

Environmental Policy And The Election: Part 2

By **James Tucker, Stacey Mitchell and Bryan Williamson**

Democratic presidential candidate Joe Biden's "clean energy revolution" and climate goals stand in stark contrast with the policies President Donald Trump has pursued during his first term, underscoring the significant impact the presidential election will have on U.S. environmental and energy policy.

The congressional elections also will significantly affect the country's environmental and energy policy, as the next Congress can shape policy not just through its constitutional powers, but also through the reversal of many of the Trump administration's late-term rules via the Congressional Review Act.

In this three-part article, we outline both candidates' key environmental and energy policies, including how the candidates might — or might not — achieve their policy goals.

The first installment identified the Trump administration's significant late-term rules that a unified Democratic Congress may seek to invalidate to minimize Trump's legacy.

This installment analyzes the policy differences between Trump and Biden on environmental issues including domestic energy, air quality and international climate diplomacy, and considers some likely consequences of those differences.

The third installment will cover the candidates' positions on water quality, biodiversity and federal lands, and environmental justice.

Domestic Energy

Trump

The Trump administration has championed an "American energy independence" policy, which seeks to shift the country's energy dependence away from foreign suppliers and toward U.S. energy sources, including primarily fossil fuels — coal, oil and natural gas.[1]

Consistent with this policy, the Trump administration repealed the Obama administration's Clean Power Plan, which sought to reduce carbon dioxide emissions from U.S. power plants, and replaced it with the Affordable Clean Energy Rule, which supplants a federal emissions reduction regime with one that allows states to establish their own, potentially



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less stringent, standards.[2]

The Trump administration has also:

- Issued an executive order aimed at curtailing the use of foreign-sourced electric equipment installed on the U.S. bulk-power system;
- Revised rules implementing the Public Utility Regulatory Policies Act of 1978 to afford states additional flexibility in setting energy rates;
- Overhauled safety standards for offshore drilling to facilitate U.S. oil production;
- Revised regulations governing the disposal of coal ash;
- Promulgated a U.S. Department of Transportation rule authorizing the transportation of liquefied natural gas by rail;
- Rewritten rules implementing the National Environmental Policy Act to hasten the federal environmental review of complex energy and infrastructure projects; and
- Repealed U.S. Department of the Interior rules governing oil and gas fracking and methane emissions.[3]

The Trump administration has effectuated its domestic energy agenda through a variety of tools, including permitting, rulemaking, executive order and trade sanction. However, its favored tool is rulemaking, by which the administration has repealed and replaced signature Obama-era regulations in addition to advancing a number of additional priorities.

Given the virtual certainty that these regulatory changes would be subject to litigation, the Trump administration has gone to great lengths to develop these rules to withstand legal challenge, although final resolution in that regard likely will take years to play out. If reelected, Trump can be expected to continue to use these tools to shepherd his support toward the fossil fuel industry and further domesticize U.S. energy production.

Biden

In the process of courting the progressive wing of the Democratic Party, Biden has described the Green New Deal as a crucial framework for meeting climate challenges as part of a broader clean energy revolution, while declining to fully adopt it as his own plan. Biden established a unity task force with Sen. Bernie Sanders, I-Vt., that has made a number of climate-related recommendations, many aimed at creating a clean energy economy.[4]

These recommendations include achieving net zero greenhouse gas emissions by 2050, reducing the carbon footprint of the U.S. building stock by 50% by 2035 and directing \$400 billion of federal funds toward clean energy research and innovation — part of an overall \$2 trillion federal investment in clean energy and environmental justice initiatives.[5]

The Biden-Sanders unity task force recommendations even go further, advocating for the elimination of carbon pollution from power plants by 2035 and the installation of 500 million solar panels and 60,000 wind turbines.[6] According to the Biden campaign, funding for these energy initiatives would come from a reversal of the 2017 tax legislation that reduced the individual and corporate tax rates.[7]

Contrary to the Trump administration's efforts to boost fossil fuel energy sources, a Biden administration would establish a new initiative, ARPA-C, described as "a new, cross-agency Advanced Research Projects Agency focused on climate."^[8] This new initiative would work to decarbonize key U.S. business sectors; decrease the costs of producing grid-scale energy storage technology; produce more hydrogen energy from renewable resources; address the challenges of nuclear waste disposal; double U.S. offshore wind production by 2030; and accelerate the deployment of carbon capture sequestration technology for use at U.S. power plants.^[9]

Importantly, the Biden campaign appears to have backed away — at least for now — from previous positions expressing support for a carbon pricing mechanism, such as a carbon tax or cap-and-trade system.^[10] The Biden campaign also has not embraced a full ban on hydraulic fracturing, or fracking, despite running mate Kamala Harris's previous statements expressing support for such a ban.^[11]

While many components of these domestic energy policy goals could be implemented through rulemaking or executive order, many would require congressional appropriations or legislation — e.g., reversal of the 2017 tax cuts, additional funding for clean infrastructure and authorization of a nationwide carbon tax.^[12] If elected, Biden would support the transition from a fossil fuel-based energy system toward one more rooted in renewable resources and developing strategies for climate mitigation and adaptation.

