

# KIRKLAND & ELLIS

Blog Post

## Biden Administration's Energy, Environmental and Climate Policies: Week In Review (February 19, 2021)

19 February 2021

This post summarizes noteworthy developments regarding federal energy, environmental, and climate policies in the past week.

### Highlights:

- The Council on Environmental Quality (“CEQ”) reinstated the requirement that federal agencies consider greenhouse gas emissions and the impacts of climate change as part of their National Environmental Policy Act reviews.
- The National Climate Task Force convened for the first time – one of several steps the Biden administration is taking to roll out its climate policy.
- Impacts of the administration’s pivot on environmental issues are playing out in the courts and through the federal agencies’ review of Trump administration regulations.
  - The U.S. Environmental Protection Agency (“EPA”) sought and received a stay in the challenge to its Clean Water Act Section 401 Certification Rule.
  - EPA announced that it does not intend to revive the Clean Power Plan.
  - A federal district court in Idaho struck down U.S. Bureau of Land Management’s (“BLM”) plan to cancel the withdrawal of 10 million acres of federal land from oil and gas development in several western states for the benefit of the greater sage grouse.

# Biden Administration Rolls Out Early Actions to Address Climate Impacts

- **CEQ Reinstates GHG and Climate Guidance for NEPA Reviews.** Today, CEQ rescinded the Trump administration’s guidance on greenhouse gas (“GHG”) emissions and reinstated the 2016 Obama-era guidance that requires agencies to disclose and consider GHG emissions and the effects of climate change as part of their National Environmental Policy Act (“NEPA”) reviews.<sup>1</sup> CEQ explained that “[f]ederal courts consistently have held that NEPA requires agencies to disclose and consider climate impacts in their reviews.”<sup>2</sup> CEQ also announced that it will undertake a review and propose any necessary revisions to the 2016 GHG Guidance, consistent with President Biden’s directive in Executive Order 13990, “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.”
- **American Innovation to Create Jobs and Tackle Climate Issues.** On February 11, 2021, the Biden administration launched its initiative with the stated goals to spur jobs, technology and innovation to address climate change issues.<sup>3</sup> A key component of the program is the new Climate Innovation Working Group as part of the National Climate Task Force, a first step toward fulfilling the commitment to launch the Advanced Research Projects Agency–Climate. The Working Group will be co-chaired by White House Office of Domestic Climate Policy, Office of Science of Technology and Policy, and Office of Management and Budget and will work to bolster the federal government’s support of technology innovation to achieve President Biden’s stated goal of a net zero economy by 2050. Key areas of focus for the Working Group include advancing:
  - Energy-efficient buildings and construction materials
  - Lower-cost energy storage alternatives
  - Advanced technologies to operate a grid powered by zero carbon power plants
  - Low-cost zero carbon on-road vehicles and transit systems
  - Sustainable fuels and efficiency measures for aircrafts, ships, and transportation systems

- Affordable, refrigerant-free air conditioning and heat pumps
  - Carbon-free processes for producing steel, concrete, chemicals and other important industrial products
  - Low-cost carbon-free hydrogen
  - Carbon dioxide removal and storage technologies using soil management, plants and agricultural techniques
  - Direct air capture carbon sequestration systems and retrofits to existing industrial and power plant exhausts
- **First National Climate Task Force Meeting.** The National Climate Task Force convened its first-ever meeting on February 11, 2021.<sup>4</sup> The Task Force includes Cabinet-level leaders from 21 federal agencies and is tasked with implementing the Biden administration’s climate policy. Representatives from the federal agencies focused on the need to cooperate across the federal government. Vice President Kamala Harris attended the meeting, underscoring the importance of climate issues to the Biden administration, and discussed the importance of incorporating environmental justice issues in climate policy.

## EPA Will Not Revive the Clean Power Plan, Signaling a Different Future Approach

When the D.C. Circuit [vacated EPA’s Affordable Clean Energy Rule](#) (“ACE Rule”) on January 19, 2021, the court did not expressly reinstate the 2015 Clean Power Plan. On February 12, 2021, EPA’s Acting Assistant Administrator, Joseph Goffman, issued a memorandum to the agency’s Regional Administrators clarifying EPA’s position that neither the ACE Rule nor the Clean Power Plan are in effect.<sup>5</sup> Deadlines for states to submit plans under the Clean Power Plan have passed, and EPA does not expect states to meet those deadlines or take any further steps at this time while EPA considers its approach going forward. This step signals that the agency does not intend to reinstate the Clean Power Plan regulations and instead will likely promulgate rules regulating greenhouse gas emissions under a different approach.

