Biden's Climate Agenda Means Oil, Gas Cos. Must Innovate

By **Stacey Mitchell, Jack Lyman and Bryan Williamson**

Stacey Mitchell

Jack Lyman

Bryan Williamson

During the 2020 campaign, President Joe Biden pledged that, if elected, he would steer the country away from its reliance on traditional energy sources and toward a clean energy future with net-zero greenhouse gas emissions.

His day-one climate actions followed through on that promise, and made clear that his administration will seek to impose the most significant hurdles the oil and gas industry has ever faced from a White House occupant.

Those actions, however, were just a prelude to what we saw on Jan. 27 — the administration's so-called Climate Day — when Biden unleashed a bevy of climate-related policies, the impacts of which will reverberate throughout the industry for years to come.

In his Jan. 20 executive order on "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," Biden had already laid out some of his administration's key priorities: protecting the environment, ensuring access to clean air and water, reducing greenhouse gas emissions and bolstering climate resiliency.[1]

To meet those goals — and fulfill campaign promises — Biden rejoined the Paris Agreement, revoked the Keystone XL pipeline's presidential permit granted by the Trump administration in 2017, and declared a temporary moratorium for oil and gas leases on over 1.5 million acres of land in the Arctic National Wildlife Refuge, or ANWR.[2]

The Trump administration had begun the process to lease land in the ANWR, culminating in an August 2020 record of decision and the January 2021 issuance of leases on nine tracts of land.[3] Biden's executive order halted this process, at least temporarily, while the U.S. Department of the Interior reviews the Coastal Plain Oil and Gas Leasing Program covering the ANWR, and analyzes its potential environmental impacts anew.[4]

The executive order also reinstated Obama-era withdrawals from oil and gas leasing of certain areas in Arctic waters and the Bering Sea.[5] The Biden administration did not stop there, however.

In a precursor to more formal action to fulfill another campaign promise — to ban new oil and gas leasing on federal lands — the acting secretary of the DOI issued a secretarial order temporarily suspending the authority of lower-level DOI officials to issue any onshore or offshore fossil fuel authorization, which by its text covers virtually any new leases, permits or other federal approvals.[6]

While the secretarial order was not itself an outright ban on the issuance of new leases and permits — and does not impact ongoing operations that already have received all necessary approvals — its practical outcome is a short-term freeze on the issuance of the vast majority of new leases, permits and approvals required for the exploration and production of fossil-based energy sources.

While a trickle of permits have been issued following that order, the DOI also reportedly revoked another approximately 70 permits issued in late January in apparent contravention of the secretarial order.[7] As with the ANWR moratorium, the DOI is using the temporary suspension period — currently set to last for 60 days — to study the questions of fact, law and policy that these activities raise.[8]

Then came Climate Day. Although Biden's Jan. 27 climate order did not go as far as some had expected, it outlined the president's ambitious road map for achieving a carbon pollution-free electricity sector by 2035, and setting the country on an irreversible path to a net-zero emissions economy by 2050.[9]

Most germane to the oil and gas industry were several targeted directives that, in no uncertain terms, will slow the industry's growth, while stimulating the development of renewable energy.

The first and most widely discussed action is a moratorium on the DOI's ability to issue new oil and gas leases on public lands or in offshore waters. Although temporary and explicitly limited to leases — instead of both leases and permits — this pause will last until the administration completes a comprehensive review that reconsiders the climate impacts of both leasing and permitting practices, as well as the royalties the federal government reaps from leases.[10]

An industry group has already sued Biden and the DOI's Bureau of Land Management over this order. But the suit is not particularly likely to succeed, given the relatively wide latitude that administrative agencies enjoy in implementing permitting and leasing decisions.[11]

Indeed, federal statutes afford the executive branch a degree of discretion to justify a moratorium to assess the environmental, health and financial impacts of fossil fuel leasing.[12] One likely mechanism would be to prepare a programmatic environmental impact statement.

A finding that the cumulative effects of the approval of fossil fuel leases results in significant negative impacts that it cannot mitigate adequately could then support new regulations, or a departure from the DOI's previous leasing plans and policies. The resulting new rules or policies are apt to impose more stringent limitations on future leasing activities and conditions that impact economic feasibility, further diminishing the value proposition of new fossil fuel production on public lands.

