

POST-ELECTION POLICY OUTLOOK

ENERGY AND ENVIRONMENT

DECEMBER 2, 2020

Today's Agenda

- Election Results and Key Takeaways
- Congressional Outlook
- Biden-Harris Administration
 - Campaign Promises and Administrative Agenda
 - Appointments and Personnel
 - Themes to Watch
 - Mechanisms for Reversing Course

ELECTION RESULTS

2020 Election Results: Topline

White House



President-Elect Joseph R. Biden (D)
Vice President-Elect Kamala D. Harris (D)

Won Electoral College 306-232

Leads Popular Vote by 4 Points
(+6.9M votes)

Senate

50 / **48**
GOP / **Dem**

To take majority, Democrats need to win two Georgia runoffs for 50 / 50 Senate (VP tie-breaker)

Biden likely to be first Democratic President since 1884 to not have full control of Congress

House

222 / **212**
Dem / **GOP**

1 race not yet called

Democrats maintain majority
Republicans netted 11 seats
(and counting)

The Big Picture

- Despite winning the most votes of any candidate in history, there is no clear mandate, with slim margins of victory and no “Blue Wave”
 - Political divisions of the last four years have solidified and the urban-rural split is worse than ever
- Congressional Republicans far outperformed pre-election polling, maintaining their Senate majority and picking up seats in the Democrat-controlled House
- Two Georgia runoffs will ultimately decide control of the Senate; Democrats must win both for a 50 / 50 split (with incoming Vice President Harris serving as the tie-breaker)
- Should Republicans maintain control of the Senate, the Biden administration will face a divided Congress – with razor thin majorities in both chambers
 - Whether that results in legislative gridlock or bipartisan compromise remains to be seen
 - Without the potential tools afforded by a Senate majority – including budget reconciliation and the potential elimination of the filibuster – ambitious Democratic legislative proposals are largely off the table

CONGRESSIONAL OUTLOOK

Congressional Committees

Senate Energy & Natural Resources



John Barrasso (R-WY)



Joe Manchin (D-WV)

Senate Environment & Public Works



Shelley Moore Capito (R-WV)



Tom Carper (D-DE)

House Energy & Commerce



Frank Pallone (D-NJ)



Michael Burgess (R-TX) or
Cathy McMorris
Rodgers (R-WA)



House Natural Resources



Raúl Grijalva (D-AZ)



Bruce Westerman (R-AR) or
Paul Gosar (R-AZ)



Congress

- Impact of divided government on energy and environmental policy
 - Major climate or environmental legislation unlikely
 - Little or no role for Congressional Review Act
 - Greater role for bipartisan groups
 - Problem Solvers Caucus
 - Bipartisan Senate Climate Solutions Caucus
 - Need for “consensus” nominees
- Even absent prospects of major legislative change, Congress will have a role
 - “Green” Infrastructure / Stimulus – R&D spending, tax credits
- The majority of energy and environmental policy changes, however, will continue to be the near exclusive purview of the Executive Branch...

BIDEN-HARRIS ADMINISTRATION

Campaign Highlights

“I would transition away from the oil industry, yes. The oil industry pollutes, significantly. ... It has to be replaced by renewable energy over time.”

Candidate Biden (10/22 Presidential Debate)

“I am not banning fracking. Let me say that again: I am not banning fracking.”

Candidate Biden (8/31 Speech in Pittsburgh)

- Debate comments caused a stir – but consistent with campaign pledges
 - Carbon neutral by 2050
 - Never endorsed GND – but called it a “crucial framework”
 - Messaging less about regulation, more about “clean energy revolution”
- “Nuanced” position on fracking
- Biden-Sanders “Unity Task Force” to bridge party divides
- Which camp will drive E&E policy in the Biden Administration?

E&E Agenda

- While climate remains a top priority, Biden will take office facing twin public health and economic crises
 - Parallels to 2009 – economic crisis as an opportunity?
- Whole-of-Government approach to climate
 - “Climate cabinet”
 - Expect quick action – Executive Orders; international efforts; regulatory rollbacks
 - Mandate action across all agencies
 - Implement climate policy through dozens and dozens of individual rules, decisions, orders, agreements, enforcement actions, legal positions, etc.
 - Tap into authority under multiple statutes

Personnel is Policy: Transition Team

- Obama-era centrists, labor leaders, progressives, and a few Republicans
- **Transition Co-Chairs**
 - Sen. Ted Kaufman (DE: 1976-1994; 2009-2010)
 - Anita Dunn (Biden Advisor, Obama Alum)
 - Gov. Michelle Lujan Grisham (D-NM)
 - Cedric Richmond (D-LA 2nd Dist)
 - Jeff Zients (Obama economic advisor)
- **Agency Review Team Leads**
 - **CEQ:** Cecilia Martinez – Center for Earth, Energy, and Democracy
 - **DOE:** Arun Majumdar – Stanford University
 - **DOI:** Kevin Washburn – University of Iowa
 - **EPA:** Patrice Simms - Earthjustice

“The president-elect reiterated his intention to ensure climate change is a core national security priority and expressed a clear sense of urgency in advancing his climate goals.”

