

Climate change should drive energy and environmental policy

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As reflected in President Biden's \$2 trillion climate plan, we expect significant changes in federal energy and environmental policy, driven by a desire to meaningfully address climate change.

However, given that the Democrats hold only a slim margin of control in the Senate, the prospect for aggressive legislative action to implement President Biden's campaign promises on this front may be limited.

On his first day in office, President Biden rejoined the Paris Climate Agreement, the international accord the U.S. joined during the Obama administration, pursuant to which the U.S. pledged to cut its CO₂ emissions 26-28% from 2005 levels by 2025.

Therefore, we expect to see more unilateral action from the Biden administration, in the form of executive orders (some of which have already been issued) and agency rulemaking.

KEY ASPECTS OF THE BIDEN CLIMATE PLAN

President Biden's campaign platform included promises of significant action with respect to climate change and clean energy, including:

- Legislation that puts the U.S. "on an irreversible path to achieve economy-wide, net-zero emissions no later than 2050";
- Efforts to achieve a carbon-free power sector by 2035 by:
 - Modernizing and electrifying infrastructure (including major public investment in automotive infrastructure, with a commitment to install 500,000 electric vehicle charging stations);
 - Directing a significant share of federal procurement (which the president pledges to increase by \$400 million during his first term) toward batteries, electric vehicles and other "clean energy" inputs; and

- Investing \$400 billion over 10 years in clean energy research and innovation, including establishing a new research agency focused on accelerating climate-friendly technologies (e.g., wind, solar and battery storage, as well as new technologies such as carbon capture and sequestration, advanced nuclear generation and green hydrogen production).
- Other "decarbonization" actions, such as:
 - Requiring federal permitting decisions to consider the effects of greenhouse gas emissions and climate change;
 - Ending federal support and financing for coal-fired power projects; and
 - Halting new oil and gas drilling leases on federal lands and waterways.

EXECUTIVE ACTION ON ENVIRONMENTAL MATTERS

The Paris Climate Agreement. On his first day in office, President Biden rejoined the Paris Climate Agreement, the international accord the U.S. joined during the Obama administration, pursuant to which the U.S. pledged to cut its CO₂ emissions 26-28% from 2005 levels by 2025. Under the Trump administration, the U.S. withdrew from the Paris Agreement effective November 4, 2020. In 2017, the U.S. also halted payments to the Green Climate Fund established under the Paris Agreement, which helps poorer nations invest in renewable energy. Reentry into the agreement will take effect 30 days after formal notice is sent.

Oil and gas leases on public lands. On President Biden's first day in office, the Department of the Interior issued an order requiring approval from a top political appointee before any new onshore or offshore fossil fuel authorization on public lands can be issued. This order is in effect for 60 days. In terms of longer-term action, President Biden has called for a temporary moratorium on new oil and gas leases on public lands. This will likely be accomplished by ordering an environmental review of the cumulative impacts of such projects and halting any new leases during that review.

An alternative approach would be to modify royalties to account for climate costs. Under the Mineral Leasing Act and implementing

regulations, the secretary of the interior can set the royalty rate for onshore oil and gas and surface coal mines in new leases without going through new rulemaking.

The new royalties would only apply to new leases, and therefore, a modification of rates will not have a significant impact if a temporary moratorium on new leases takes effect. Accordingly, this strategy could be utilized in lieu of a moratorium, or after any moratorium has been lifted.

Under President Biden, the Environmental Protection Agency will likely seek to regulate GHG emissions from the power industry, but the form of that rulemaking is not clear.

The Arctic National Wildlife Refuge. On his first day, President Biden issued a temporary moratorium on all oil-and-gas leasing activities in ANWR. The executive order directed the Department of the Interior to review the oil-leasing program for ANWR and to do a new analysis of its potential environmental impacts. In addition to the temporary moratorium, Democrats have indicated that they support permanent protection against drilling in ANWR, and such protection may be something that President Biden pursues with control of Congress.

Renewable energy. President Biden has said that he will establish targeted programs to enhance the development of renewable energy projects on federal lands and waterways, with the goal of doubling offshore wind-generating capacity by 2030. We expect that a large part of these efforts will focus on assigning more resources to expedite the permitting process, which was a slow-moving process under the Trump administration.