Importantly, Biden's moratorium is not unprecedented, nor have only Democratic presidents used the tool. The Nixon, George H.W. Bush and Obama administrations issued somewhat comparable suspensions during their tenures.[13]

Biden's other noteworthy Climate Day edicts target the oil and gas industry's competitiveness. For instance, in a somewhat nebulous order that satisfies an oft-touted campaign promise, Biden directed federal agencies to find ways to eliminate any fossil fuel subsidies they provide.[14]

After consulting with the new national climate adviser (and former U.S. Environmental Protection Agency administrator) Gina McCarthy, the White House Office of Management and Budget will then exclude any such subsidies from the administration's fiscal year 2022 budget request.[15]

With that said, the elimination of many fossil fuel subsidies — e.g., intangible drilling costs deduction, percentage depletion deduction, advanced fossil energy projects loan guarantees — would require revisions to the tax code or other federal statutes.[16] Accordingly, we do not expect significant reform in this area, in light of Democrats' razor-thin U.S. Senate majority, at least in the immediate future.

While agencies work to cut the cord with new oil and gas development on public lands, they will seek to build a bridge toward renewables. Biden's order directs the DOI to review renewable permitting and siting processes, with the goal of increasing emissions-free energy production on public lands and waters.[17] Offshore wind energy, in particular, is likely to flourish, given the administration's goal of doubling wind production — or, more realistically, wind energy leasing — by 2030.

What does this mean for the oil and gas industry moving forward? Many have interpreted the administration's early actions as the opening salvo of a tenure that aims to oversee a rapid and lasting transition away from the U.S.' current energy mix.

To a large degree, this is true, as oil and gas will bear the brunt of Biden's and congressional Democrats' push to eliminate carbon emissions from the country's power system in under 15 years. Regulatory developments — like stronger motor vehicle and airline emission standards, or the resurrection of Obama-era methane pollution limits — could make this transition even more difficult for the industry.

And by touting climate change as a job driver, the president implicitly acknowledged the potential for his climate policies to result in deleterious economic impacts on the industry, at least in the short term — and potentially in the longer term, too.

Still, Biden's moratorium is temporary, and courts — even sympathetic ones — will tolerate a nationwide pause for only a discrete period of time. In addition, members of Congress on both sides of the aisle continue to resist full-throttled attempts to stymie the fossil fuel industry, as we saw most recently with a vote to amend the Feb. 5 Senate budget resolution to prohibit the U.S. Environmental Protection Agency and the White House Council on Environmental Quality from banning hydraulic fracturing.[18]

Although a wider vote eliminated that proposed amendment, it is notable that seven Democrats, and all Republicans, voted in its favor. As a result, the industry will not recede overnight, and the higher oil and gas prices likely to result from Democrats' policies should provide enough time and flexibility for sophisticated companies to plan and execute alternative long-term strategies to delay or limit the negative impacts of those policies.

In the short term, this means shifting development to private lands, where practicable, and maximizing exploration and development on already leased and permitted public lands and waters through technological and data-driven advances.

The long-term outlook is less promising. But the industry's most innovative players will rise to this challenge through a multifaceted, deliberate approach that harnesses technological advances — like data analytics, digitalization and artificial intelligence — to maximize operational efficiency.[19]

We also expect to see the industry manage its risk profile by diversifying into renewables, and pursuing synergistic integration and consolidation strategies, especially in the shale space.[20] Finally, prudent operators will adapt to this uncertain future while making accelerated strides to operate more sustainably through decreased freshwater usage, improved water and used oil recycling, and reduced methane leakage.[21]

Stacey Mitchell is a partner, and Jack Lyman and Bryan Williamson are associates, at Akin Gump Strauss Hauer & Feld LLP.

Akin Gump partner Cynthia Mabry and associate Meaghan Jennison contributed to this article.

[1] Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021).

[2] Id. at 7039, 7041.

[3] Bureau of Land Mgmt., U.S. Dep't of the Interior, Coastal Plain Oil and Gas Leasing Program Record of Decision (2020) (Record of Decision); Leases Issued for ANWR Coastal Plain Oil and Gas Program, Bureau of Land Mgmt., U.S. Dep't of the Interior, https://www.blm.gov/press-release/leases-issued-anwr-coastal-plain-oil-gas-program (last visited Feb. 3, 2021) (lease issuance announcement).

