

KIRKLAND & ELLIS

Blog Post

Biden Administration's Energy, Environmental, and Climate Policies: Latest Updates and Actions (March 29, 2021)

29 March 2021

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

Highlights:

- The White House today announced a “whole-of-government” approach to jumpstarting the U.S. offshore wind sector, including the availability of additional leases off the coast of New York.
- The Department of the Interior returns to regular order of business for reviews of new oil and gas permits on federal lands and conducts first public forum on Interior’s offshore oil and gas leasing program.
- Uncertainty remains over the future of the 2020 revisions to NEPA’s implementing regulations.
- Federal Energy Regulatory Commission (“FERC”) limits the ability of states and other retail electricity regulatory authorities to limit the participation of demand response resources in wholesale electricity markets.
- President Biden is expected to make an announcement about his planned infrastructure package on Wednesday.

White House Announces Major “Whole-of-government” Effort to Jumpstart Offshore Wind

Earlier today, the White House announced a major “whole-of-government” effort to spur investment in the U.S. offshore wind sector.¹ The announcement came following a meeting that included National Climate Advisor Gina McCarthy, Interior Secretary Deb Haaland, Energy Secretary Jennifer Granholm, Commerce Secretary Gina Raimondo, Transportation Secretary Pete Buttigieg, state officials, industry executives and labor leaders. Key developments include:

- **Shared Interagency Targets.** The Departments of Interior, Energy and Commerce announcing a shared goal to deploy 30 gigawatts of offshore wind in the U.S. by 2030. As part of the effort to meet the 2030 target, the Department of the Interior’s Bureau of Ocean Energy Management (“BOEM”) plans to offer new lease sales and complete review of at least 16 Construction and Operations Plans by 2025, which would represent more than 19 gigawatts of offshore wind.
- **\$3 billion in loans or loan guarantees through the Department of Energy’s Loan Programs Office (“LPO”).** LPO releasing a fact sheet to facilitate access for the offshore wind industry for \$3 billion in funding through the LPO’s Title XVII program.
- **\$230 million in funding for Port Infrastructure.** The Department of Transportation announcing a Notice of Funding Opportunity for \$230 million for port and intermodal infrastructure-related projects through the Port Infrastructure Development Program.
- **New Wind Energy Area.** BOEM announcing a priority Wind Energy Area of 800,000 acres in the New York Bight, an area of shallow waters between Long Island and the coast of New Jersey.² BOEM is expected to issue a Proposed Sale Notice, which would be followed by a public comment period and according to the White House release, a lease sale at the end of 2021 or in 2022.
- **Advancing Environmental Reviews for Ocean Wind and Future Projects.** BOEM announcing a Notice of Intent to prepare an Environmental Impact Statement for Ocean Wind, a 1,100 megawatt proposed offshore wind project off the coast of New Jersey. The White House release also suggested that BOEM anticipates initiating environmental reviews for up to 10 additional projects later this year.

Recent Events Impacting Oil and Gas Production on Federal Lands and Waters

- **Temporary Requirement for Department-Level Review of New Drilling Permits Expires.** The Department of the Interior's order to conduct a [Department-level review](#) of any new oil and gas drilling permits for 60 days³ lapsed on March 21, 2021, and there is no indication that the agency will renew the order. Going forward, decisions to issue new permits will revert back to the career officials at the U.S. Bureau of Land Management.
- **Virtual Forum on Leasing Program.** On March 25, 2021, the Department of the Interior held a public virtual forum for its drilling program review with testimony and discussion from numerous stakeholders, including industry representatives, environmental groups and Tribes.⁴ This is the first event in which the agency gathered information from stakeholders to inform its comprehensive review of the federal leasing and permitting program, which is anticipated to conclude in the coming months.
- **Alaska Drilling on Hold.** Ongoing litigation over President Trump's decision to open large portions of the National Petroleum Reserve in Alaska to new drilling⁵ will be stayed until at least May 10, 2021, at the request of the Biden administration. The Department of the Interior asked for a delay in the litigation to review President Trump's decision and determine its next steps.
- **Environmental Groups Seek to Halt Offshore Leases.** The Center for Biological Diversity and other environmental groups filed a petition before the Department of the Interior asking the agency to implement a five-year moratorium on offshore leases while the agency conducts its review of the oil and gas leasing program.⁶

CEQ Requests Remand in NEPA Regulations Litigation

In ongoing litigation⁷ over the 2020 revisions to the National Environmental Policy Act ("NEPA") implementing regulations, the White House's Council on Environmental Quality ("CEQ") is seeking to remand the rule to CEQ for further review. CEQ explained to the court that it is reviewing the 2020 Rule under President Biden's Executive Orders on the "climate crisis"⁸ and that it "has 'substantial concerns' about whether the 2020 Rule may adversely affect environmental justice, and 'climate change, climate resilience, or environmental quality generally.'"⁹ Notably, CEQ has asked the court to remand the rule without vacatur leaving the rule in place during the pendency of the agency's review, which could take more than a year if the agency determines that it will engage in a rulemaking process to amend or repeal the rule. Environmental groups are seeking to press the case forward to a resolution.¹⁰ Although the court denied the environmental groups' request to stay the rule and impose a nationwide injunction in September 2020, the court also

rejected CEQ's request for a 60-day stay of the case in February 2021. The outcome of this procedural move will determine whether the 2020 rule will stay in place during CEQ's review or move forward to a resolution.