Biden Transition Readout
11/30

Personnel is Policy: Initial Appointments/Hires

- Initial appointments and hires largely acceptable to both wings of the party
- National Security and Economic teams rolled out first
- **National Security Team**
 - **Secretary of State:** Antony Blinken
 - **Special Presidential Envoy for Climate:** John Kerry
 - Cabinet-level; will sit on National Security Council
- **Economic Team**
 - **Secretary of Treasury:** Janet Yellen
 - **Director of National Economic Council:** Brian Deese
- **White House Senior Staff**
 - **Chief of Staff:** Ron Klain
 - **Senior Advisor/Direct of Public Engagement:** Cedric Richmond
 - **White House Climate Director:** TBD

Personnel is Policy: Cabinet Rumor Mill

- **EPA Administrator**

- Mary Nichols (CARB Chair; former Air Administrator under Clinton)
- Gov. Jay Inslee (D-WA)
- Katie McGinty (Former Secretary of Pennsylvania DEP; Former CEQ Chair under Clinton)
- Heather McTeer Toney (Senior Director, Moms Clean Air Force; former EPA Region 4 RA)

- **Energy Secretary**

- Arun Majumdar (Stanford; former Acting Energy Secretary and ARPA-E head)
- Elizabeth Sherwood-Randall (Georgia Tech; former deputy Energy Secretary; Former Biden aide in Senate)
- Dan Reicher (Stanford; Clinton DOE official; Google Director of Climate and Energy; NRDC attorney)

- **Interior**

- Outgoing Sen. Tom Udall (D-NM)
- Rep. Deb Haaland (D-NM)

- **CEQ**

- Mustafa Santiago Ali (former EPA Environmental Justice office; former Interagency EJ Work Group

Themes to Watch

- **Climate Change**

- Net-Zero (Carbon Neutral) Power Sector by 2035
- 100% Clean Energy Economy/Net-Zero Economy-wide Emissions by 2050
- (New?) Paris Commitments

- **Environmental Justice**

- Historically, EJ has been a modest ancillary consideration in agency decision-making
- The Biden/Harris EJ approach will be different
 - Will drive substantive outcomes, will determine whether projects are permitted & where, will dictate enforcement priorities

- **Reversing the Reversals**

- Multiple actions to undue multiple Trump-era actions
- Goal is not to simply return to Obama-era regulatory approach
 - Strong interest in moving well beyond Obama-era approaches that some view as “weak” or “centrists”

Biden Administration: Climate Change

- Paris Climate Accords

- Joined on September 3, 2016; withdrew on November 4, 2020; rejoin February 2021?
- Rejoining is easy
 - Send UN notification of intent to rejoin – becomes official 30 days later
- Meeting commitments is hard
 - Cost: Obama committed \$3b for initial fund + annual funding
 - Commitment: reduce GHG emissions by 26-28% below 2005 level in 2025
- Meeting new commitments will be harder
 - Biden Administration will seek, and offer, more aggressive commitments

Biden Administration: Climate Change

- **Federal Spending:** \$2 trillion over next 10 years
- **Federal Purchasing Power:** All zero-emission vehicles; energy efficient federal buildings
- **R&D:** “Advanced Research Projects Agency” (ARPA-C)
 - Energy storage; carbon capture, storage, removal, and use; small-scale reactors; net-zero buildings; “sustainable fuels”
- **Energy Efficiency Standards:** DOE
- **Mobile Sources:** Fuel economy standards
 - 100% EV for new light and medium duty vehicles; 500k charging stations by 2030; restore / increase EV tax credit; aircraft emissions

Biden Administration: Climate Change

- **Power Sector:** Rescind ACE Rule and restore updated Clean Power Plan
- **Federal Lands Policy:**
 - Decrease/Elimination of fossil fuel leasing
 - Reinstatement of coal leasing moratorium
 - Significant increase in renewable leasing and use of federal land for CCS
 - Rules/restrictions on federal land (e.g., BLM Rule)
 - Royalty Rate Adjustments
 - Climate-focused NEPA reviews and ESA consultation

Biden Administration: Climate Change

- Beyond Power Sector
 - Methane
 - Rescind and replace NSPS
 - Existing Source ICR
 - Look to state actions
 - New rules under CAA
 - BACT?
 - NAAQS?
 - Air rules for other industries
 - Social Cost of Carbon
 - Financial Disclosure

Biden Administration: Climate Change

- **Enforcement & Litigation**
 - Climate-focused enforcement
 - Climate-focused Supplemental Environmental Projects (SEPs)
 - “Strategically support” suits against companies alleging climate torts or failure to disclose fossil fuel risks
- **Everything Else**
 - Regulations need not be focused on GHG
 - Anything that increases costs on fossil fuel development helps shift economics toward renewables
 - ESA, MBTA, NWP 12, Effluent Limitation Guidelines, etc.

Mechanisms for Changing Course

- Quick Actions (Easy Come, Easy Go)
 - Rejoin Paris Accord
 - Regulatory Freeze
 - Executive Orders
 - Rescind Trump EOs: (“One in, 2 Out,” Cooperative Federalism, Energy Independence, Monuments, Infrastructure, Improve Enviro Review, *etc.*)
 - New EOs: Climate, Leasing, Environmental Justice?
 - Guidance

Mechanisms for Changing Course

- Rules & Regulations

- Course changes take more time but are more durable (a bit)
- Procedural
 - Notice & Comment under APA and other statutes
 - Apply to promulgation and rescission
 - Adequately explain proposal and meaningfully respond to comments
- Substantive
 - *Chevron* Deference
 - APA Standards for Review
 - In accord with statute? Reasonable construction? Rationally connected to record?
 - Policy Reversals (*FCC v. Fox Television*)
 - Must explain course change, show good reasons for new policy and that it is permissible under statute
 - Need not demonstrate that reasons for new policy are better than reasons for old policy

Mechanisms for Changing Course

- Ongoing Actions
 - Leasing & Permitting
 - Broad, but arguably limited, executive authority for new leasing decision
 - Much more limited authority over existing leases
 - Enforcement
 - Litigation
 - “Sue and Settle” with eNGOs and Blue State Aqs
 - Rules for Rulemaking/Analytical Approaches
 - Social Cost of Carbon & Methane/CBA/Uncertainty & Foreseeability

QUESTIONS?