[4] Exec. Order No. 13990, 86 Fed. Reg. 7037, 7039 (Jan. 25, 2021).

[5] Id. President Donal Trump sought to revoke President Barack Obama's withdrawal of these areas from leasing through Executive Order 13795, but the U.S. District Court for the District of Alaska vacated the revocation in March 2019. League of Conservation Voters v. Trump, 363 F. Supp. 3d 1013 (D. Alaska 2019).

[6] Secretarial Order No. 3395, Temporary Suspension of Delegated Authority (Jan. 20, 2021), https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3395-signed.pdf. The order provides a few exceptions, such as where conditions exist that could pose human health or safety risks or adverse impacts to public lands or mineral resources.

[7] Jennifer A. Dlouhy, Biden Revokes Oil Drilling Permits for Additional Review, Bloomberg Green (Jan. 29, 2021), https://www.bloomberg.com/news/articles/2021-01-29/biden-yanks-just-approved-drilling-permits-for-additional-review.

[8] Id.

[9] Exec. Order No. 14008, 86 Fed. Reg. 7619, 7622, 7624 (Feb. 1, 2021).

[10] Id. at 7624-25.

[11] Petition for Review of Government Action, Western Energy Alliance v. Joseph R. Biden, Jr., No. 0:21-cv-00013 (D. Wyo. filed Jan. 27, 2021). But see Hornbeck Offshore Servs. LLC v. Salazar, 696 F. Supp. 2d 627, 638 (E.D. La. 2010) (enjoining enforcement of Obama administration moratorium on deepwater drilling activity in the Outer Continental Shelf following the Deepwater Horizon incident).

[12] See, e.g., 30 U.S.C. § 201(a)(1) (discretion to offer leases for lands containing coal); 30 U.S.C. § 226(g) (discretion to set standards related to financial arrangements, ensuring reclamation of lease tracts, and restoration of any lands or surface waters adversely affected by lease operations); 43 U.S.C. § 1344(a)(2)(G) (allowing the DOI to base the "timing and location" of oil and gas offshore activities on "the relative environmental sensitivity and marine productivity" of the outer continental shelf).

[13] See Statement on Outer Continental Shelf Oil and Gas Development, 26 WEEKLY COMP. PRES. DOC. 1006 (June 26, 1990) (Bush administration moratorium on "leasing and development activity" in areas off the coast of several west coast states and parts of the Atlantic Ocean and Gulf of Mexico); Secretarial Order No. 3338, Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Program (Jan. 15, 2016) (Obama administration moratorium on coal leasing); Secretarial Order No. 2952, 38 Fed. Reg. 4682 (Feb. 17, 1973) (Nixon administration moratorium on the issuance of new coal leases and prospecting permits).

[14] Exec. Order No. 14008, 86 Fed. Reg. 7619, 7625 (Feb. 1, 2021).

[15] Id.

[16] See e.g., 26 U.S.C. § 263 et seq. (intangible drilling costs deduction); 26 U.S.C. § 613 et seq. (percentage depletion deduction); 42 U.S.C. § 16513(b)(2) (advanced fossil energy projects loan guarantee program).

[17] Id. at 7624.

[18] S. Amdt. 833 to S. Con. Res. 5, 117th Cong. (2021).

[19] 8 ways the Oil and Gas Industry is making better use of sustainable technologies, World Future Energy Summit, https://www.worldfutureenergysummit.com/en-gb/future-insights-blog/8-ways-the-oil-and-gas-industry-is-making-better-use-of-sustainable-technologies.html (last visited Feb. 10, 2021).

[20] Duane Dickson, 2021 oil and gas industry outlook, Deloitte, https://www2.deloitte.com/us/en/pages/energy-and-resources/articles/oil-and-gas-industry-outlook.html (last visited Feb. 10, 2021).

[21] 8 ways the Oil and Gas Industry is making better use of sustainable technologies, World Future Energy Summit, https://www.worldfutureenergysummit.com/en-gb/future-insights-blog/8-ways-the-oil-and-gas-industry-is-making-better-use-of-sustainable-technologies.html (last visited Feb. 10, 2021).