

U.S. Energy and Environmental Policy Under President Trump: As the Federal Government Scales Back, Will States Step In?

By Jeff Lane, Jennifer Morrissey and Andrew Shaw

The last comprehensive federal energy legislation was passed by Congress and signed by President George W. Bush in 2007, and was followed by a decade of Congressional gridlock. The Executive Branch was left in the driver's seat, which in turn has given the judiciary an outsized role in shaping policy as rules are challenged by opponents in court at the back end rather than debated in Congress on the front end. This dynamic also has left a void which state and local governments have begun to fill, sometimes tentatively, sometimes innovatively and sweepingly.

Efforts by the Democratic-led Congress early in the Obama Administration to approve "cap-and-trade" legislation to combat climate change were unsuccessful, leaving federal energy and environmental policy-making largely in the hands of the executive branch. President Obama then moved forward aggressively with regulations, executive actions and spending proposals that reflected his agenda to make the U.S. a leader in addressing climate change and supporting clean energy technologies.

Any policy premised on executive action, of course, can be largely undone by a new President with different priorities. President Trump made clear during the campaign that he intended to pursue an energy and environmental policy focused on job growth and deregulation, energy independence achieved through the increased production of fossil fuels — including revitalization of the U.S. coal industry — and a move away from picking "winners and losers" by subsidizing clean energy technologies.

President Trump, with willing partners in the Republican-led Congress, is working quickly to fulfill those promises. This article explores those early actions and other potential changes at the federal level, and describes how state governments will likely continue to push forward with their own climate and clean energy initiatives.

ENERGY POLICY ACTIONS IN THE EARLY DAYS OF THE TRUMP ADMINISTRATION

President Trump has already signed numerous executive orders addressing energy and environmental policy and regulations. In the face of a lack of action from Congress, Executive Orders have become a tool of choice in recent Administrations for guidance to the agencies both on enforcement of statutes and on the policy direction to be pursued. Of course, executive orders are not all immediately implementable, and only have the full force of law if the authority for the action is based on a statute or the Constitution, or on a delegation of discretionary authority to the President by Congress. Executive orders also may be subject to challenge in the courts. Nevertheless, even if not implemented, executive orders certainly impact the policy initiatives coming out of the White House.

Indicative of some of his policy priorities, President Trump directed agencies to revive the Keystone XL and Dakota Access oil pipeline projects within days of his inauguration, and he issued an order to expedite environmental permitting processes for other high-priority infrastructure projects. The Administration has indicated in court filings that it intends to rescind the Bureau of Land Management's rule on hydraulic fracturing on federal and tribal lands. President Trump also signed a broad executive order to reform the Administration's regulatory process, requiring agencies to identify for elimination at least two regulations for every new regulation they issue and establishing a regulatory budget to set a fiscal cap on rules each year (notably, this order would apply only to discretionary rulemakings, not to regulations required to be issued or updated by statutes such as the Clean Air Act).

Meanwhile, the Republican Congress has swiftly taken aim at existing regulations by utilizing the Congressional Review Act (CRA), which gives it the power to disapprove rules finalized in the late stages of the Obama Administration. These include, among others, the Interior Department's Stream Protection Rule (restricting how close coal mines can operate to nearby waterways) and the Securities and Exchange Commission's Resource Extraction Rule issued pursuant to the Dodd-Frank legislation (requiring publicly traded oil, gas and mining companies to disclose payments to foreign governments.) Democrats generally opposed these actions but were powerless to stop them; CRA disapproval resolutions cannot be filibustered in the Senate and thus require only a majority vote. The Methane Waste

Andrew Shaw is a Senior Managing Associate; Jeff Lane and Jennifer Morrissey are Counsel with Dentons US LLP in Washington, DC. Jennifer Morrissey may be reached at jennifer.morrissey@dentons.com

Rule (requiring oil and gas companies to reduce methane leaks from drilling operations on federal and tribal lands) is similarly a CRA target.

