US energy policy in the Trump Administration and 115th Congress

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Donald J. Trump's victory in the November election is the catalyst for dramatic changes in policy direction in Washington. The president has already signaled by virtue of his cabinet and personnel choices that his administration will pursue energy and environmental priorities that differ significantly from those of the Obama Administration. While those policies are likely to evolve in the implementation process, with Republicans controlling both the House and the Senate, albeit narrowly, the prospects for shifts in the federal regulatory structure and direction are captivating the attention of electric utilities and other energy business sectors.

Confirming President Trump's intentions as set forth during the campaign to seek new directions on energy, environmental, and climate policies, the White House released An America First Energy Plan shortly after he assumed office on 20 January 2017.

Deregulation

As detailed in his “Contract with the American Voter” address on 22 October 2016, Trump sets forth an ambitious agenda to scale back federal regulations and curb the powers of federal regulatory agencies. Trump pledged "on the first day of my term in office" to implement a hiring freeze on federal employees (with exceptions) and to implement a requirement that for every new federal regulation, two existing regulations must be eliminated. The Contract address also specifically enumerated action items to “lift the restrictions” on the production of energy reserves and “lift the roadblocks” to vital energy infrastructure projects.

President Trump's nominations for key positions in his administration generally reflect dedication to implement the deregulatory agenda he highlighted during his campaign. Notably, the nominee to head the Office of Management and Budget (OMB) – a key arbiter of federal regulations and agency funding – is Representative Mick Mulvaney (R-SC), a budget hawk who is associated with the fiscally conservative “Freedom Caucus.”

The Republican majority in Congress is also prioritizing a deregulatory agenda as shown by H.R. 26, “Regulations from the Executive in Need of Scrutiny (REINS) Act of 2017,” which passed the House by a party line vote during the first week of the new session on 5 January 2017. The REINS Act would substantially modify the federal rulemaking process by mandating that Congress approve “major rules” with an economic impact greater than US$100 million. Senate passage of the REINS Act will take a 60-vote majority to overcome Democratic objections and is unlikely.

However, depending on the nature of the regulatory matter at issue, there are options to avoid Senate filibusters of legislation in order to pursue deregulatory goals:

- Revoke Executive Orders: The president has the discretion to revoke or amend his predecessors’ orders.
- Invoke the Congressional Review Act (CRA): This empowers the Senate to block regulations finalized in the latter days of the Obama Administration with limited debate and a simple majority vote. The disapproval resolution must also pass the House and be signed into law by the president.
- Repeal or revise existing regulations: Executive branch agencies can seek to void or amend regulations that have been promulgated by previous administrations but are obligated to do so by notice and comment under the Administrative Procedure Act, a potentially time-consuming and litigation prone process.
- Enact appropriations funding “riders”: Congress can prohibit federal agencies from enforcing or issuing regulations by including restrictive language in “must-pass” appropriations legislation. President Obama’s veto power was a practical limitation on use of this authority by Republican majorities in recent years.

Carbon emissions and climate change

The nomination of Oklahoma Attorney General Scott Pruitt to be the administrator of the Environmental Protection Agency (EPA) establishes a stark contrast to the Obama Administration's approach to environmental regulation. As state attorney general, Mr. Pruitt has been a leader in fostering litigation against EPA initiatives, notably the challenge to EPA’s Clean Power Plan (CPP), which is pending in the U.S. Court of Appeals for the D.C. Circuit. Pruitt views environment statutes as empowering states to take the primary responsibility in regulatory matters with the federal government more properly relegated to a subservient “backstop” role.

Efforts to legislatively block the CPP have passed in Congress along party lines but failed to become law as President Obama vetoed Congressional Review Act (CRA) resolutions of disapproval in 2015. As designed by EPA, the CPP sets federal standards that can be met by state implementation plans in order to reach
an overall goal of a 32% reduction in carbon emissions from the electric power sector by 2030.

While the Trump Administration could withdraw its support for the CPP, states such as California and New York will not concede in asserting the federal government’s legal duty under the Clean Air Act to regulate greenhouse gas emissions. In fact, it was state-initiated litigation during the George W. Bush Administration that resulted in the Supreme Court finding in Massachusetts v. EPA (2007) that the EPA has a statutory obligation to evaluate whether greenhouse gas emissions had harmful effects on human health and the environment, leading to the EPA’s “Endangerment Finding” documenting such harms in 2009. For the Trump Administration’s EPA to procedurally reverse course on the CPP without a solid scientific justification or an alternative compliance plan could be complicated by judicial intervention.