## States' Challenge to Clean Water Act § 401 Certification Changes on Hold While EPA Reviews Rule

Under Section 401 of the Clean Water Act, states, Tribes, and local authorities are empowered to review projects requiring federal permits and issue a water quality certification to ensure that water quality is sufficient to support human, plant and animal life. In June 2020, the EPA finalized the 401 Certification Rule,<sup>6</sup> which limited the scope and timing of the 401 review process, which states and Tribes have recently used to block permits for energy projects such as coal terminals, liquefied natural gas export facilities and pipelines. Numerous states, Tribes and environmental groups challenged the rule.<sup>7</sup> EPA requested, and the court granted, a stay in the *South Carolina Coastal Conservation* case signaling EPA's intent to review the 401 Certification Rule under White House Chief of Staff Ronald Klain's Regulatory Freeze Pending Review Memorandum.<sup>8</sup>

## Court Strikes Down Cancellation of Greater Sage Grouse Habitat Oil and Gas Leasing Withdrawal

In 2015, BLM and the U.S. Forest Service rolled out a series of amended land use plans impacting federal lands across western states, including Idaho, Montana, Nevada, Oregon, Utah and Wyoming. The conservation measures restricted oil and gas development in the bird's habitat and breeding grounds, and were considered important restrictions to avoid listing the species under the Endangered Species Act. In 2019, the agencies relaxed the restrictions as a step to open the areas to energy development and canceled a planned withdrawal of 10 million acres of federal lands identified as Sagebrush Focal Area from oil and gas leasing. Environmental groups challenged the 2015 decisions as not going far enough to protect the bird and amended their complaint to include a challenge to the 2019 withdrawal cancellation. The U.S. District Court for the District of Idaho struck down BLM's cancellation, finding that the agencies did not adequately explain their

decisions to change course. The court remanded the 2019 amendments to the agencies for further review, but it is likely that the Biden administration will allow the withdrawal of the Sagebrush Focal Areas from oil and gas leasing to proceed.

## BLM Pivots on Renewable Energy Development in Southern California

In early January 2020, BLM issued a plan to amend the 2016 land use and resource management plan for the California Desert Conservation Area<sup>9</sup> that would have removed certain measures from the conservation plan<sup>10</sup> aimed at balancing solar and wind development with protection of the desert ecosystem and sensitive wildlife species such as the desert tortoise, bighorn sheep and golden eagles. The conservation plan was developed by BLM in collaboration with California agencies and environmental groups, and finalized in 2016. The plan sets aside approximately 6.5 million acres for conservation and 400,000 acres for renewable energy projects. The Trump administration's proposal would have abolished 32 environmentally sensitive areas, eliminating approximately 1.8 million acres of federally protected land and reducing the boundaries of other protected areas and opened the areas to multiple uses (e.g. renewable energy, mining access, grazing, recreational vehicle access). On February 17, 2021, BLM withdrew the planned revisions and will revoke the pending public comment period,<sup>11</sup> limiting the planned expansion of renewable energy project development in sensitive wildlife areas, but retaining the original acreage set aside in the plan. Although the total acreage for renewable development will be less than planned under the Trump administration, it will likely face less litigation over wildlife habitat concerns because the plan was developed in concert with stakeholders, including environmental groups.

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1. Council on Environmental Quality, National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, Notice of Rescission of Draft Guidance, 86 Fed. Reg. 10252 (February 19, 2021).↩

2. *Id.*↩

3. Biden-Harris Administration Launches American Innovation Effort to Create Jobs and Tackle the Climate Crisis (Feb. 11, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/11/biden-harris-administration-launches-american-innovation-effort-to-create-jobs-and-tackle-the-climate-crisis/>.↵

4. Readout of the First National Climate Task Force Meeting (Feb. 11, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/11/readout-of-the-first-national-climate-task-force-meeting/>. ↵

5. EPA Memorandum, Status of Affordable Clean Energy Rule and Clean Power Plan (Feb. 12, 2021), online: [https://www.epa.gov/sites/production/files/2021-02/documents/ace\\_letter\\_021121.doc\\_signed.pdf](https://www.epa.gov/sites/production/files/2021-02/documents/ace_letter_021121.doc_signed.pdf).↵

6. Clean Water Act Section 401 Certification Rule, Final Rule, 85 Fed. Reg. 42210 (July 13, 2020), available at: <https://www.federalregister.gov/documents/2020/07/13/2020-12081/clean-water-act-section-401-certification-rule>.↵

7. See e.g., *Del. Riverkeeper Network v. EPA*, No. 2:20-CV-3412 (E.D. Pa.); *Am. Rivers v. Wheeler*, No. 3:20-cv-04636 (N.D. Cal.); *Cal. v. Wheeler*, No. 3:20-cv-04869 (N.D. Cal.); *S.C. Coastal Conservation League v. Wheeler*, No. 2:20-cv-03062 (D.S.C.); *Suquamish Tribe v. Wheeler*, No. 3:20-cv-06137 (N.D. Cal.).↵

8. Regulatory Freeze Pending Review, available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/>.↵

9. Notice of Availability, Draft Land Use Plan Amendment (LUPA) and Draft Environmental Impact Statement (EIS), for an amendment to the California Desert Conservation Area (CDCA) Plan and the Bakersfield and Bishop Resource Management Plans (RMPs), available at: <https://public-inspection.federalregister.gov/2021-00579.pdf>.↵

10. California Desert Renewable Energy Conservation Plan, available at: <https://www.blm.gov/sites/blm.gov/files/documents/files/media-center-public-room-california-desert-renewable-energy-conservation-plan-overview.pdf>.↵

11. Official statement: Department of the Interior will revoke the BLM's comment period on proposed amendment to the Desert Renewable Energy Conservation Plan (Feb. 17, 2021), available at: <https://www.blm.gov/press-release/official-statement-department-interior-will-revoke-blms-comment-period-proposed>.↵

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