

Massive Gulf Separates Trump And Clinton On Energy Policy

By Keith Goldberg

Law360, New York (August 5, 2016, 1:31 PM ET) -- The energy policy gulf between U.S. presidential candidates Hillary Clinton and Donald Trump is nothing short of historic, leaving the fate of sweeping regulatory initiatives, such as the Clean Power Plan, hanging in the balance when voters go to the polls this November, policy experts say.

Clinton, the Democratic nominee, has pledged to build upon the clean energy and climate change policies enacted by President Barack Obama. Meanwhile, Trump, the Republican nominee, has said he will walk back Obama's climate change agenda and is full-throated in his support of fossil fuel development and use.

"I can't recall a situation where it has been such a huge divide between both camps," said K&L Gates LLP partner Tim Peckinpugh, who manages the firm's political action committee and has been in and around Washington since the early 1980s. "These two particular campaigns and the two party platforms make it clear, in spades, the huge difference between the two parties on energy policies."

The fact that U.S. energy policy is now intertwined with climate change policy makes the differences between the candidates even starker, experts say.

"People forget that in 2000, George W. Bush outflanked Al Gore to the left on climate change and said he would regulate carbon dioxide," said Holland & Knight LLP senior policy adviser Beth Viola, who served on the White House Council on Environmental Quality during Bill Clinton's administration and as an energy and environmental policy adviser to Gore and 2004 presidential candidate John Kerry. "We've never had such a distinct, divisive view of energy and climate policy."

ENERGY & CLIMATE POLICY

 Hillary Clinton	 Donald Trump
Clean Power Plan	
Would implement	Would rescind
Oil and Gas Methane Rules	
Would implement	Would rescind
Global Climate Agreement	
Would implement	Would withdraw
Oil and Gas Development	
Limit drilling in certain sensitive areas	Open more onshore and offshore areas to drilling
Coal Policy	
Push economic transition plans for coal-dependent communities	Revise regulations to encourage coal production and use

Neither the Clinton nor Trump campaign responded to requests for comment on their respective energy policies. But an examination of their campaign materials and public comments reveal two candidates who would take starkly different regulatory approaches if installed in the White House.

Many of the regulatory steps Clinton has pledged to take build on actions taken by the Obama administration, including slashing carbon emissions from the electricity and transportation sectors and methane emissions from the oil and gas sector, as well as tighter standards for hydraulic fracturing and other drilling activities.

“A Clinton administration would likely look very similar to an Obama administration in terms of executive action and the scope of executive action,” said Crowell & Moring LLP partner Tom Lorenzen, a former environmental assistant chief in the U.S. Department of Justice. “Barring congressional action to amend the statutes or give us a new regime for climate change, Secretary Clinton will look to the Clean Air Act as the tool for her administration to implement a clean energy policy.”

That includes the U.S. Environmental Protection Agency's Clean Power Plan, which calls for existing power plants to slash their carbon emissions by 32 percent from 2005 levels by 2030. Dozens of states and industry groups have challenged in court, saying the EPA doesn't have the Clean Air Act authority to craft the rule, and the U.S. Supreme Court has put the rule on hold until the legal challenges play out.

“If the CPP is upheld, I would expect them to aggressively look to implement it,” said Lorenzen, who is representing CPP challengers. “If it is not upheld, I would expect her to look at other tools to address climate change.”

Meanwhile, Trump has pledged that he would walk away from the Clean Power Plan within his first 100 days in office.

“If Trump comes in, he will nullify that rule, end of story,” Peckinpugh said. “That will trigger additional legal challenges.”

In fact, Trump has said he would rescind Obama's Climate Action Plan, which includes not only the Clean Power Plan, but also the EPA's rule capping carbon emissions at new power plants and efforts to slash methane emissions from the oil and gas sector by 40 percent to 45 percent from 2012 levels by 2025.

“That has implications across all of what EPA is doing: electricity, energy supply, the coal industry,” said Andrew Wheeler, counsel and co-leader of Faegre Baker Daniels LLP's energy and natural resources practice and a former GOP staff director and counsel on the Senate environment committee.

Trump has also pledged to roll back the EPA and Army Corps of Engineers' controversial Waters of the United States rule, a proposed definition of which waterways fall under the agencies' purview that has been criticized as a power grab and is on hold while being challenged in court. He's also vowed to pull the U.S. out of the global climate change agreement inked in Paris last year. For its part in the accord, Obama has pledged the U.S. will cut its carbon emissions by 26 percent to 28 percent from 2005 levels by 2030.

“Trump can't wait to back out from Paris, whereas Hillary would take Paris and say 'give me more' when it comes to dealing with climate change issues,” Peckinpugh said.

However, Lorenzen says that rolling back regulatory actions can be just as cumbersome, and risky, as

crafting them.

“It requires its own rulemaking process, and review by the courts as to whether the regulatory move is impermissible backsliding,” Lorenzen said. “It’s a much more complex process than any potential president is willing to admit during a campaign. Doing things quickly exposes things to legal vulnerabilities.”

Given the polarization in Congress, much of the recent major energy policymaking originated from the executive branch. However, experts say both Clinton and Trump will at least attempt to coax Capitol Hill to sign on to their policy priorities.

Clinton has pledged to push Congress to close the so-called “Halliburton loophole” in the Safe Water Drinking Act that excludes fracking from regulation of underground injection of water and other fluids. Clinton advisers have also indicated that she could get behind a carbon tax if there’s sufficient interest from Congress.

Clinton’s background as a senator who was able to broker bipartisan deals could be an asset, experts say.

“I think initially, there’s going to be an eagerness to try and build some consensus on some issues,” Viola said. “My sense is she won’t be afraid to regulate, but she’s going to be very eager to try and work with the legislative branch.”

Trump doesn’t have a legislative background, but experts say he would likely champion policies that encourage further oil and gas development and infrastructure development. That could gain more traction if Republicans retain and solidify control of both the House and Senate in elections this fall.

“In all likelihood, the election is going to be muddled, and we’re going to wind up with close margins in one or both houses and the parties remaining polarized and unable to move legislation,” Lorenzen said. “That is a recipe for executive action.”

There are some areas of potential overlap between the candidates’ energy platforms. For example, Clinton has touted natural gas as a bridge fuel to a clean energy economy. And despite Trump’s support for oil and gas development, he recently suggested that he doesn’t have an issue with local municipalities enacting fracking bans.

But overall, the choice for voters this fall in terms of energy policy is about as black-and-white as you can get, experts say.

“There’s no other issue that highlights the wide chasm between the GOP and the Democrats more than energy policies,” Peckinpough said. “They’re all-in with respect to their points of view.”

--Editing by Patricia K. Cole and Kelly Duncan.