Federal review of climate effects. We also expect that, under the Biden administration, federal agencies performing environmental reviews will be required to consider the effects of GHG emissions and the impact on climate change in a more significant fashion than had been done previously. In particular, this will likely require relevant agencies to

- (1) estimate the life cycle of GHG emissions,
- (2) assess the cumulative climate impacts of similar projects being pursued in order that the total long-term effects of all similar projects are considered, not just the relatively minor impacts from one project,
- (3) compare GHG emissions to smaller projects rather than to worldwide emissions, since GHG emissions of any one project are always insignificant compared to worldwide emissions and it is thought that comparing emissions to smaller projects will provide a better context for evaluating the impacts on climate change, and

- (4) consider the social costs of carbon as estimated by the federal government.

The Keystone pipeline. On his first day in office, President Biden also canceled the construction permit for the Keystone XL oil pipeline.

POTENTIAL RULEMAKINGS FOCUSED ON CLIMATE CHANGE

The Biden administration will also likely initiate rulemakings to regulate GHG emissions from numerous sources.

Power industry. Under President Biden, the Environmental Protection Agency will likely seek to regulate GHG emissions from the power industry, but the form of that rulemaking is not clear. The EPA could attempt something similar to the Clean Power Plan, which was advanced by the Obama EPA and focused on achieving statewide reductions in GHG emissions. Such a strategy would likely face significant challenges in the courts, however; the U.S. Supreme Court initially stayed the implementation of the Clean Power Plan pending numerous legal challenges, and we expect the current court would be equally skeptical if Biden proposed a similar approach.

Companies should expect a renewed emphasis on traditional enforcement of environmental laws and regulations, with a particular focus on environmental justice.

An alternative approach could be a focus on reductions at plant-specific levels, which could be accomplished by requiring natural gas co-firing or mandating the use of carbon capture technology where available.

Another approach would be to reduce GHG emissions through regulations that require drops in other emissions, such as ozone and particulate matter, since reductions in those emissions also decrease GHG.

Oil and gas industry. President Biden has called for “aggressive methane pollution limits for new and existing oil and gas operations.” This could involve reinstating an information request from 2016 (which the Trump administration rescinded) designed to fill gaps in knowledge about how facilities operate, what equipment they use and what strategies to control methane are feasible. If reinstated, the responses to the information request would be used to craft more stringent regulations, both for existing and new sources, to limit methane pollution from the oil and gas industry.

Transportation industry. The president has pledged to develop standards “aimed at ensuring 100 percent of new sales of light- and medium-duty vehicles will be electrified and

[calling for] annual improvements for heavy-duty vehicles.” California’s voluntary agreement with five automakers to increase fuel efficiency and limit GHG emissions from automobiles could serve as a model for such standards. We also expect the Biden administration to seek a stay of the current litigation challenging the Safer Affordable Fuel-Efficient Vehicles Rule – which revoked California’s power to set its own GHG standards – in anticipation of the rule being rescinded and the state’s power reinstated.

RENEWED EMPHASIS ON ENFORCEMENT AND ENVIRONMENTAL JUSTICE

Companies should expect a renewed emphasis on traditional enforcement of environmental laws and regulations, with a particular focus on environmental justice.

Environmental and climate justice division. President Biden has said he will create a new Environmental and Climate Justice Division within the Department of Justice. This office would complement the DOJ’s existing Environment and Natural Resources Division by increasing criminal prosecutions and other enforcement, supporting climate litigation against fossil fuel companies, addressing legacy pollution and working with the EPA’s Office of Civil Rights. President Biden has indicated that part of this division’s work will include implementing, to the extent possible with executive action, Sen. Cory Booker’s Environmental Justice Act of 2019, which is focused on addressing and eliminating disproportionate environmental and human health impacts on populations of color, communities of color, indigenous communities and low-income communities.

Supplemental environmental projects. The Biden administration may also rescind the Trump administration’s directive against using supplemental environmental projects in settlements. SEPs are projects with environmental benefits that a regulated party can agree to perform in exchange for a lower penalty when settling alleged legal violations. SEPs have traditionally been popular with both the EPA and the regulated community, and we expect them to return.

CONCLUSION

The prospects for aggressive legislative action on environmental and clean energy matters seem limited. Accordingly, the Biden administration is likely to utilize executive actions and rulemaking authority – including those highlighted above – to create a foundation for longer-term implementation of the incoming president’s broader climate plan, and as a means of supporting ongoing state-level carbon-reduction initiatives.

While the programmatic details, implementation steps and funding for these efforts are likely to be the subject of continued disagreement between President Biden’s administration and the Republican minority in Congress, the administration nonetheless appears focused on taking swift action to pursue its ambitious climate change and clean energy goals.

President Biden has already implemented some of the above executive actions in his first week in office.

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