

Election 2020: Impacts on Federal Energy and Environmental Law and Policy

Presentation to Carbon Management Workshop
December 8, 2020

Today's Presenters



Frederick R. Eames - Partner
*Former Counsel, House Energy &
Commerce Committee*

feames@HuntonAK.com
Washington, DC
+1 202 778 2245 direct



Kerry McGrath - Partner

kmcgrath@HuntonAK.com
Washington, DC
+1 202 955 1519 direct



Matthew Z. Leopold - Partner
Former U.S. EPA General Counsel

mleopold@HuntonAK.com
Washington, DC
+1 202 419 2041 direct



Our Agenda

● Election Overview

● Tools of Policy Change

● CCUS and Energy Policy



● The Biden EPA

● Climate Regulation

● Water and Natural Resources Regulation



Election Results

	Pre-Election	Post-Election
President		
House of Representatives	<div><div></div> 232</div> <div><div></div> 198</div> <div>Independent – 1 Vacant – 4</div>	<div><div></div> 222 (-10)</div> <div><div></div> 212 (+11)</div> <div>Undetermined - 1</div>
Senate	<div><div></div> 53</div> <div><div></div> 45</div> <div>Independent – 2</div>	<div><div></div> 50 (-1)</div> <div><div></div> 46 (+1)</div> <div>Independent – 2 Undetermined - 2</div>

Divided Control of Congress*

Both Chambers

- Majority controls the chamber's business – floor, committees, legislation, hearings, investigations, and rules (e.g., Senate cloture rule)
- Committee membership adjusted to represent R/D split
- No use of reconciliation to advance White House policy objectives
- No Congressional Review Act efforts to undo Trump actions
- Potentially only a two-year window of control

House

- Will be the venue to advance the legislative vision of the Administration, attempt to build pressure for Senate action
- Tax legislation must originate in the House
- Potential investigations of Trump-era regulatory actions
- Increased tension between progressives and moderates

Senate

- Cloture rule requires 60 votes for most legislative debate
- Provide “advice and consent” of the Senate for nominees – cabinet officials, sub-cabinet officials, independent commissioners, judges
- No court packing, no new States

What Legislation Could Pass?

Major Legislation

- Stimulus/COVID-19 Relief
- Infrastructure/Transportation
- Appropriations (will shift agency funding)

Energy and Environmental Legislation

- Carbon capture utilization and storage
- Hydrogen RD&D
- Battery storage
- Electrification

What legislation is off the table?

- Carbon tax
- Climate cap and trade
- Tax reform law repeal
- Federal CES, but . . .



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The Biden Climate Agenda

- \$2 Trillion Climate Plan for R&D and deployment
- Mandates establishing "an irreversible path" to net-zero carbon emissions by 2050
- Explicitly recognizes CCS
- Funded by reversal of the 2017 tax law that lowered individual/corporate tax rates
- Rejoin the Paris Climate Accord on Day 1 and promote major countries to ramp up domestic climate targets

THE BIDEN PLAN FOR A CLEAN ENERGY REVOLUTION AND ENVIRONMENTAL JUSTICE

I. ENSURE THE U.S. ACHIEVES A 100% CLEAN ENERGY ECONOMY AND NET-ZERO EMISSIONS NO LATER THAN 2050

The United States must have a bold plan to achieve a 100% clean energy economy and net-zero emissions no later than 2050 here at home. On day one, Biden will sign a series of executive orders that put us on this track. And, he will demand that Congress enacts legislation in the first year of his presidency that 1) establishes an enforcement mechanism to achieve the 2050 goal, including a target no later than the end of his first term in 2025 to ensure we get to the finish line, 2) makes a historic investment in energy and climate research and innovation, 3) incentivizes the rapid deployment of clean energy innovations across the economy. Failure is not an option. If Congress falls short of its duty to act, Biden will hold them accountable.

A Divided Government

A Republican Senate Affects the Biden Climate Agenda

- **The Biden Climate Plan must rely on Executive Action**
 - No possibility for new sweeping GHG authority
 - “square peg, round hole” - situation faced by Obama Administration
- **Focus on *direct and indirect* ways to speed an energy transition**
 - Focus on unwinding Trump policies and regulations
 - Must rely on existing statutory authority
- **Might look to “indirect” actions to reduce GHG emission, for example:**
 - New SEC requirements to book and report climate risk
 - Ease current restrictions on shareholder resolutions
 - Increased capital requirements for banks financing fossil-based infrastructure
 - Regulatory changes that complicate permitting/operations for fossil energy infrastructure:
 - NEPA
 - WOTUS definition/Nationwide Permits
 - CWA 401 State Water Quality Certification
 - Cumulative Impact Analysis
 - Federal procurement requirements
 - Trade policy



Carbon Capture Utilization and Storage and the Climate Agenda

Will the “U” become a small “u”?