An important corollary issue is whether the Trump Administration will disregard the Obama Administration’s participation, along with 196 other countries, in the 2015 Paris Agreement to reduce carbon emissions. The agreement, which went into effect in November 2016, was not submitted to the Senate for ratification, and US involvement is subject to revision at the discretion of the new president. During the campaign, Trump stated that he would “cancel” the US participation in the Paris Agreement but his post-election comments have been less definitive about his intentions.

In the absence or dilution of federal mandates and initiatives, states will assume an enhanced role in determining carbon emission reduction requirements, if any, for electric power producers and other emitting industries. Notably, California and a regional consortium of northeastern states (Regional Greenhouse Gas Initiative) have established carbon emissions reduction policies including cap-and-trade regimes. Major companies that operate in such states and incorporate sustainability and clean energy policies in their business practices are likely to continue to foster low carbon emission innovations.

Renewable energy

Trump was somewhat critical of the economics of wind power during his campaign, but voiced his support for renewables in addition to other sources of energy. His choice to head the Department of Energy, former Governor of Texas Rick Perry, is a staunch advocate of fossil fuels, but also oversaw a significant expansion of renewables in Texas. This “all of the above” approach to the energy mix appears to be the intended path forward for the new administration.

Governor Perry signed the 2005 Texas Renewable Portfolio Standard (RPS) and supported Competitive Renewable Energy Zone (CREZ) transmission line expansions, which significantly benefited both wind and solar. The wind industry has grown to have a significant employment and manufacturing presence in Texas, with wind power generating 11.7% of the state’s electricity in 2015. Texas now leads the nation in wind power production.

Both the solar and wind industries grew substantially and were favored by tax and other policies implemented during the course of the Obama Administration.

In 2015, as part of a Congressionally negotiated “deal” in exchange for the removal of statutory barriers to exporting domestically produced crude oil, the wind production tax credit and solar investment tax credit were extended and phased down over a five-year period.

The fate of renewable energy tax incentives, however, is not clear in the context of favorable prospects for broad-based tax reform in the new Congress. In 2016, Congress allowed a variety of energy tax provisions, including incentives for biomass power, hydro power and biofuels, to expire. Significantly, the House GOP “Blueprint” for tax reform is structured to eliminate such specialized credits in part to offset the revenue costs of lowering the overall tax rates. Although compromises and changes are inevitable before any major tax bill would be enacted by Congress, and renewables have powerful Republican advocates and Democratic support in the Senate, it is not certain that the incentives will emerge unscathed in the tax reform process.
Coal

Trump pledged to “bring back coal” in his campaign. The “Contract with the American Voter” states he will act to remove regulatory obstacles to the production of “clean coal.” While the coal mining industry will welcome relief from regulatory barriers, there are significant obstacles to accomplishing Trump’s goal.

Certain actions of the Obama administration are subject to Congressional Review Act review. For example, the “Stream Protection Rule,” finalized by the Department of the Interior on 16 December 2016, and others such as the Interior’s federal lands coal leasing review and moratorium, could be revised at the Trump Administration’s discretion.

However, many other long-standing regulations promulgated by the EPA pursuant to the Clean Air Act and the Clean Water Act are not easily reversed, and attempts to do so would be predictably resisted with time-consuming litigation by nongovernmental organizations and others.

Perhaps most significantly, energy market-driven changes that have significantly affected electric power production and reduced coal consumption are likely to continue. For example, abundant and low-priced natural gas resources make it less likely that utilities or financial investors will fundamentally adjust their recent business models to favor new investments in coal-fired production even in the absence of federal carbon-reduction edicts or the lessening of current environmental standards.

Oil and gas

During the campaign, Trump expressed strong support for oil and gas production including advocacy of unrestricted use of shale technology and expanded energy development on federal lands. The “Contract with American Voter” pledges to “lift the restrictions on production of US$50 trillion dollars’ worth of job-producing American energy reserves, including shale, oil, natural gas and clean coal.”

Although domestic oil and gas production has surged and exports of liquefied natural gas and crude oil have been allowed during President Obama’s tenure, many points of contention in his administration’s policies have been identified by industry leaders.

