

# Climate Change Policy in the New Administration

by David J. Hayes

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This Article was written before his appointment to the Working Group and reflects his personal opinion.

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## *Editors' Summary:*

The road to meaningful climate action at the federal level is a difficult one with many obstacles that will not be easily overcome. But while many focus on the tactical issues for achieving federal climate change legislation and international agreements that include the United States, the Obama Administration is likely to focus on building a clean energy economy that deploys America's copious renewable energy resources, dramatically improves the efficient delivery and use of energy through a "smart grid," and reduces reliance on Middle East oil by requiring more efficient fleets of cars and trucks that can utilize the next generation of biofuels and plug-in hybrid technology.

Scientists are telling us, in increasingly worrisome terms, that climate change presents our global environment with the greatest challenge that it has ever faced. For their groundbreaking work, the world's leading climate scientists rightfully earned a Nobel Prize.

Less noticed is the fact that climate change presents an equally daunting challenge to our governance systems. Just as it took a Nobel Prize-winning performance by hundreds of scientists to appreciate the scientific mechanisms behind climate change, it may take a similarly spectacular performance by policymakers, politicians, and diplomats to prompt U.S. Congress, the incoming Barack Obama Administration, the states, and the international community to enact a strong climate change action agenda. The fact that the agenda needs to move forward simultaneously in so many forums, on an expedited basis, makes the challenge even tougher.

Congress' performance over the last two years has reminded us of how high a hill we have to climb. U.S. Senate Majority Leader Sen. Harry Reid (D-Nev.) and U.S. House of Representatives' Speaker Rep. Nancy Pelosi (D-Cal.) made a commitment at the beginning of the 110th Congress to put climate change at the top of their legislative agendas. And they meant it. Speaker Pelosi, for example, created a select Committee on Energy Independence and Global Warming and appointed Rep. Ed Markey (D-Mass.) as its chair, in an attempt to draw continuing attention to the climate change imperative. Despite this move and many others, the House could not get a comprehensive climate change bill to the floor for action. On the Senate side, the Lieberman-Warner legislation was yanked through committee and onto the floor of the Senate, but the sheer complexity of its economywide cap-and-trade system, and the manic grab for new auction revenues by every interest group in Washington, prompted many of its proponents to express concern about its approach. The bill was unceremoniously pulled when it failed to garner the 60 votes needed to overcome a promised filibuster.

At least Congress tried. That's more than can be said of the George W. Bush Administration. Even when confronted by the U.S. Supreme Court's confirmation that the Clean Air Act (CAA)<sup>1</sup> requires the U.S. Environmental Protection Agency (EPA) to regulate carbon dioxide (CO<sub>2</sub>) and other greenhouse gases (GHGs) (given EPA's strong statements about GHGs being a severe threat to the environment), political appointees at EPA and the White House balked, refusing to make an "endangerment finding" and throwing sand in EPA's rulemaking gears. The Bush Administration hunkered down, apparently figuring that it could run out the clock against lawsuits seeking to compel EPA's Administrator to make an endangerment finding. EPA's leadership has thrown lawyers into the breach to defend against its inaction, and to respond to the

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1. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

avalanche of citizen suits seeking to invalidate permits and other Agency decisions that have ignored GHG emissions.

A number of states have tried to fill the void, with California and the Western Climate Initiative and the Northeast's Regional Greenhouse Gas Initiative leading the way. But while these climate change initiatives have made great progress in designing regional cap-and-trade systems, the absence of a national market and uniform rules applicable to power generated from all U.S. sources has greatly complicated their efforts. Virtually everyone agrees that having a nationwide cap on carbon emissions, with an accompanying nationwide trading system, would be better than having a patchwork of different approaches on a state-by-state or region-by-region basis.

And then there's the international angle. Over the past eight years, the United States has remained on the sidelines as a bit player in international efforts to control GHG emissions. Following President George W. Bush's early and vocal repudiation of the Kyoto Protocol, the international community moved forward on its own, ratified it and established a multibillion dollar international carbon market. At President Bush's instigation, a smaller group of important nations has gathered on a few occasions to address climate change issues of common interest, but given the U.S. unwillingness to make any meaningful carbon reduction commitments, little progress has been made. Meanwhile, as the United States remains a bystander, the international community is turning its attention toward the pressing problem of tropical deforestation—the source of 20% of the world's annual GHG emissions.

As if this combination of challenging circumstances were not enough, the new Administration faces additional hurdles. The severe economic downturn will limit Congress' eagerness to pass a bold new climate change initiative if there is a perception, or a reality, that a carbon cap could constrict energy supplies and result in higher energy costs for consumers. Likewise, there will be new sensitivity to the possible pass-through of auctioned allowances in the form of higher energy prices.

