

Biden's Win Puts Clean Energy Center Stage

By **Keith Goldberg**

Law360 (November 8, 2020, 5:18 PM EST) -- President-elect Joe Biden will breathe new life into climate change and clean energy policy, but achieving the most ambitious planks of his platform hinges upon which political party controls the U.S. Senate next year.

Biden won the presidency Saturday with apparent victories in Pennsylvania and Nevada, and while President Donald Trump is continuing to fight the results in court, the former vice president said he was moving forward with his transition plans so he would be ready to hit the ground running on Inauguration Day in January.

The Biden administration will pull a U-turn from President Donald Trump's climate change-skeptical, fossil fuel-forward agenda of the previous four years. That could include restoring Obama-era greenhouse gas emissions rules for power plants, vehicles, and oil and gas infrastructure that the Trump administration rolled back. Biden has already vowed that the U.S. will rejoin the Paris climate change agreements.

Bigger-ticket items such as a national clean energy standard that calls for 100% carbon-free electricity, and plowing trillions of dollars into zero-emission technologies and infrastructure will require Biden to partner with Capitol Hill, and that will be difficult if Republicans maintain their majority in the Senate, experts say.

Control of that chamber will come down to a pair of Senate runoff elections in Georgia in January. If they win both Georgia seats, the best Democrats can hope for in the Senate is a 50-50 split with Vice President-elect Kamala Harris breaking ties and effectively securing the majority.

"It's too far to say that if Republicans retain control of the Senate ... that the Biden infrastructure plan is dead on arrival," Akin Gump Strauss Hauer & Feld LLP partner Jamie Tucker, a former Republican staffer on Capitol Hill. "But it creates an incredibly steep challenge to reach consensus."

Experts say a Biden administration will hit the ground running on the regulatory front. That means looking to end legal fights over things like Trump'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, if not strengthen, the original regulations.

Expect action via executive orders and other White House-level moves, whether it's reentering the Paris Agreement, reestablishing a robust system of calculating the social cost of carbon when performing cost-benefit analyses of regulations, or beefing up enforcement against corporate polluters or energy market manipulators.

Crowell & Moring LLP counsel Tyler O'Connor, who focuses on energy litigation, said the energy industry should brace for increased enforcement from the U.S. Environmental Protection Agency, the U.S. Department of Energy on efficiency standards, and the Federal Energy Regulatory Commission's enforcement office.

"Given that Biden's plan focuses specifically on enforcement and prioritizes environmental justice, I would expect to see his EPA and DOE enforcement efforts at least revert to their Obama-era levels, if not exceed them," O'Connor said.

Tucker of Akin Gump predicts administrative actions on environmental justice issues within Biden's first 100 days in office, if not sooner.

"You could see an EPA that directs agencies to account for environmental justice in all of their rulemakings," Tucker said.

But the meat of Biden's energy plans, which include decarbonizing the U.S. electricity system and spending trillions of dollars on climate-centered investment and infrastructure development, will require negotiations with Congress.

Democrats retained control of the House of Representatives, but it's the Senate that will ultimately determine how much of Biden's energy and climate change plans can be implemented, experts say.

"The reality is, most of what he's going to try and achieve is going to have to be done legislatively," said Holland & Knight LLP senior policy adviser Beth Viola, who served on the White House Council on Environmental Quality during Bill Clinton's administration.

Major chunks of spending to support Biden's energy and climate initiatives, as well as potential extensions of clean energy tax credits, could be included in budget reconciliation or stimulus bills that would require only a simple majority vote. If Democrats can scrape together a razor-thin majority in the Senate, it could also provide them an immediate opening to use the Congressional Review Act to nullify regulations crafted in the final months of the Trump administration.

But if the Republicans retain control of the Senate, the use of the CRA is likely off the table and Biden would need GOP help to pass budget reconciliation or stimulus bills.

Still, experts say there are opportunities for Biden to broker bipartisan agreements in Congress to boost clean energy spending.

"There's a lot of bipartisan support for carbon capture, for things like nuclear, energy storage, incentivizing new energy technologies and deployment for energy efficiency," Viola said. "If he's going to spend a lot of resources making the case that we need to expand the tax incentives for renewable energy, then I think we're going to get some pushback from some Republicans. But if you expand it ... and you include things like green hydrogen or hydrogen or carbon capture, you could definitely see some bipartisan support and agreement there."

Crowell & Moring's O'Connor says it's notable that Biden's energy and climate plan revolves around infrastructure, as well as harnesses the federal government's purchasing power to shift market behavior and move toward a decarbonized energy system.

"I think that it may reflect the fact that Biden views infrastructure as a more durable investment than regulatory changes, which can in many circumstances be undone by a subsequent administration," O'Connor said.

--Editing by Bruce Goldman.

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