

Implications of the 2020 election for the energy industry

As of the date of this article, Joe Biden is likely to become the 46th president of the United States. Assuming that stands, the Biden-Harris administration will try to implement dramatically different environmental and energy policies than the Trump administration. Whether Congress enacts many or all those policies depends heavily on the outcome of the two January U.S. Senate special elections in Georgia. The Biden administration can impart significant changes through executive orders and agency actions despite the outcome of those elections, while states and regional governmental bodies will continue to play a significant role in shaping policy. This article reviews some of the implications of the 2020 election for the energy industry.

2020 election summary

National elections. Republicans cut into the Democrat's majority in the House but Democrats still hold a 222-205 margin as of the date of this article. Republicans hold 50 Senate seats to 46 for the Democrats and two for independents pending the outcome of the Georgia special elections for Senate in January. If Democrats pick up both seats, Vice President-Elect Kamala Harris would cast the deciding vote on matters which divide the Senate 50-50. Shelley Moore Capito (R-WV) is likely to succeed John Barrasso (R-WY) as the top Republican on (and possibly become the chair of) the Senate Environmental and Public Works Committee when Senator Barrasso moves on to head the Energy and Natural Resources Committee. Both are positive developments for the energy industry.

Mr. Biden has chosen individuals from non-governmental environmental organizations and academia to lead his transition teams to staff the Environmental Protection Agency, Council on Environmental Quality, the Department of Interior and the Department of Energy. The teams themselves are largely comprised of those of similar background. Notably absent are representatives from the energy industry, which portends the nominations of more environmental-activist agency heads than served in the Trump administration. For example, the *Wall Street Journal* has criticized Mr. Biden's choice of John Kerry as a cabinet-level special envoy for climate (i.e., a "climate czar") as reflecting that climate will be a special negotiating priority rather than one

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2020 election recap: The Pennsylvania perspective

The 2020 election was anything but business as usual in Pennsylvania as the Commonwealth took center stage in the protracted battle for the presidency. While the Keystone State appears to have helped deliver the White House to the Democrats, further down the ballot it was a good election cycle for Republicans.



That was the takeaway provided to PIOGA members in a December 4 election-recap webinar featuring two political insiders from the association's Harrisburg lobbying firm, Gmerek Government Relations.

Gmerek's Chris Lammando and Dick Gmerek explained that the 2020 election cycle was historic for a several reasons. One was that voting occurred under the first significant rewrite to the state's election law in decades, and most notably under that was the change to make it easier to vote by absentee ballot. While previously there were just a few, specific reasons under which a voter could request an absentee ballot, now any voter may obtain a mail-in ballot without providing a reason.

The coronavirus pandemic created a huge demand for mail-in ballots—approximately 3 million were requested (compared to about 280,000 in the previous election) and 85 percent of those were returned. Democrats were far more likely to vote by mail in this election than Republicans.

For all the headlines about actions by Pennsylvania's secretary of state and the Pennsylvania Supreme Court regarding mail-in ballots, along with Joe Biden's apparent win over Donald Trump for president, Republicans did surprisingly well in Pennsylvania, Lammando explained.

At the federal level, the Pennsylvania delegation to the House of Representatives remains evenly split 9-9 between Republicans and Democrats. Lammando noted that Democrats had expected to flip two seats, but that failed to happen.

Among state row offices, Republicans captured two of the three positions up for election. Tim DeFoor took the open seat for auditor general and Stacy Garrity beat incumbent Joe Torsella for auditor general. The third was a disappointment to the oil and gas industry, with Democrat Josh Shapiro easily winning reelection as attorney general. Lammando described

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issue among many in foreign policy. Mr. Biden has already committed to rejoining the Paris Climate Agreement on his first day in office or within his first 100 days, depending on which report you read.

State elections. At the state level, Republicans retained their majority in the state houses in seven of the 10 states critical to energy extraction and production, including Pennsylvania. There are Republican governors in six of those states. The following table summarizes the makeup of the state houses and executive offices.

State	Post-election majority		Governors
	State Senate	State House	
Alaska	Republican	TBD	Mike Dunleavy
Colorado	Democratic	Democratic	Jared Polis
Louisiana	Republican	Republican	John Bel Edwards
New Mexico	Democratic	Democratic	Michelle Lujan Grisham
North Dakota	Republican	Republican	Doug Burgum
Ohio	Republican	Republican	Mike DeWine
Oklahoma	Republican	Republican	Kevin Stitt
Pennsylvania	Republican	Republican	Tom Wolf
Texas	Republican	Republican	Greg Abbott
West Virginia	Republican	Republican	Jim Justice

Courtesy of The Klaber Group

The Biden Energy Plan

The president-elect’s environmental and energy teams say climate change is an “existential threat” to the environment. The Biden Energy Plan commits the U.S. to an *irreversible path* to net-zero carbon emissions *economy-wide* by 2050. Although the plan does not propose to tax carbon emissions, impose a carbon cap and trade program or ban hydraulic fracturing on private land, and therefore is not as far-reaching as the Green New Deal, it is an unsettling departure from the Trump administration’s policy of reducing regulatory overreach in favor of less burdensome regulations on the fossil fuel industry.