Regulatory restructuring and rules issued by the Department of the Interior in the aftermath of the 2010 Deepwater Horizon have increased the costs of offshore exploration and development in the Gulf of Mexico. The “Methane and Waste Prevention Rule,” which was issued by Interior on 15 November 2016 and designed to reduce wasteful release of natural gas from operations on federal and Indian lands, also has generated objection and is a likely priority for a resolution of disapproval under the Congressional Review Act process.

On 20 December 2016, President Obama acted using presidential power under the Outer Continental Shelf Lands Act to permanently withdraw millions of acres of offshore lands in Alaska and the Atlantic Ocean from being leased by oil and gas companies. Whether President Trump has the power to reverse the Obama withdrawal decision is legally debatable.
In the context of so many contentious issues within the jurisdiction of the Department of the Interior, it is worth noting that the president’s nominee to be secretary is Representative Ryan Zinke (R-MT), a moderate conservation-oriented Republican who prevailed over more conservative alternatives in the selection process.

**Energy infrastructure**

During the campaign, Trump frequently highlighted his objections to the Obama Administration’s decision not to permit the Keystone XL Pipeline with Canada and his frustration with delays on other major infrastructure projects. The “Contract with the American Voter” commits to remove the “roadblocks and allow vital energy infrastructure projects, like the Keystone Pipeline, to move forward.”

Wilbur Ross, the president’s nominee to be Secretary of Commerce, crafted an infrastructure plan that Trump embraced during the campaign. In order to address the nation’s infrastructure needs, the plan would use tax incentives designed to leverage US$1 trillion in private investment in a variety of sectors, including “energy infrastructure.”

Trump’s choice of Elaine Chao to be Secretary of Transportation is widely considered to reflect the high priority he has given to working with Congress to process infrastructure legislation. Chao, who has served in the George W. Bush Administration’s cabinet, is also the wife of Senate Majority Leader Mitch McConnell.

Although House Republican leaders have been reticent about endorsing infrastructure spending, and Democrats who support traditional Highway Trust Fund and Department of Transportation infrastructure programs have expressed skepticism about broadly defined tax incentives, a compromise on infrastructure remains possible.

A central question if the Trump Administration proposes a detailed infrastructure tax incentive plan to Congress is how “energy infrastructure” would be defined. From the utility perspective, would it be broad enough to include, for example, grid improvement and transmission projects?

**Summary**

The election of Donald J. Trump and the coupling of his incoming administration with Republican majorities in Congress present many opportunities for utilities and other energy sectors to help frame legislation and federal agency action in the context of revising status quo policy assumptions. In 2009, when the new Obama Administration was aligned with Democratic majorities in Congress, there was a flurry of early activity including the enactment of the American Recovery and Reinvestment Act (aka “stimulus”). The 115th Congress is primed to be similarly eventful.
Contacts

Deborah Byers  
US Energy Leader  
+1 713 750 8138  
deborah.byers@ey.com

Susan Bell  
Financial Accounting, Advisory Services  
+1 404 817 4865  
susan.bell@ey.com

Adi Karev  
Global Oil & Gas Leader  
+852 2629 17 38  
adi.karev@hk.ey.com

Benoit Laclau  
Global Power & Utilities Leader  
blaclau@uk.ey.com  
+44 207 951 8453

Steve Landry  
EY Americas Oil and Gas Tax Leader  
+1 713 750 8425  
stephen.landry@ey.com

Herb Listen  
Assurance  
+1 713 750 8282  
herb.listen@ey.com

Greg Matlock  
EYAmericas Energy, Tax Leader  
+1 713 750 8133  
greg.matlock@ey.com

Thomas Minor  
EY Americas Mining and Metals Tax Leader  
+1 205 226 7407  
thomas.minor@ey.com

Jeff Petrich  
Washington Council  
+1 202 467 8401  
jeffrey.petrich@wc.ey.com

Paul Roberti  
Financial Accounting Advisory Services  
+52 55 5283 1300  
paul.roberti@mx.ey.com

Doug Tymkiw  
Fraud Investigation & Dispute Services  
+1 504 592 4837  
douglas.tymkiw@ey.com

Tim Urban  
Washington Council  
+1 202 467 4319  
timothy.urban@wc.ey.com

Steve Wanner  
Assurance  
+1 215 448 5287  
stephen.wanner@ey.com

David Zaozirny  
Financial Accounting Advisory Services  
+1 713 750 8148  
david.zaozirny@ey.com

Miguel Zweig  
Global Mining & Metals Leader  
Miguel.Zweig@br.ey.com  
+ 55 11 2573 3363
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