irrigation projects.
- Water quality improvement for rural communities.

Beyond financial support, the coalition also called on the federal government to ensure the timely construction of water projects by streamlining the regulation and permitting processes.

President Biden has signaled that he wants to spend \$2 trillion on infrastructure, with a focus on transit in high-poverty areas, high speed rail, and road and bridge repairs this year alone. He has said that his Administration will be proposing an even more ambitious *Build Back Better* legislative initiative, which the new president will outline in a joint session of Congress in February. That plan is expected to focus heavily on infrastructure, including hundreds of billions

of dollars for clean and renewable energy investments to fight climate change. A key purpose of the coalition effort is to demonstrate the importance of Western water infrastructure to the nation.

8. Family Farm Alliance 2021 “Virtual” Annual Meeting

At a time of almost unimaginable political divisiveness, it is more important than ever that diverse interests find ways to work with one another to solve critical Western water challenges. We hope you will join the Family Farm Alliance (virtually, that is) on February 18-19, 2021, to learn how Western agricultural water users seek "A Bridge Over Troubled Water" and are working with their communities, federal and state governments, investors and NGOs to shore up their water reliability. The virtual conference will consist of two morning ZOOM sessions (Pacific Time) on Thursday, February 18 and Friday, February 19.

Featured speakers include U.S. Senators John Barrasso (R-WY) and Michael Bennet (D-CO), U.S. Reps. Jim Costa (D-CA) and Dan Newhouse (R-WA), former Commissioner of Reclamation Brenda Burman, and Tanya Trujillo, President Biden’s nominee for Assistant Secretary of Water and Science at the Department of Interior, responsible for overseeing the Bureau of Reclamation and U.S. Geological Survey. A panel presentation will be made by key organizational representatives on the Food and Agriculture Climate Alliance (FACA). Nadine Bailey with the Family Water Alliance is moderating a panel of experts to provide updates on pressing Western wildfire and forest health issues.

Traditional conference highlights will continue, like the Bureau of Reclamation Roundtable, featuring all 5 regional directors and Camille Touton, President Biden’s choice for Commissioner of Reclamation. Mark Limbaugh of The Ferguson Group will moderate the Capitol Hill Update, featuring majority and minority staffers from key Senate and House water committees. For more information on conference registration and sponsorship opportunities, please visit <https://www.familyfarmalliance.org/events/>

This is a quick summary of just a few of the issues the Alliance has been engaged in. Please do not hesitate to contact me at dan@familyfarmalliance.org if you would like further information about what the Alliance is doing to protect water for Western irrigated agriculture.