

Energy Impact: What the Biden Administration's Environmental Agenda Means for the Oil and Gas Industry

By Frank L. Tamulonis III and Margaret Hill, Blank Rome LLP

Assuming that the legal challenges to the election results are unsuccessful, when Joe Biden takes the oath of office next January, he will immediately undertake a series of executive actions and regulatory rulemakings that could significantly impact the energy sector. Climate change is at the top of the agenda, with a pledged goal of a 100% clean energy economy and net-zero emissions by 2050. The following is a brief preview of some of the anticipated environmental regulatory changes and other observations that are expected to impact the energy sector.

ACE Rule. President-elect Biden has made clear his intent for the United States to rejoin the Paris Climate Agreement. Stateside, it is expected that the Biden Administration will repeal the Trump Administration's Affordable Clean Energy Rule, known as the "Ace Rule," which sought to reduce power plant greenhouse gas emissions by focusing on "inside the fence" improvements at power plants and improving efficiency. The Biden Administration's replacement will likely focus on setting stringent emissions reduction goals, similar to the Obama-era Clean Power Plan.

NEPA Review. The Trump Administration streamlined the often lengthy environmental review process required for federal projects under the National Environmental Policy Act and also limited the extent to which cumulative impacts of a project are considered, prompting criticism that such review fails to take into account aspects of climate change in certain projects. The Biden Administration will likely reform the review process by placing an emphasis on climate change impacts, which will likely lead to longer review periods.

Methane Controls. In August 2020, the Trump Administration rolled back the Obama-era Methane Emissions Rule, which regulated methane emissions from new and modified oil and gas operations under the Clean Air Act, and also set volatile organic compound standards for pipelines. The Biden Administration is expected to reinstate methane standards that are at least as stringent, or more stringent, than prior standards.

WOTUS. Even before the plurality decision in *Rapanos v. United States*, regulators have struggled to define "Water of the United States" under the federal Clean Water Act ("CWA"). The definition of "WOTUS" has alternately expanded and contracted. Under President Obama, 2015 guidance expanded the definition to include waters like tributaries and intermittent streams. The Trump Administration rescinded this rule and set forth a narrow definition, excluding from CWA jurisdiction intermittent and ephemeral streams and certain agricultural operations. The Biden Administration is expected to, once again, reverse course and expand the definition of WOTUS, thus increasing instances where oil and gas developers require permits to construct in and around waterways, or discharge into a waterbody.

Public Lands. In a stark reversal from the Trump Administration, the Biden Administration will reduce or eliminate oil and gas development on public lands. This is consistent with the Biden campaign's pledge to "transition away" from fossil fuels.

Environmental Enforcement. While environmental enforcement trends have been interpreted by some as having decreased since the Obama Administration, the Biden Administration is expected to fulfill its campaign promise to increase enforcement efforts. This effort may include seeking to impose personal liability on corporate officers where warranted. Biden also plans to resurrect Supplemental Environmental Projects, or SEPs, to assist local communities impacted by pollution. SEPs were previously used to decrease penalties for violations, and the Trump Administration expressed the view that penalties should be paid to the US Treasury in lieu of agreeing to SEPs.

The cumulative effects of these changes on the oil and gas industry will likely include increased permitting battles and application review time frames, and increased litigation and enforcement actions. However, any radical reforms will be backstopped by a new and increasingly conservative Supreme Court that will likely strike down regulations or laws that it sees as overreaching. Additionally, while most actions will take place at the executive level (executive orders and rule makings), any significant legislative reforms will face an uphill battle with a very slim Democratic majority in the House and the anticipated GOP-controlled Senate. In short, while the anticipated reforms will undoubtedly lead to “choppy waters” for the oil and gas sector in 2021, oil and natural gas will continue to remain key components of our national energy portfolio and key contributors to our national security, as well as critical components of thousands of products that we use every day.