Also, the Bush Administration has consistently downplayed the magnitude of the threat that climate change poses to the nation by, among other things, editing scientific reports in the White House and deep-sixing EPA's incontrovertible conclusion that GHG emissions pose a danger to health and the environment under the CAA. At the same time, the Bush Administration has resisted calls for limits on CO<sub>2</sub> and other GHGs, asserting that any such limits would "wreck" the economy. After eight years of this messaging, a sizable minority of Americans remain uncertain about how serious a threat climate change poses, and whether it is worth trying to blunt its effects.

President-elect Barack Obama and his new team have the unenviable challenge of reversing course entirely and moving forward on a positive agenda that acknowledges the threat posed by climate change and forthrightly attacks it.

When evaluating how the new president will be able to effectively score new cap-and-trade legislation, bring the states into the equation, and reengage the United States in international discussions on climate change, most observers move quickly into a discussion of tactics: Will President-elect Obama's team offer a specific climate change bill to Con-

gress, or will it invite the Democratic leadership to develop its own plan? What timetable for congressional action should be deemed acceptable? As a related matter, should the new EPA Administrator move aggressively to promulgate regulations under the CAA that will target CO<sub>2</sub> and other GHG emissions, or should he or she wait for Congress to enact a more flexible trading mechanism that will depart from the CAA's command-and-control structure? On the transportation side, when and how should the new Administration act on California's request for a waiver and, if EPA grants the waiver, should EPA adopt a new tailpipe standard for CO<sub>2</sub> on a national basis? If so, how will a new EPA standard be meshed with the U.S. Department of Transportation's fuel efficiency (Corporate Average Fuel Economy (CAFE)) standards? And what about the meeting that the international community will be holding in Copenhagen at the end of 2009? Will the Obama Administration present a new blueprint for a post-Kyoto international climate change agreement? If so, what will it say?

While these tactical questions surely are important, President-elect Obama has long recognized that confronting climate change must go beyond cap-and-trade legislation and discussions of international frameworks. President-elect Obama emphasized throughout his campaign that he would prioritize the transformation of our economy into a clean energy economy that deploys America's copious renewable energy resources, dramatically improves the efficient delivery and use of energy through a "smart grid," and reduces reliance on Middle East oil by requiring more efficient fleets of cars and trucks that can utilize the next generation of biofuels and plug-in hybrid technology.

So rather than slipping into Washington-style "inside baseball" and handicapping the passage of cap-and-trade legislation or the potential return of the carbon tax idea, it may be more instructive to watch the new Administration's early moves in how it organizes itself to address the big moving parts of the energy economy: the power generation sector; the transportation sector; the industrial use sector; and the home and commercial office sector. When it comes to the power generation sector, for example, dramatic reductions in GHGs will follow if carbon capture and storage projects can be demonstrated to work in large-scale applications. Likewise, if the new Administration is successful in opening up renewable energy resources in the sun-drenched Southwest and wind-swept plains states by providing siting opportunities on the public lands and pushing for new transmission line connections, the same result will follow. In the transportation sector, the combination of new CO<sub>2</sub> tailpipe standards and the availability of new fuels and plug-in hybrids holds promise for significant reductions in GHGs. And in the industrial sector, and in housing and commercial real estate settings, a well-organized effort by the new Administration to facilitate the more efficient use of energy could yield dramatic reductions in energy use and GHG emissions.

In other words, the most important early moves by the new Administration may be how it puts together its energy plan "orchestra," rather than whether cap-and-trade legislation, the California waiver, or a new clean air rule gets to play first vio-

lin. Unlike many historical environmental initiatives, where the predominant question was whether new laws or regulations would effectively stop offending behavior, the key question for climate change is how quickly affordable, new, and cleaner ways of producing and using energy can proliferate throughout the economy. Putting an appropriate price on carbon through cap-and-trade legislation has a vitally important role to play in this regard because it will provide a more level playing field on which clean technologies can compete. But the government will need to use its full arsenal of policy tools to encourage the flow of private investment dollars into the clean energy economy. That is why it is not enough to watch how quickly and effectively the new Congress takes up new cap-and-trade legislation, or to read the body language of the new EPA Administrator as he or she discusses how the Agency intends to move forward with CAA rulemakings under *Massachusetts v. U.S. Environmental Protection Agency*.<sup>2</sup> Equal attention should be given to the progress of carbon capture and storage demonstration projects, efforts to build new transmission corridors to bring renewable energy to market, the development of the smart grid, and the retrofitting of energy-efficient homes and offices. This is a case where the whole—the clean energy “orchestra”—will be greater than the sum of its parts.

If the recipe for transforming our economy into a clean energy economy sounds complicated and somewhat messy, it is, and will be. Among other complications, pushing forward on multiple tracks is not likely to translate neatly into a formula that can be easily applied in a new international climate change framework that many in the international community are eager to negotiate with the United States. That should not be an overriding concern, however. After so many years of domestic inaction, we need to devote full attention to the home front. With the Obama Administration moving forward with its ambitious agenda, the United States surely will re-earn its place at the international table. But first, it must deliver.

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2. 127 S. Ct. 1438, 37 ELR 20075 (2007).