The Biden Energy Plan essentially is a \$2 trillion infrastructure plan. It emphasizes an interconnectivity between clean energy and the economy. Highlights include the goal of zero net emissions from power plants by 2035 and economy-wide by 2050. The federal government would use its procurement power to build 500,000 e-vehicle charging stations, convert all 500,000 school buses to electric and provide all Americans in municipalities of more than 100,000 population with “quality public transportation” (in the plan’s words) by 2030. The Biden plan promises to upgrade four million commercial buildings to become more energy efficient and weatherize two million (mostly low income) homes within four years. It intends to induce the construction

of 1.5 million homes and public housing units to address a stated affordable energy crisis and increase energy efficiency. Environmental justice principles feature prominently in the plan.

The road to the Biden Energy Plan

How green we go and how fast we get there depends on congressional and executive branch action.

The January special elections in Georgia will dictate the extent to which Congress passes legislation to implement the Biden Energy Plan. Republicans in Congress see themselves largely in a defensive posture for the upcoming 117th Congress, acting to temper or block far-reaching energy bills the more environmentally active House might contrive.

In the short term and apart from legislation, if both Senate seats go to Democrats, Congress could use the Congressional Review Act (CRA) to invalidate late-term Trump administration regulations. Adopted in 1996, the CRA allows Congress to invalidate, by a simple majority vote, final agency regulations adopted by the previous administration in the 60 legislative days before the previous Congress adjourned. It is a simple, expedited procedure—a joint resolution to invalidate a regulation is presented to committee, then, if

approved, is presented to the legislative bodies for majority vote. Trump administration pro-energy regulations at risk to CRA invalidation, depending on the date of adjournment, include the September 14 and 15 EPA final oil and gas Review Rule and the Reconsideration Rule (i.e., the Quad O and Quad Oa rules that exclude transmission and storage from the O&G Production Source category and do not regulate methane emissions); the final October 15 Coal Combustion Residuals rule (extending the deadline to close landfills and surface impoundments and allowing owners of surface impoundments (of which approximately 520 currently are in operation) to demonstrate that an unlined impoundment is as safe as a lined one); and the final July 13 Clean Water Act Section 401 water certification rule (limiting the review of section 401 certifications to water quality impacts rather than far-reaching potential climate change effects).

If the Senate remains in Republican hands, the Biden administration and its agencies can take several steps to undo Trump administration regulations they believe would impede the Biden Energy Plan. Litigation abeyance is one such tactic. For pending litigation involving Trump-era regulations, a new EPA and Department of Justice can ask courts to place cases in abeyance to postpone briefing and arguments until the new admin-

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Recap: 2020 Oil & Natural Gas Tax and Accounting Seminar

Ask anyone about 2020 and they will say it has been an extraordinary year in so many ways—COVID-19, business shutdowns, working from home and government initiatives. In an effort to keep our members informed of the many programs put forth by the CARES Act as well as industry tax issues, we once again asked Arnett Carbis Toothman LLP (ACT) to present their annual Oil & Natural Gas Accounting and Tax Seminar. The format of the November 18 event was changed to a virtual webinar due to COVID-19 restrictions.

In prior years ACT has presented three separate in-person seminars for PIOGA, the Independent Oil & Gas Association of West Virginia and the Southeastern Ohio Oil & Gas Association. This year the three organizations cosponsored the seminar. Tax and accounting issues affecting West Virginia, Ohio and Pennsylvania were discussed. Time was allotted for questions during the seminar and the ACT presenters have made themselves available for questions and consultations by phone or email after the seminar.

Presenters addressed general state and federal tax updates for 2020 and updates specific to the industry. Also covered was the CARES Act; Paycheck Protection Program forgiveness, tax and accounting considerations; purchase/sale, valuation, succession and estate planning; and IT security.

PIOGA extends a sincere thank-you to the team from Arnett Carbis Toothman for all their efforts to hold this annual seminar and to provide this valuable educational event to PIOGA members and guests. A special thanks to instructors Marlin Witt, Partner, CPA, CFP, CGMA; Bill Phillips, Partner, CPA; Charlene Tenney, Supervisor, Business Outsourcing; Chad Parker, CPA; Jonathan Jones, CPA; Benjamin Ellis, Director, Information Technology; and Scott Stone, Partner, Information Technology. They presented to a group of 60 participants who earned CPEs after the seven-hour course. ■

Election implications *Continued from page 4*

istration reviews and potentially revises or withdraws the regulations.

For example, litigation concerning the oil and gas Review Rule and the Reconsideration Rule is pending in the D.C. Circuit Court. The new administration could ask the court to suspend further proceedings until it reevaluates those two rules. Litigation involving a major regulatory revision to the National Environmental Protection Act (which is intended to streamline the Environmental Impact Statement process) is pending in federal courts in Virginia, California and New York for which the Biden administration could employ the same tactic. The same is true of the CCR and 401 Certification rules mentioned above as well as many others.