Regulatory Issues

- Section 45Q tax credit regulations and implementation
- Class VI reform
- State Class VI primacy applications
- Infrastructure permitting

Legislative Issues

- Section 45Q extension
- Section 45Q direct pay
- AFFECT Act
- USE IT Act

Energy Policy

- **Department of Energy**
 - Likely generally stable with respect to CCUS
 - Shift in program funding to support renewables, de-emphasize fossil fuels
 - “Energy dominance” yields to climate focus on export policies
- **Department of Interior**
 - Limits on fracking on federal lands
 - Increased climate reviews for leases and infrastructure
- **Federal Energy Regulatory Commission**
 - More robust consideration of climate impacts in pipeline and other project approvals
 - Encouragement of integration of renewables into wholesale markets and de-emphasis of reliability risks from intermittent resources
 - Fostering energy storage
 - Integration of State clean energy policies with FERC wholesale market policies



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What Is Subject to Change?



- Personnel
- Executive Orders
- Pending Permits and Authorizations
- Regulations
- Guidance
- Enforcement
- Litigation
- R&D Funding
- International Policy
- Bully Pulpit

Environmental Protection Agency

- **Heather McTeer Toney:** EPA Regional Administrator; Mayor of Greenville, MS
- **Heather Zichal:** Long-time Biden associate; former Obama Deputy Assistant for Energy and Climate Change
- **Mary Nichols:** CARB Chair 1979 - 83, 2007 – present; Clinton-era Assistant Administrator for Air

White House Climate Czar

- **International Envoy - John Kerry:** Former Massachusetts Senator and Secretary of State
- **Domestic**
 - **Ali Zaidi:** NY Deputy Secretary for Energy & Environment
 - **Tom Steyer:** Former hedge fund manager and presidential candidate
 - **Gina McCarthy:** Former EPA Administrator

Department of the Interior

- **Rep. Deb Haaland:** New Mexico Congresswoman; would be first Native American appointed to a Cabinet seat
- **Sen. Tom Udall:** New Mexico Senator, son of former Interior Secretary Stewart Udall (Kennedy, Johnson)

Department of Energy

- **Arun Majumdar:** Former ARPA-E Director and Acting Undersecretary; Stanford University
- **Ernest Moniz:** Former DOE Secretary; CEO Energy Futures Initiative
- **Elizabeth Sherwood Randall:** Former DOE Deputy Secretary; Georgia Tech

Administrative Actions to Unwind and Change Course

Near Term Actions

- Rescind/Replace Executive Orders
- Stop or delay agency work on pending regulations/guidance
- Delay effective dates of new regulations
- Halt and review pending permits and authorizations for projects

Longer Term Actions

- Overhaul strategic approaches to pending litigation dockets (i.e., lift abeyances or request abeyances)
- Promote desired policies through guidance documents, including reinstating withdrawn or rescinded guidance or retracting current guidance
- Change internal agency procedures or organization (e.g., alter composition and role of advisory boards)
- Initiate notice and comment rulemaking

The Biden EPA



Climate Focus

- Primary organizing policy goal across programs
- Beyond coal – focus on oil and gas regulation



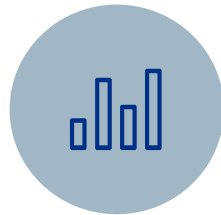
“Re-regulation” under the Clean Air Act, Clean Water Act, RCRA

- Many rescinded regulations may be targeted for reissuance



Cooperative Federalism?

- EPA will exert more control over delegated programs and leave less to the states



Spending Increase?

