U.S. Domestic Climate Policy – Looking Forward

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Introduction

On January 6, 2021, Joseph R Biden was inaugurated as President of the United States, to serve until January 2025. In addition to securing the presidency, his party (Democrats) won control of both chambers of Congress after a runoff election in the state of Georgia, and action on climate is one of the Biden administration's four priorities. However, as Lienke and Schwarz already pointed out in "Climate Policy Architecture in the U.S.", this does not mean that the new administration has a legislative path to climate action at scale. There is a major hurdle facing the new administration, namely the filibuster, a procedural device that can be used to block legislation and can only be overcome if 60 Senators vote to advance the legislation. They also go on to conclude that the razor-thin margin between Democrats and Republicans in the Senate makes it unlikely that legislation will come out of Congress or that Congress would even vote to eliminate the filibuster.

There is certainly the possibility of significant legislative progress directed at climate change, perhaps through a broader package addressed at infrastructure or energy for example, as highlighted by the Biden team in its plans. But, as has been the case for many prior presidents (Kagan, 2001), the Biden administration will also need to focus on making policy at the agency level by taking actions within existing statutes.

Within that environment, the Biden administration is taking steps to flex its muscles through its agencies, laying out many of its priorities in two key documents:

- The Biden Plan for a Clean Energy Revolution and Environmental Justice[1]
- Build Back Better: Joe Biden's Jobs and Economic Recovery Plan for Working Families[2].

To accomplish those priorities, there are two broad categories of actions that his administration can and seems likely will take to address climate change aggressively, namely, using its authority to make changes that cut across many different administrative agencies and also using its authority to address specific sources of emissions through specific agency actions.

Cross-Cutting Actions

In the first category of actions, the Biden administration can take steps that will have cross-cutting impact across different regulatory regimes, starting with elevating the importance of science within the cabinet (Zimmer, 2021). The cabinet is staffed primarily with Senate-confirmed heads of all of the major agencies and serves as the president's closest advisory committee. Elevating accountability for science-based policy and actions that address climate change, in particular, to the cabinet level thus sends a strong signal of the issue's importance.

The non-governmental Climate 21 Project recommended numerous "cross-agency initiatives" including requiring agencies to "account for climate in their procurement decisions, strategic planning and performance management" and focusing on building back the budgets for agen-

1 https://perma.cc/6A34-K5TN

2 https://perma.cc/JV88-L7KK

cies that have endured cuts as well as significant staff retirements for years (Biden for President, 2020). In addition, President Biden's focus on equity and environmental racism will ensure that all agency actions pay attention to pollution that "disproportionately harm[s] communities of color and low-income communities" and that they use an "inclusive, community-driven process" (Biden for President, 2021b).

Another cross-cutting action is the administration decision to rejoin the Paris agreement[3], committing the federal government to across-the-board cuts in greenhouse gas emissions (Acceptance, 2021). One key issue in this area will be that the electricity market has moved away from coal and towards natural gas, helping bring about significant reductions in carbon emissions (U.S. Energy Information Administration, 2020). But with the Biden's administration's net-zero goal, the agencies will all need to look for ways to move away from gas as well—and should be particularly cognizant of the need to avoid entrenching gas (Carter & McEnaney, 2019). Working with states and State Attorneys General will be crucial to this effort.

And yet another important cross-cutting priority will be to roll back Trump-era regulations that sought to restrict how agencies use science, such as EPA's Trump-era rule governing cost-benefit analysis (Hijazi, 2020) and another new rule governing use of scientific studies (Lee & Hijazi, 2021).

One way to support regulatory regimes addressed at cutting greenhouse-gas emissions across agencies is to provide a tool to value the benefits of reducing the emissions. With that tool, agencies can provide strong economic justifications for their climate-related rules, which scholars have found aids them in court (Cecot, 2019). In 2009, the Obama administration assembled experts from a dozen federal agencies and White House offices to "estimate the monetized damages associated with an incremental increase in [greenhouse gas] emissions in a given year" based on "a defensible set of input assumptions that are grounded in the existing scientific and economic literature." (Interagency Working Group, 2010). The interagency group produced estimates that agencies could use to value the damages from an additional ton of carbon emissions (Interagency Working Group, 2016). The Obama administration's estimates were repeatedly endorsed by reviewers as based on the best available evidence (Revesz, 2017; Nat'l Acad. Sci., 2017; Nat'l Acad. Sci., 2016; Gov't Accountability Office, 2014) and their use was upheld as in 2016 court case (*Zero Zone,* 2016).