Air Quality

Trump

The Trump administration has relied on the rulemaking process to repeal and, in many cases, replace many key Obama-era regulations aimed at curbing air emissions, including most notably the Clean Power Plan, DOI rules governing oil and gas fracking and methane emissions, and fuel economy and carbon dioxide emission standards for passenger cars and light-duty trucks.^[13]

The U.S. Environmental Protection Agency also issued a final rule in September 2019 that revokes California's Clean Air Act preemption waiver, which had allowed California and other states to adopt more stringent motor vehicle emissions standards than those in place under federal law.^[14] With respect to national air quality standards, the Trump administration decided to retain the Obama-era standards for particulate matter, despite signals from the administration's early days indicating that the EPA may have been considering confronting U.S. Supreme Court precedent foreclosing the agency from considering economic costs in formulating these standards.^[15]

To that end, however, the EPA issued a proposed rule in early June that aims to revamp the agency's process for considering benefits and costs when promulgating significant rules under the Clean Air Act, by requiring, among other things, that future rulemakings include benefit-cost analyses that do not factor so-called co-benefits from existing regulations in assessing the incremental benefits of new rules.^[16]

Most of this administration's major air-related rule rescissions have faced legal challenges, many of which are still pending in the courts.^[17] Beyond rulemaking, the Trump administration has sought to downplay the impact of air pollution through discretionary executive action, such as through the EPA's rejection of a petition from Maryland seeking more stringent restrictions on emissions from coal-fired power plants in upwind states, and

the U.S. Bureau of Land Management's issuance of increasing numbers of leases authorizing oil and gas development on federal land.[18]

If reelected, the Trump administration likely would continue the stepwise replacement of existing air regulations, further efforts to modify how economic impacts are accounted for in agency decisions and use an additional four years to revise any components of the administration's rules that courts vacate.

Biden

As in the case of Biden's proposed energy initiatives, his focus on air would seek to "reinstate federal clean air protections, rolled back by the Trump Administration." [19] According to his campaign, a Biden administration would focus on reducing the impact of emissions from the transportation sector, particularly through motor vehicle and aircraft standards and investments in sustainable aircraft fuel.[20]

With respect to motor vehicle emissions, a Biden administration would be expected to promulgate standards more similar to those in place under the Obama administration, restore tax credits for electric vehicles, increase the number of electric vehicle charging stations throughout the country and attempt to require annual improvements in fuel economy and emissions performance for heavy-duty vehicles.[21]

The Biden campaign also has pledged to require aggressive methane pollution limits on oil and gas operations, require agencies issuing federal permits to consider the impact of greenhouse gas emissions and climate change, and commit to reducing climate pollution through federal infrastructure investments.[22] Lastly, Biden has stated that he would establish a new cabinet position dedicated to addressing climate change, which reportedly would "go beyond [the] EPA." [23]

To complement the regulations the Biden campaign has previewed, we likely would see a Biden administration that more aggressively pursues enforcement actions against fossil fuel-based energy producers and other large emitters of regulated pollutants that are found to violate existing standards. However, most of the Biden campaign's air quality aspirations, such as research-based emissions reductions initiatives and plans to expand zero-emission vehicle infrastructure, would require appropriations.

Finally, any attempt to restore electric vehicle tax credits or establish an official new cabinet position would require congressional authorization. But Biden could ascribe a new, climate-related title to an existing aide or adviser, or elevate the role of the chair of the White House Council on Environmental Quality without formally establishing a new cabinet position.[24]

International Climate Diplomacy

Trump

Consistent with one of his significant 2016 campaign tenets, Trump, within the first six months in office, withdrew the U.S. from the United Framework Convention on Climate Change's 2015 Paris Agreement.[25] In accordance with the Paris Agreement, the U.S.' withdrawal will become effective on Nov. 4, one day after the 2020 presidential election.[26]

Also among this administration's signature moves is its replacement of the North American