For Trump-era rules that have not been finalized yet, such as the proposed definition of “habitat” under the Endangered Species Act and the proposed reevaluation and reissuance of the Army Corps’ Nationwide Permit 12, the Biden administration could simply direct EPA to stop work on these rules and withdraw others that are sitting with the Office of Management and Budget for review. And of course, the Biden administration could revoke the presidential permit granted to the Keystone XL Pipeline and take similar actions. Thus, despite how the Georgia special election plays out, many avenues are available to the Biden administration to remove perceived obstacles to the implementation of the Biden Energy Plan.

In the states

State environmental law can significantly affect the energy industry. Discussing the many state programs and how the 2020 elections will influence them is beyond the scope of this article. However, to highlight a few key points, 23 states have specific executive or legislative (or both) programs with specific greenhouse gas reduction targets. Twenty-nine states have renewable portfolio standards including Pennsylvania’s Alternative Energy Portfolio Standard. California, New York, Nevada, Washington, Maine and Virginia each has enacted state laws to eliminate carbon emission from electric power plants.

Several regional initiatives relate to carbon pricing and carbon cap and trade. These include the Transportation Climate Initiative, for which 12 northeastern states signed a memorandum of understanding in 2019 to reduce carbon emissions from transportation; the Western Climate Initiative, a California economy-wide cap and trade program; and the Regional Greenhouse Gas Initiative (RGGI), for which the Pennsylvania Environmental Quality Board’s proposed regulations are open for comment until January 14.

Political makeup in the states will play an important role in the Biden administration’s implementation of the Biden Energy Plan. For example, the Wolf administration is committed to adopting final RGGI regulations to reduce CO₂ emissions which the General Assembly is trying to thwart, the most recent example being biparti-

san House Resolution 1088, which urges the Independent Regulatory Review Commission to disapprove the proposed RGGI regulations. In Louisiana, Governor John Bel Edwards established a new Climate Initiatives Task Force through executive action to develop a blueprint to meet aggressive CO₂ emission reductions despite Republicans controlling the legislature.

Conclusion

It remains to be seen how the 2020 elections will play out for the energy industry. Courts undoubtedly will be asked to resolve the tension between the executive (President-Elect Joe Biden and some governors) and the legislature (possibly a Republican-controlled U.S. Senate and Republican state general assemblies) regarding legal authority for critical policies affecting the energy industry. Overarching these legal issues are the economic fallout from the COVID pandemic and a growing social sentiment to reduce the use of fossil fuels to respond to climate change. They may be as much or more important to the long-term composition of the energy industry. ■

Pennsylvania election *Continued from page 3*

Shapiro as “a very, very politically focused individual” who is expected to continue to use his office to advance his visibility in a run for governor in 2022.

Republicans increased their control over the state House of Representatives, going from a 109-93 margin pre-election to 113-90 heading into the 2021-2022 legislative session. The most notable Republican victory came in picking off Frank Dermody of Allegheny County, a long-time member of the House leadership. The industry lost one ally on the Democratic side of the aisle—Representative Joe Petrarca of Westmoreland County. He served in the House since 1995 and was a good friend of PIOGA and the conventional oil and gas industry. House Republicans had targeted his district for the last few election cycles, Lammando related.

As of the date of the webinar, there was still one Senate race to finalize due to a challenge to a pool of mail-in ballots. When the race is decided, it’s anticipated the margin will remain 28 Republicans, 21 Democrats and one independent, Senator John Yudichak of Luzerne County, who predominantly votes with the GOP.

“There’s going to be a lot of new faces in Harrisburg,” Lammando said, as the makeup of the General Assembly has changed due to retirements and incumbents who lost in elections. Over recent years, the Republican and Democratic caucuses have moved further to the right and left, making it more difficult to accomplish things in a bipartisan manner.

At the same time, the relationship between the GOP-controlled General Assembly and Governor Tom Wolf will become even more strained. Lammando explained that even before the 2020 election, the unwillingness of the governor to negotiate was a major stumbling block

with the legislature. In the current election cycle, Wolf heavily spent heavily from his own money to try to defeat Republican candidates—something that backfired on him.

“After investing all that money, Republicans ended up being in a stronger position,” Lammando said. “I don’t foresee any improvement in the willingness to work together. The legislative leadership will be unlikely to tackle any big, important issues that would require buy-in from the governor.” Essentially considered a lame duck, Wolf is anticipated to continue to attempt to impose his way via executive orders and regulatory actions such as the current rulemaking to join the carbon cap-and-trade program of the Regional Greenhouse Gas Alliance.

Once the new session begins in January, the Gmerek team believes these will be the priorities of the legislature:

- Combatting COVID-19 and restarting the economy.
- Investigating the 2020 election, particularly how it was impacted by administrative and judicial actions.
- Reforming government, reducing expenditures to address the anticipated FY 2020-2021 deficit and finding non-tax ways to generate revenue, such as gambling expansion and privatization of the state liquor system.
- Legislative redistricting of both state and federal districts.
- Addressing the funding deficit for state road and bridge maintenance and construction. ■



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