The Trump Administration has also signaled its intention to revisit the Environmental Protection Agency's (EPA) Clean Power Plan (CPP), the centerpiece of the Obama Administration's climate change agenda and a pillar of the U.S. commitment to reduce emissions as a signatory to the Paris climate agreement. The goal of the CPP is to reduce power sector carbon emissions by 32 percent below 2005 levels by 2030. The CPP establishes state-by-state emissions reduction targets, with options to shift away from coal-fired power by investing in renewable energy, energy efficiency, natural gas and nuclear power. Opponents have argued that the CPP goes beyond EPA's authority to regulate under the Clean Air Act and is unduly burdensome, and the Supreme Court has stayed its implementation pending the resolution of a legal challenge to the rule by numerous states and other stakeholders.

Among the plaintiffs in that lawsuit against the CPP is the State of Oklahoma, whose former Attorney General, Scott Pruitt, was recently confirmed as the new EPA Administrator. Pruitt opposes the CPP and has testified that he intends to "hew closely to the text and intent of the Clean Air Act when considering...further regulation of GHGs under that law." But any Trump Administration attempt to rescind or withdraw the CPP could be complicated and time-consuming. The Trump Administration is reportedly considering a variety of options to roll back the CPP, from issuing a new rule based on a more narrow interpretation of the Clean Air Act, to having the new rule focus only on efficiency improvements for power plants, to taking administrative actions short of issuing a new rule such as deferring enforcement of emissions reductions standards and/or approving lenient state implementation plans. The Administration's proposed fiscal year 2018 budget would eliminate EPA funding for the CPP and other climate change programs as part of a dramatic 31 percent overall reduction in the EPA budget.

With regard to the Paris Agreement on climate change, the Trump Administration has sent conflicting signals. During the campaign President Trump vowed to "cancel" the agreement, but after the election indicated he has an "open mind" about the climate change accord. Incoming Secretary of State Rex Tillerson implied support for continued U.S. participation in his confirmation hearing, stating that the U.S. is "better served" by "having a seat at the table to address this issue at a global basis..." Tillerson also testified, however, that he would review the Obama Administration's pledge to provide \$3 billion over four years to the United Nations Green Climate Fund. Before President Obama left office, the State Department had already transferred \$1 billion to the Fund. Indeed, the Trump Administration's budget proposal would eliminate State Department's Global Climate Change Initiative and U.S. funding for the Green Climate Fund.

While under President Trump the U.S. may remain a formal signatory to the Paris Agreement, it is important to note that the accord does not bind the new Administration to a particular greenhouse gas emission reduction target. The U.S. pledge and other countries' pledges are voluntary, subject only to mandatory reporting and review requirements. And the U.S. commitment to cut emissions is largely premised on prospective actions such as implementation of the Clean Power Plan and new vehicle fuel efficiency standards and appliance efficiency standards. In addition to the steps it has taken and is considering with regard to the CPP, for example, President Trump has directed the EPA and the Department of Transportation to review the fuel efficiency standards previously approved for model year 2022-2025 light duty vehicles.

Of course, U.S. CO₂ emissions will also be affected by market forces — such as the move away from coal to low-cost natural gas in electricity generation — and by policy and regulatory actions taken at the local, state and regional level. Indeed, with the federal government under President Trump and the Republican Congress acting to reduce regulation and government intervention, in the coming years the center of gravity for energy and environmental policy initiatives may move outside of Washington.

STATES FORGE AHEAD WITH THEIR OWN ENERGY POLICY AGENDAS

In many ways, the next four years could resemble the policy landscape during the 2000s when states forged ahead on climate and clean energy initiatives. For example, last decade, California established its economy-wide greenhouse gas cap-and-trade program, and northeastern states formed the Regional Greenhouse Gas Initiative (RGGI), which established a cap-and-trade program for the electricity sector.