Lawsuits over Revised Social Cost of Carbon

The "social cost of carbon" is a metric often used by federal agencies to monetize the climate impacts of emissions. In February 2021, the Biden administration raised the social cost of carbon price to \$51 per ton on an interim basis, replacing the Trump administration's method for calculating the cost, which was set as low as \$1 per ton. The Environmental Protection Agency intends to use this interim cost while the Biden administration completes a more thorough review of the amount. Higher set costs have the potential to impact rulemakings that require a cost benefit analysis and may result in more stringent regulation of industry emissions. Twelve state Attorneys General swiftly challenged the new social cost of carbon arguing that the changes should be made by Congress, if at all.¹¹ The outcome of this lawsuit has the potential to impact future rulemakings by the Biden administration on topics addressing emissions, in particular methane and other greenhouse gases.

FERC Further Facilitates Demand Response Resources' Participation in Wholesale Markets

On March 18, FERC issued two orders that may expand demand response resources' ability to participate in FERC-jurisdictional wholesale electricity markets: the first, an order on rehearing of last year's landmark Order No. 2222, involving aggregations of distributed energy resources ("DER"), and the second, a notice of inquiry involving demand response resources more broadly. By way of background, demand response resources have long been permitted to participate in FERC-jurisdictional wholesale electricity markets, but FERC historically has given states and other relevant electricity retail regulatory authorities (collectively, "RERRAs") the right to "opt-out" of that wholesale market participation model.

In 2020, FERC reiterated RERRAs' right to "opt-out" of demand response resource participation in wholesale markets when FERC issued Order No. 2222, which required Regional Transmission Operators ("RTO") and Independent System Operators ("ISO") to establish rules permitting DER aggregations to participate in

the RTO/ISO-administered wholesale markets. Although FERC declined to give RERRAs the same type of “opt-out” right for DER aggregations that it gave the RERRAs for demand response resources, FERC found that a demand response resource could not participate in such a DER aggregation if its RERRA had exercised its pre-existing “opt-out” right with respect to demand response resources.

In two orders issued on March 18, FERC changed course on this issue in a manner that will decrease RERRAs’ ability to prohibit demand response resources from participating in wholesale market participation. First, FERC granted rehearing of Order No. 2222, finding that demand response resources that join a DER aggregation are not subject to RERRAs’ demand response “opt-out” rights. That reversal likely will facilitate the development of DER aggregations containing more demand response resources. Second, FERC issued a separate order in which it requested public comment on the broader issue of whether it should eliminate RERRAs’ right to “opt-out” of having demand response resources participate in the wholesale markets. Taken together, these two orders indicate a policy shift at FERC to expand its jurisdiction over demand response resources and further facilitate such resources participation in wholesale markets.

President Biden Set to Unveil Infrastructure Package

March 31

President Biden is expected to announce his \$3 trillion infrastructure plan in Pittsburgh on Wednesday. Yesterday, White House press secretary Jen Psaki confirmed speculation on Fox News Sunday that President Biden will split his “Build Back Better” agenda into two parts. President Biden’s Wednesday speech will include specific proposals on the first part of the plan, which is expected to focus on physical infrastructure projects such as roads, bridges, waterways, rural broadband, climate impacts and jobs. The second part of the plan will cover “social infrastructure,” including child care and healthcare and is expected to follow in the coming weeks. The *Wall Street Journal* [reported](#) that senior Biden administration officials have discussed raising corporate taxes and taxes for high-income individuals, capital-gains taxes and tightening international tax rules that apply to U.S. companies. On Fox News Sunday, Psaki [declined to offer specifics](#) on how the proposal would be paid for, at the same time suggesting that the Biden administration would introduce proposals for covering the costs of the plan but was also “eager to hear ideas from both parties as well.”

We intend to post an update to this blog later in the week regarding Biden’s proposals on the first part of the infrastructure plan and will continue to cover Biden’s “Build Back Better” plan and its impact on energy and infrastructure investors as the legislation develops.

1. Press Release, FACT SHEET: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs (March 29, 2021), online: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-biden-administration-jumpstarts-offshore-wind-energy-projects-to-create-jobs/>↵

2. <https://www.boem.gov/renewable-energy/state-activities/new-york-bight>↵

3. Department of the Interior Order No. 3395: Temporary Suspension of Delegated Authority, January 20, 2021, online: <https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3395-signed.pdf>↵

4. Press Release, Interior Department Outlines Next Steps in Fossil Fuels Program Review (Mar. 9, 2021), online: <https://www.doi.gov/pressreleases/interior-department-outlines-next-steps-fossil-fuels-program-review>↵

5. *Nat. Audubon Society et al. v. De La Vega*, No. 3:20-cv-00206-SLG (D. Ala.)↵

6. Petition For No New Offshore Oil & Gas Leasing, online: https://s3-us-west-2.amazonaws.com/s3-wagtail.biologicialdiversity.org/documents/2021-03-16_--_CBD_et_al_OCSLA_5YP_Petition.pdf↵

7. *Wild Virginia et al. v. Council on Env. Quality*, No. 3:20-cv-45-JPJ-PMS (W.D. Va.)↵

8. Executive Order 13990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021); Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619 (Feb. 1, 2021)↵

9. *Wild Virginia*, Defs.’ Mot. for Remand Without Vacatur, ECF No. 145 at 7 (Mar. 17, 2021)↵

10. *Id.*, Opinion and Order Denying Mot. for Prelim. Injunction, ECF No. 92 (Sept. 11, 2020); Order Denying Defs.’ Mot. for Stay of Case, ECF No. 139 (Feb. 19, 2021)↵

11. The States of Missouri, Arizona, Arkansas, Indiana, Kansas, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, and Utah v. Joseph R. Biden, Jr., No. 4:21-cv-00287-SPM (E. D. Mo.)↵

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