Free Trade Agreement with the U.S.-Mexico-Canada Agreement, which contains environmental provisions that are similar to those in other U.S. trade agreements, as well as provisions intended to support the oil and gas industry by reducing duties, allowing U.S. energy producers to bid on Mexican oil and gas exploration leases and challenge climate policies, and eliminating tariffs on steel used to construct pipelines.[27]

In addition, the Trump administration has issued trade sanctions and executive orders to restrict the use of foreign energy supplies, in an effort to bolster the production and export of U.S. oil and gas.[28]

Given Trump's reliance on constitutional authority to shrink the U.S. role in developing international climate policy and bolster the nation's production of fossil fuels, we expect that, if reelected, he would continue to focus on domestic policy, eschew international climate diplomacy as the U.S. officially withdraws from the Paris Agreement, and continue efforts to engage internationally to promote U.S.-produced energy sources abroad.

Biden

The Biden campaign has announced its intention to recommit the U.S. to the Paris Agreement and "lead an effort to get every major country to ramp up the ambition of their domestic climate targets" with "transparent and enforceable" commitments.[29]

A Biden administration also would seek to join or initiate other international climate agreements, such as a global moratorium on offshore drilling in the Arctic; a commitment among G-20 nations to end export finance subsidies of high-carbon projects; a program to offer financing for lower-carbon energy investments in Belt and Road Initiative countries; and reforms to the International Monetary Fund and regional development bank standards to prioritize projects with low-carbon impacts.[30]

If elected, Biden would be expected to take immediate steps to reverse the Trump administration's international climate efforts, or lack thereof, by relying on the same executive authority used to implement those policies in the first instance.

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[1] President Trump's Energy Independence Policy, The White House (Mar. 28, 2017), <https://www.whitehouse.gov/briefings-statements/president-trumps-energy-independence-policy/>.

[2] Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520 (July 8, 2019) (codified at 40 C.F.R. pt. 60 et seq.).

[3] See Exec. Order No. 13920, 85 Fed. Reg. 26595 (May 1, 2020) (securing the U.S. "bulk-

power system"); Oil and Gas and Sulfur Operations in the Outer Continental Shelf — Blowout Preventer Systems and Well Control Revisions, 84 Fed. Reg. 21908 (May 15, 2019) (codified at 30 C.F.R. pt. 250 et seq.) (offshore drilling safety rule revisions); Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Amendments to the National Minimum Criteria (Phase One, Part One), 83 Fed. Reg. 36435 (July 30, 2018) (codified at 40 C.F.R. pt. 257 et seq.) (coal combustion residuals rule revisions); Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule, 82 Fed. Reg. 61924 (Dec. 29, 2017) (codified at 43 C.F.R. pt. 3160) (oil and gas fracking rule rescission); Hazardous Materials: Liquefied Natural Gas by Rail, ___ Fed. Reg. ___ (June 19, 2020) (to be codified at 40 C.F.R. pts. 172-74, 179-80) (authorizing transportation of liquefied natural gas by rail); Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, ___ Fed. Reg. ___ (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500-05, 07-08) (re-writing NEPA's implementing rules); Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 49184 (Sept. 28, 2018) (codified at 43 C.F.R. pts. 3160, 3170) (methane rule rescission).

[4] Joe's Plan for a Clean Energy Revolution and Environmental Justice, Biden for President, <https://joebiden.com/climate/>; Biden-Sanders Unity Task Force, Combating the Climate Crisis and Pursuing Environmental Justice (July 2020), <https://joebiden.com/wp-content/uploads/2020/07/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf>.

[5] Joe's Plan for a Clean Energy Revolution and Environmental Justice, *supra* note 10; The Biden Plan to Build a Modern, Sustainable Infrastructure and an Equitable Clean Energy Future, Biden for President, <https://joebiden.com/clean-energy/>.

[6] Biden-Sanders Unity Task Force, *supra* note 10 at 47.

[7] Joe's Plan for a Clean Energy Revolution and Environmental Justice, *supra* note 10.

[8] *Id.*

[9] *Id.*

[10] Amy Harder, Joe Biden unlikely to push carbon tax as part of climate change plan, *Axios* (Aug. 20, 2020), <https://www.axios.com/joe-biden-carbon-tax-climate-change-plan-e8d522a8-5015-45fc-8164-3ec5c8a0d8a3.html>.

[11] "Harris: 'There is No Question I'm in Favor of Banning Fracking,'" YouTube (Sep. 4, 2019), <https://www.youtube.com/watch?v=IHnXl6S0E8w&feature=youtu.be>.