As one might expect, California is expected to take a leading role among the states in shaping clean energy and climate change policy. California Governor Jerry Brown (D) is advocating for an extension of the state's cap-and-trade program from 2020, when it is currently set to expire, to 2030. Moreover, Brown's plan is to pass the extension with two-thirds of the vote in both chambers of the California

Assembly in order to insulate the cap-and-trade program from future legal challenges. California's current cap-and-trade is currently facing legal challenges from businesses who contend that the emission allowance auctions constitute as a tax, and therefore under state law, requires two-thirds vote from the Assembly. Given Democratic supermajorities in both state chambers, Brown may get two-thirds support for new legislation, which could resolve legal uncertainty associated with the current cap-and-trade program. In addition, California is also scheduled to link its cap-and-trade program with Ontario next year, building upon the current linkage with Quebec.

The nine northeastern RGGI states are also continuing discussions on post-2020 CO₂ caps. RGGI has succeeded in reducing CO₂ emissions while generating revenue from allowance auctions for participating states. With low electricity prices and relatively flat load growth, the RGGI states are now weighing more aggressive annual reductions in its emissions cap. New York Governor Andrew Cuomo (D) is proposing a 3% annual decrease in the emissions cap after 2020. Some stakeholders are also pushing for a complementary emissions containment reserve, which would withhold allowances from the market in the event that allowance prices fell below a certain floor price.

In addition to discussions on RGGI's post-2020 caps, other northeastern states are forging ahead on other climate change and clean energy policy. The Maryland General Assembly recently overrode Governor Larry Hogan's (R) veto on legislation that increases the state's renewable portfolio standard (RPS) from 20% to 25% by 2020. The legislation also bolsters the solar carve-out from 2% to 2.5%. Last year, Connecticut, Massachusetts and Rhode Island partnered on a joint request for proposal for generators to provide the region with clean energy. The states selected seven projects, constituting 460 megawatts, to proceed to the next step of negotiating contracts, discussions which could be completed in the early part of this year. The Massachusetts Legislature may also consider legislation that would require that the state procure all of its electricity needs from renewable sources by 2035 and eliminate fossil fuel usage economy-wide by 2050.

It is not just coastal states that are pushing forward on energy policy, as a number of Midwestern states have recently reaffirmed their commitments to clean energy. In December, Michigan Governor Rick Snyder (R) signed legislation that increases the state's RPS from 10% to 15% by 2021. Other state lawmakers may push bills to roll-back or repeal state RPS, but these bills will likely face opposition from Governors, the renewable energy sector and the broader business community. Notably, last December, Ohio Governor John Kasich (R) vetoed legislation to make the state's RPS voluntary. In vetoing the legislation, Kasich, a former Republican Presidential candidate, stated that eliminating the RPS "risks undermining this progress by taking away some of those energy generation options, particularly the very options most prized by the companies poised to create many jobs in Ohio in the coming years, such as high technology firms." Kasich and the Ohio Legislature may battle again this year over potential changes to the state's RPS.

Finally, the courts will continue to play a significant role in the shaping of energy policy as some states and environmental organizations raise legal challenges to the Trump Administration's energy and environmental actions. For example, the California Assembly recently retained former U.S. Attorney General Eric Holder to advise them on looming litigation, including potential climate change lawsuits, against the Trump Administration. The anticipated litigation strategy is similar to the one employed during the Bush Administration that ultimately resulted in *Massachusetts v. EPA*, the seminal 2007 climate change case in which the U.S. Supreme Court held that the Clean Air Act provides EPA with the authority to regulate GHG emissions and that the agency must regulate emissions unless "it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do."

Thus, despite Trump Administration efforts to roll back many of the prior Administration's energy and climate initiatives, the next four years could see significant progress on climate change and clean energy through state and regional action. These initiatives, coupled with litigation, could ultimately pave the way for future federal action on climate change, either under the current President, or under a future Administration.