

## Energy Regulation And Legislation To Watch In 2021

By **Keith Goldberg**

*Law360 (January 3, 2021, 12:02 PM EST)* -- The new Biden administration will drastically shift U.S. energy policy from the previous four years under President Donald Trump, but continued division on Capitol Hill means most major moves will come via regulation and executive action rather than legislation.

With President-elect Joe Biden making climate change and clean energy development a central plank of his administration, federal agencies and Biden himself will look to undo Trump rollbacks of Obama-era regulations aimed at slashing greenhouse gas emissions while crafting and implementing climate and clean energy-focused regulations and executive orders of their own.

But major energy and climate legislation will be a much tougher go, especially if Democrats fail to gain control of a second house of Congress by winning both Senate runoff elections in Georgia on Jan. 5.

"Even if the Democrats have the Senate, it'll be a razor-thin margin, and getting significant new energy legislation passed is going to be a challenge," said Kirkland & Ellis LLP energy regulatory partner Bob Fleishman. "A lot of the action as it relates to energy will be at the agency level, given how the results came out in the election."

Here, Law360 breaks down four regulatory and legislative issues energy lawyers should keep tabs on in 2021.

### **A Climate Change Reset in the Executive Branch**

Experts say the Biden administration will look to end legal fights over the Trump administration's repeal and replacement of the Obama-era Clean Power Plan limiting greenhouse gas emissions from power plants and the relaxation of vehicle emissions and fuel economy standards while working to restore or even strengthen the original regulations.

But that also involves time-consuming formal rulemakings at federal agencies like the U.S. Environmental Protection Agency. Biden can take more immediate action, though, by scrapping Trump executive orders that among other things, promoted oil and gas development and defanged a Obama-era system of calculating the social cost of carbon when performing cost-benefit analyses of regulations.

"From a regulatory standpoint or a White House standpoint, what is old is new again," said Holland & Hart LLP partner Kelly Johnson, who worked on energy and environmental issues on Capitol Hill and at

the U.S. Department of Justice. "That's a real safe place to start, particularly given that the transition teams for EPA, [the Department of Energy] and [the Department of the Interior] is just peppered with folks who served in the Obama administration."

Beyond formal regulations and executive orders, the energy industry should prepare for climate change informing the everyday actions of federal agencies in a way it simply didn't during the Trump administration.

"There's no shortage of climate change-focused executive actions a President Biden could take or other types of guidance and direction the agencies could do," Johnson said. "Those types of activities will occur — if not the first day, they will be done early in the administration."

### **A Legislative Boost for Power Lines**

Some of Biden's boldest climate and energy-related proposals, such as a national clean energy standard and a multitrillion-dollar infrastructure plan, will require legislation that's a long shot at best and a likely nonstarter if Republicans keep control of the Senate.

"I just am skeptical that anything will happen in the first term of a new Congress, on climate change particularly," Johnson said.

Smaller, piecemeal bills have better odds of finding bipartisan support in Congress, experts say. So could bills designed to encourage more development of long-range power lines.

Multistate transmission lines are seen as key to increasing clean energy development, yet individual states retain authority over siting, construction and permitting of projects themselves.

Such transmission corridors have been "the holy grail for electric transmission development for decades, the closest they've come is 2005," Davis Wright Tremaine LLP energy regulatory partner Sean Atkins said.

In the Energy Policy Act of 2005, Congress gave the DOE the authority to designate national transmission corridors and FERC a "backstop" authority over the siting of transmission projects if states don't act. But a pair of appeals court decisions in 2009 and 2011 threw out the agencies' implementation of that authority, and the agencies have shied away from using it since.

"I don't think there's a chance that they're going to overturn state authority over siting," Kirkland energy regulatory partner Brooksany Barrowes said. "But they can perhaps introduce legislation that requires more coordinated planning and siting, something that creates ways the states have to work together so we don't see as much by way of state and local challenges to updating and modernizing the transmission grid in the way that's needed."

### **Implementation of FERC's Small-Scale Clean Energy Rule**

The Federal Energy Regulatory Commission in September issued a long-awaited landmark rule that opens up wholesale electricity markets — and the interstate grid — to power that comes from small-scale technologies like rooftop solar panels, electric vehicles and batteries.

The rule allowing wholesale market participation for aggregated distributed energy resources, or DERs,

has been hailed as a game-changer for clean energy, but enacting it may have actually been the easy part, experts say.

This year, regional grid operators must submit to FERC plans to implement the rule. The electric industry will be closely watching not only the plans that are submitted to FERC but also how the agency determines whether they pass muster.

"Distributed energy aggregation is a lot more complicated because of the different types of resources involved," Fleishman said. "It's going to take more time to get that right than it has taken for energy storage to be implemented in the various [regional transmission areas]."

And putting together implementation plans will be a delicate dance between parties including DER providers, utilities, state regulators and regional grid operators, Covington & Burling LLP of counsel Mark Perlis said.

"Then the rule itself gives the states certain levers, and it will be interesting to see how they vary and whether some states will impose more barriers than others," Perlis said.

### **Smoother Sailing for Offshore Wind**

States up and down the Atlantic Coast have made offshore wind development a key part of their clean energy goals, but delays in the federal review process have frustrated both project developers, investors and clean energy advocates.

For example, the Vineyard Wind project in Massachusetts, the first commercial-scale wind farm to be built in federal waters, which started the federal permitting process in 2017, has seen its environmental review by the DOI's Bureau of Ocean Energy Management pushed into the new year.

The Biden administration could help speed up BOEM's permitting process for offshore wind projects and better align it with project reviews conducted by other federal and state agencies, experts say.

"It's going to require a lot of coordination, but it seems that potentially with an administration change, maybe some of that would be eased going forward," said Myles Reynolds, who chairs Hunton Andrews Kurth LLP's energy regulatory practice. "These are long-term projects, but definitely in the forefront in a lot of jurisdictions."

--Editing by Brian Baresch and Rebecca Flanagan.