[12] The Clean Air Act may allow the EPA to approve state compliance plans that implement a carbon tax, but Congress would need to authorize any attempt to institute a federally mandated carbon tax. See Samuel D. Eisenberg et al., *A State Tax Approach to Regulating Greenhouse Gases Under the Clean Air Act*, The Brookings Institute (May 22, 2014) (discussing the legal bases for imposing state or federal carbon taxes under Section 111(d) of the Clean Air Act).

[13] The Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24174 (Apr. 30, 2020) (codified at 40 C.F.R. pts. 86 et seq., 600 et seq.).

[14] The Safer Affordable Fuel-Efficient Vehicles Rule Part One: One National Program, 84

Fed. Reg. 51310 (Sept. 27, 2019) (codified at 40 C.F.R. pts. 85 et seq., 86 et seq.).

[15] See Review of the National Ambient Air Quality Standards for Particulate Matter, 85 Fed. Reg. 24094 (Apr. 30, 2020) (to be codified at 40 C.F.R. pt. 50 et seq.) (retaining Obama-era particular matter standards); William H. Haak, Trump Orders EPA 'Back to Basics' on NAAQS, *The Magazine for Environmental Managers* (July 2018) (citing Memorandum from E. Scott Pruitt, Administrator, U.S. Evtl. Protection Agency, to Assistant Administrators, U.S. Evtl. Protection Agency, (May 8, 2018), available at <https://www.epa.gov/sites/production/files/2018-05/documents/image2018-05-09-173219.pdf>) (discussing the Trump Administration's renewed emphasis on assessing the economic impact of national ambient air quality standards revisions).

[16] Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 85 Fed. Reg. 35612 (June 11, 2020) (to be codified at 40 C.F.R. pt. 83), available at https://www.epa.gov/sites/production/files/2020-06/documents/consistent_transparent_bca_fr_notice_final_pre-pub_0.pdf.

[17] See Roundup: Trump-Era Agency Policy in the Courts, Institute for Policy Integrity, New York Univ. School of Law, <https://policyintegrity.org/trump-court-roundup> (last visited May 28, 2020) (tracking outcomes of litigation involving the Trump Administration's agencies).

[18] See Response to Clean Air Act Section 126(b) Petitions From Delaware and Maryland, 83 Fed. Reg. 50444 (Oct. 5, 2018) (EPA's rejection of Maryland's petition); U.S. District Court for the District of Montana, Great Falls Division, Order in Case No. CV-18-73-GF-BMM (May 1, 2020), https://earthjustice.org/sites/default/files/files/39_-_order.pdf (litigation related to BLM's issuance of 287 oil and gas leases in December 2017 and March 2018).

[19] Joe's Plan for a Clean Energy Revolution and Environmental Justice, *supra* note 10.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Sean Sullivan, His campaign limited, Joe Biden sketches out his would-be administration, *Wash. Post.* (April 17, 2020), https://www.washingtonpost.com/politics/his-campaigning-limited-joe-biden-sketches-out-his-would-be-administration/2020/04/17/2ffc8b28-80bd-11ea-8013-1b6da0e4a2b7_story.html.

[24] See U.S. Const. art. II, § 2 (requiring the "Advice and Consent of the Senate" for appointments of "Officers of the United States").

[25] Press Release, Michael R. Pompeo, U.S. Sec. of State, On the U.S. Withdrawal from the Paris Agreement (Nov. 4, 2019), <https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/>.

[26] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 13, 2015, in Rep. of the Conference of the Parties on the Twenty-First Session, U.N. Doc. FCCC/CP/2015/10/Add.1, annex (2016).

[27] See Scott Vaughan, USMCA Versus NAFTA on the Environment, *Int'l Inst. for*

Sustainable Dev., <https://www.iisd.org/library/usmca-nafta-environment> (noting similarities between the two agreements); Marianne Lavelle, *5 Reasons Many See Trump's Free Trade Deal as a Triumph for Fossil Fuels*, InsideClimate News (Jan. 24, 2020), <https://insideclimatenews.org/news/24012020/trump-trade-usmca-nafta-climate-change-oil-gas> (describing industry-friendly provisions in the USMCA).

[28] Timothy Gardner, Alissa de Carbonnel, *Aggressive U.S. energy policy tests ties with European allies*, Reuters (July 10, 2019), <https://www.reuters.com/article/us-usa-energy-europe/aggressive-u-s-energy-policy-tests-ties-with-european-allies-idUSKCN1U512P> (noting sanctions on oil exports from Iran and Venezuela).

[29] *Joe's Plan for a Clean Energy Revolution and Environmental Justice*, supra note 10. Note that an attempt to rejoin the Paris Agreement would require providing notice to the United Nations of the country's intent to reenter the Agreement, followed by a 30-day waiting period.

[30] *Id.*