- Will seek to expand EPA budget and seek to replenish EPA’s ranks
- EPA’s FY20 Enacted Budget = ~\$9.1 billion
- EPA FY20 workforce = 14,172

The Biden EPA

(Continued)

Key Structural Changes Subject to Review

- **Change 1:** Science Transparency Rules
 - Finalization of EPA rule expected later this year
- **Change 2:** Cost-Benefit Rule under the Clean Air Act
- **Change 3:** EPA Guidance Rule
 - EPA's publicly-searchable repository of guidance documents, which now contains over 10,000 documents
 - Under this effort, EPA also rescinded 1,000 guidance documents
- **Change 4:** Regional Reorganization
 - Reorganized EPA's regional offices to mirror headquarters
- **Change 5:** Enforcement reforms and compliance assistance

Air and Climate Policy and Regulation

Primary Air Regulations and Policies to Reconsider

- Affordable Clean Energy Rule (ACE)
- The Safer Affordable Fuel Efficient (SAFE) Vehicles Final Rule for Model Years 2021-2026 (California Waiver and Tail Pipe Emissions)
- New Source Performance Standards (NSPS) for Oil and Natural Gas
- National Ambient Air Quality Standards (NAAQS) for Ozone and Particulate Matter (PM)
- Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act (Once in, Always in)
- New Source Review (NSR) Guidances
- Mercury and Air Toxics (MATS) Appropriate and Necessary Determination



Air and Climate Policy and Regulation

Potential New Clean Air Act Regulations

- Re-codified Versions of reconsidered Rules
- Section 209 California Waiver for Mobile Sources
- Section 111 New Source (NSPS) and Existing Source (Emissions Guidelines) for GHG Addressing Other Industry Sectors
- Section 115 of the Clean Air Act, titled “International Air Pollution”
- Title VI Rules for Stratospheric Ozone and Global Climate Protection
- Environmental Justice and Climate in Permitting
- Social Cost of Carbon Utilization in Rulemaking





BLM Venting and Flaring Regulations

- **2016 BLM Venting and Flaring Rule**
 - Regulated venting and flaring of methane by oil and gas facilities on federal and tribal lands
 - Recently struck down by federal district court in WY
 - Court found 2016 rule was beyond BLM's statutory authority because grounded in air quality motivations, which is the purview of EPA
- **2018 BLM Revision Rule**
 - Struck down by federal district court on procedural grounds
- **Biden Administration likely to revisit venting and flaring regulations**



Environmental Justice

- Biden EJ Plan to revise and reinvigorate EO12898
- Biden Admin likely to issue new EJ guidance and revamp EJSCREEN tool
- Biden's \$2 Trillion Climate Plan sets a goal that 40% of all clean energy spending will go to disadvantaged communities
- The Biden Climate Change and EJ proposal includes creating an Environmental and Climate Justice Division within the Department of Justice
- Sen. Kamala Harris's proposed Climate Equity Act would create Office of Climate and Environmental Justice Accountability within the White House



Water Policy and Regulation

EPA/Corps Water Regulations and Policies Likely to be Revisited

- Navigable Waters Protection Rule (NWPR)
WOTUS Definition
- 401 Certification Rule
- 404 Nationwide Permits (NWPs) Reissuance
- *County of Maui* / Hydrologic Connection Guidance

Wildlife & Natural Resources Policy and Regulation

CEQ Regulations and Policies Likely to be Revisited

- National Environmental Policy Act (NEPA) Regulation
- NEPA Guidance on Consideration of GHGs

Department of Interior/NOAA Regulations and Policies Likely to be Revisited

- FWS/NMFS Endangered Species Act (ESA) Regulations on Listing, Critical Habitat Designations, and Consultation
- DOI/FWS Compensatory Mitigation Policies
- Migratory Bird Treaty Act (MBTA) DOI Solicitor Opinion M-37050
- MBTA Incidental Take Regulations (may be issued in final months of Trump Admin)

Produced Water


- Produced water increasingly being recycled and reused
- Where not reused, managed as waste via Class I and II UIC control under SDWA or onsite disposal
- Discharges of pollutants from produced waters to surface waters generally prohibited
- EPA evaluating broader discharge of oil and gas extraction wastewaters (including produced water) under Clean Water Act NPDES program
 - EPA Report, *Summary of Input on Oil and Gas Extraction Wastewater Management Practices Under the Clean Water Act* (May 2020)
- State actions in Texas and Oklahoma (among other states)
 - Seeking delegation of NPDES permitting authority for produced water





Permits and Authorizations

- **New Administration can order immediate pause and review or change status of pending permit authorizations**
 - Recent Example – Dakota Access Pipeline
- **Biden Administration likely to have different approach to permitting**
 - Potentially broader scope of review (NEPA reviews, ESA consultation, 404 permits)
 - Increased focus on environmental justice
 - Increased focus on consultation with Tribes
 - Example of what ENGOs will be pushing for
 - Central Maine Power transmission line carrying electricity from Quebec dam system – ENGOs argue Corps' NEPA review should evaluate EJ impacts of dams on Canadian indigenous communities



Q&A

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