The Trump administration disbanded the interagency group and adopted an "interim" number that purported to estimate domestic-only climate damages (Exec. Order, 2017). But a court has since held that reliance on that "interim" number was unreasonable (*California*, 2020). Now the Biden administration can endorse the best available science and update the numbers to reflect the latest and best data.

In sum, the Biden administration's climate focus will be felt across agencies. And while the Biden climate plan is not a full endorsement of the economy-wide plans in the Green New Deal (a congressional package announced by Representative Alexandria Ocasio-Cortez of New York and Senator Edward J. Markey of Massachusetts in 2019) (Friedman, 2019), it nonetheless embraces the Green New Deal as a "crucial framework." In addition, it contains many similar elements, including embracing the jobs benefits and pushing for net-zero emissions, though on a longer timeline than the Green New Deal (Berardelli, 2020).

Addressing Specific Emission Sources Through Agency-Specific Actions

A second focus of the new administration will be to address specific emissions sources through actions at specific agencies. Despite congressional gridlock, much is possible under existing statutes.

Starting with the Environmental Protection Agency, a priority will be improving the greenhouse-gas emission standards that apply to ve-

3 This is addressed more fully by Keohane in "American Climate Diplomacy: Past Performance and New Opportunities".

hicles. In the United States, the transportation sector is the largest source of carbon emissions (U.S. Energy Information Administration, 2020) and the agency has well-recognized authority to impose emissions standards restricting carbon pollution (*Massachusetts*, 2007).

The agency also has authority under section 111(d) of the Clean Air Act to address greenhouse-gas emissions at existing power plants and other sources (42 U.S.C. § 7411.) Though Obama-era restrictions on greenhouse gas emissions were paused by the Supreme Court, there are many routes available to EPA for designing regulations that fall comfortably within the agency's authority to regulate sources of a pollutant that the agency has already found endangers human health and welfare (EPA, 2009). And as a result of the recent vacatur of the Trump administration's rollback of the Obama regulations, the new administration has an opportunity to begin anew.

The Department of Interior can also make changes in policies regarding mineral extraction and drilling (Hein, 2020). For example, it can rely on discretion to reinstate a pause on new coal and oil and gas leasing while it conducts a long-delayed programmatic review of both the royalty and environmental impacts of new coal leases (Department of Interior, 2016). And it can pause permit decisions, keeping any drilling from occurring (Dlouhy, 2021).

Other agencies have a role to play as well. For example, the agriculture industry contributes significantly to total greenhouse gas emissions (EPA, 2018). The Department of Agriculture, the primary regulator for significant aspects of food and agriculture, has significant steps it could take to address climate change, including helping rural communities become more resilient (Clarke, 2021). The White House Council on Environmental Quality will likely update its guidance on the building sector (Clarke, 2020) and on environmental reviews (Brugger, 2020) to address climate change. The Department of Transportation has infrastructure work it is likely to prioritize (Joselow, 2021). The Security and Exchange Commission is likely to push private companies to disclose climate-related risks (Ho, 2020). And the Federal Energy Regulatory Commission has options for more affirmatively addressing climate (Unel, 2020), through pipeline permitting (Bell, 2020), carbon pricing (FERC, 2020), and pulling back on federal policies that harmed states seeking to promote clean energy (Frosh, Jennings, & Grewal, 2020), among other policies.

Across agencies, the Biden administration will need to move fast and will need to ensure that it complies with procedural rules governing administrative changes (Davis Noll & Jacewicz, 2020). But by following these rules, the administration is well-placed to make significant progress on climate in the coming months and years.

Note

This Chapter does not represent the position, if any, of NYU School of Law.

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42 U.S.C. § 7411

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