

A New Climate Change Paradigm

By **Kenneth J. Warren** | *The Legal Intelligencer*

Much of the criticism of the Trump Administration's environmental policies has focused on the limitations placed on environmental programs established or enhanced during the Obama Administration. Characterizing climate change as a hoax and regulations as the enemy of economic prosperity, the current Administration relaxed environmental standards, narrowed the reach of environmental regulations and Clean Water Act jurisdiction, prioritized compliance assistance over enforcement, and leased federal lands for oil and gas exploration. Although most environmental practitioners would agree that streamlining and improving environmental requirements is a worthwhile goal, some of the changes made by the Trump Administration are widely regarded as a retreat from the environmental progress our nation has achieved.

Changes are afoot. President-Elect Biden intends to undo most of the environmental actions of his predecessor, and also focus federal agencies on integrating greenhouse gas reductions, energy efficiency and protection of disadvantaged communities into their programs and activities. If successful, this initiative would transform the United States economy by substituting renewable sources of energy for fossil fuels and dramatically increasing the efficiency of motor vehicles, buildings, and other energy users. Given the ambitious goal of creating a low or zero emission economy, the legal and political challenges are enormous.

We can expect the Biden administration to base its programs on sound science and creation of jobs. The immediate need to address greenhouse gas emissions and their impact on climate patterns and sea level rise stems from the scientific consensus underlying climate change models. Various technical reports such as the National Climate Assessment Report prepared collaboratively by U.S. federal agencies and reports issued by the Intergovernmental Panel on Climate Change document the dire predictions of the scientific community if mitigation and adaptation measures are not promptly taken. Recent hurricanes and forest fires bring these concerns into sharp focus.

Yet science alone or combined with the prospect of a cleaner environment resulting from lower fossil fuel emissions may provide insufficient incentives for the changes Biden will seek. The incoming Administration will likely need to demonstrate the job creating potential of its climate program. Employment resulting from construction and distribution of new technologies for energy generation, carbon capture and building efficiency are important elements of the plan.

One job-creating area in which various policies of the new Administration may coalesce at an early date is infrastructure development. There may be interest in Congress on both sides of the aisle in improvements to highways, bridges and mass transit as a way to reinvigorate the economy and generate local benefits. The Biden Administration may seek to direct some infrastructure funds to development of wind farms and other renewable energy sources and to distribution of renewable energy including through construction of electric vehicle charging stations. We can expect a greater integration of environmental and economic policies than has occurred to date.

No single legal mechanism will be suitable to accomplish all of the Biden Administration's objectives. Where President Trump has acted through executive orders, they can be vacated with the stroke of a Presidential pen. Similarly, proposed regulations or those not yet in effect may be withdrawn or delayed. For regulations that have been challenged in court, litigation can be settled or stayed. And while more cumbersome, new regulations can be adopted. But it is unlikely that dramatic economic and environmental changes can be accomplished by Executive action alone. New legislation may be required, and may be difficult to enact, depending on the composition of the Senate and the continued vitality of the filibuster.

To jump start these changes, we can expect some of the Biden Administration's early action to be highly symbolic. Biden has stated his intent to rejoin the Paris Agreement on climate change on his first day in office. This action will serve as a demonstration of the United States' reemergence as a climate change leader on the world stage, and also send a domestic message that future proposals to reduce greenhouse gases will be forthcoming.

These proposals are likely to be numerous and offered early in his first term in office. Enhanced building efficiency standards resulting in zero net energy, new appliance efficiency standards, development and use of advanced biofuels, decarbonization of the agriculture sector and new technologies for carbon capture are likely to be pursued in tandem with more traditional environmental tools. Reviews of major federal projects under the National Environmental Policy Act will likely include an evaluation of climate impacts, and consideration of greenhouse gas emissions will be a component of permitting decisions. Fuel economy standards will be strengthened, and courts will be requested to afford the incoming Administration time to modify power plant regulations currently under judicial review. Aggressive methane limits for oil and gas operations can be expected. Stringent securities law requirements for public disclosure of a company's greenhouse gas emissions may be proposed.

Climate change will be a factor in other decisions of the new Administration. Wherever fossil fuels are presently used, we can anticipate that alternate sources of energy and conservation measures will be promoted. Options in this regard include purchasing electric vehicles for use by federal agencies, implementing energy efficiency in federal buildings, and assisting in the development and deployment of biofuels. As part of its efforts to promote use of electric vehicles, the new Administration is likely to allow California and other states to impose motor vehicle fuel economy standards and encourage development of offshore wind.

The Biden Administration will implement its plans with an eye toward protecting vulnerable communities. Environmental justice concerns may prioritize reducing greenhouse gas and other pollutants in those neighborhoods with disproportionately high concentrations of minority and low-income residents. The demographic characteristics of communities may shape the choice of infrastructure funded in communities. For example, in vulnerable communities an expanded roadway may be viewed as increasing harmful emissions, while installing electric charging stations or undertaking brownfields cleanups may be favored. In environmentally burdened communities, permits to emit or discharge pollutants may become more difficult to obtain, views of community members may be considered before permits are issued, community fence line monitoring of emissions may be encouraged, and federal enforcement efforts may increase.

Climate considerations may also affect management of federal public lands. The incoming Biden Administration may seek to roll back the recent leasing of the Arctic National Wildlife Refuge. A freeze on oil and gas permitting in public lands may occur, and permits will not be issued for hydraulic fracturing activities on federal land. In contrast, renewable energy siting on federal lands and waters may be encouraged with the goal of doubling electric generation from offshore wind by 2030. The Forest Service's activities may also receive support and redirection to promote carbon sequestration.

From an environmental perspective, the changes Biden advocates may lead to a significant reduction in emissions of greenhouse gases and other pollutants. Renewable energy sources are more environmentally friendly than fossil fuels, and greater building or motor vehicle efficiency reduces energy demand. Nevertheless, these changes are not without their own environmental risks. Wind farms threaten birds flying into the turbines. Solar panels placed on sensitive lands may encroach on wildlife habitat. And carbon storage by preserving our forests may promote forest fires absent appropriate management measures.

The plans of the incoming Biden Administration to address climate threats by application of sound science and integrated programs throughout the federal government is encouraging. Whether the programs will be implemented, and what their unintended environmental effects may be, will merit close attention.

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