Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Energy Policy In The Trump Era: Part 1

By **Christopher Carr and Robert Fleishman, Morrison & Foerster LLP**

Law360, New York (December 1, 2016, 2:55 PM EST) -- Presidential elections matter.

Christopher Carr

Robert Fleishman

President-elect Donald Trump has pledged to drastically change the federal government's role and policies in relation to energy, the environment and climate change. Reducing regulation was a hallmark of the Trump campaign and serves as a unifying tenet of the new administration taking shape.

However, detailed policy positions in these critical areas were not put forth during the campaign. Just a few weeks after the election, the transition process is under way, but Trump has not made the key appointments for the heads of the responsible departments and agencies in these areas. The Senate confirmation process for such appointees, which should shed considerable light on what actions and policies the Trump administration will take, is months away.

Nonetheless, this 2-part article offers some predictions about at least the direction and velocity of the changes the incoming administration may seek to make to energy, environmental and climate change regulations and policies. We are informed, of necessity, by statements and postings by the president-elect during the campaign and following his election, as well as by his transition team.

Energy

In the energy sphere, it seems apparent that the new administration will devote considerable attention to infrastructure, natural gas, oil and coal. But what about renewable generation and clean energy and technology? We offer some predictions below.

Infrastructure, Natural Gas, and Oil

President-elect Trump has spoken about the need for $1 trillion in infrastructure investments via public-private partnerships and private investment through tax incentives. This could be an area where Democrats in Congress and President Trump can find common ground in relatively short order.

In particular, we expect a focus on energy infrastructure with respect to natural gas, oil and electricity. In a YouTube video posted on Nov. 21, the president-elect said that on day one of his presidency he will "cancel job-killing restrictions on the production of American energy, including shale energy and clean coal, creating many millions of high paying jobs."

It seems likely that the new administration's focus on job creation would override any pressure on it to disfavor renewable energy sources, such as solar or wind.

Trump has talked about lifting roadblocks to energy projects, including the Keystone Pipeline. The Trump administration is likely to streamline permitting and environmental review processes for conventional energy infrastructure with respect to natural gas and oil, and it is likely to respond positively to more electric transmission development and grid harmonization.

It seems unlikely the new administration would take overt steps to make the permitting and environmental review processes for renewables more onerous, as this would be inconsistent with its pledges to reduce regulation.

Trump has pledged to open up more federal lands for onshore and offshore oil and gas production. He may encourage the Federal Energy Regulatory Commission to more swiftly approve the siting and construction of natural gas infrastructure (such as interstate pipelines and liquefied natural gas export (LNG) terminals), and may push the Department of Energy (DOE) to act more quickly on certain applications to export LNG.

The percentage of natural gas use for electric generation in various markets continues to climb. The United States now is a net exporter of natural gas; LNG exports are becoming a prominent feature of the U.S. natural gas market.

Natural gas production in the United States has increased annually since 2005, catalyzed by the shale gas revolution. In a Trump administration, we expect the future of natural gas will only become brighter.

Coal

During the campaign, the president-elect vowed to end the "war on coal" and promised to revitalize the coal industry.

Thus, the biggest possible shift in the electricity sector appears to be a federal focus on increased coal production and electric generation from coal, both of which have been in steady decline in recent years largely due to an abundance of lower-cost natural gas for generation and related market forces.

Trump has stated that domestic energy resources — including coal, oil and natural gas — represent trillions of dollars in potential economic output and that his administration will create millions of new jobs by transforming the United States into a net energy exporter.

Among other things, the DOE may attempt to expand its efforts to promote and subsidize "clean coal" endeavors such as carbon capture and sequestration technology, and we may see more coal exports. But coal has taken it on the chin for many years, primarily due to market forces spawned by the shale gas revolution and the declining cost of wind and solar generation.

At the same time, coal mining has shifted from underground to surface mining, which generally requires fewer workers. Over this period, environmental and other federal regulations (and the moratorium on federal coal leasing) have been lesser factors in coal's decline.

Thus, despite a possible set of federal rules and polices favoring coal, a material increase in coal as an energy source in the U.S. energy markets during the Trump administration would face challenges.

Given these challenges, we expect the new administration will consider a range of policy responses, beyond regulatory changes, around coal mining and electricity generated from coal to address the difficult circumstances of local economies and communities historically dependent on coal.

Renewable Generation and Clean Energy and Technology

During the campaign, President-elect Trump criticized renewable generation as expensive, disparaging solar power as not working so well and warning that wind turbines kill birds.

Nonetheless, because of the jobs that solar and wind development support, and the investment of many utilities and businesses in those areas, it is not clear that Trump will try to eliminate tax incentives for solar and wind or take other steps to affirmatively disfavor renewable energy.

Moreover, as many of those jobs occur in red states and not only blue states, the Republican-controlled Congress may have no desire to eliminate various tax credits set to expire of their own accord if construction begins after 2019 for wind and after 2022 for solar.

The Trump transition team's website currently talks of promoting both conventional and renewable resources. Importantly, renewable energy is an area where the focus is on what a Trump administration may not be able to change or impact significantly.

The movement toward more renewable energy in the United States is expected to continue to be driven by state renewable portfolio standards (RPS) and the large and growing corporate procurement of renewables. Corporate sourcing by consumer-facing businesses and large multinational corporations that have already adopted internal targets for more sustainable and energy-efficient operations will continue apace.

This movement has been aided greatly by reductions in the cost of wind and solar power. Indeed, corporations may feel pressure from consumers to accelerate their sourcing of renewable energy if actions taken at the federal level are perceived as antithetical to renewables.

A growing roster of companies is investing in renewable energy and related sustainability efforts because they believe their fiduciary duties to shareholders may require it. Private companies on that roster believe it's good business.

So, even if the new administration pulls back on the Obama administration's commitment to the Paris Agreement, and revokes or unwinds the Clean Power Plan (CPP) — both of which are discussed in the second part of this article — investment decisions with respect to renewables and clean energy technology are unlikely to be significantly impacted.

In addition, recent trends toward more distributed energy resources, energy efficiency, conservation, microgrids, energy storage (especially batteries) and a new role for local distribution utilities likely will continue, regardless of changes at the federal level.

Absent a cohesive and comprehensive modern federal energy policy with respect to renewable generation and clean energy and technology, states likely will continue to take a leadership role in promoting the growth of renewable generation by upholding or expanding RPS programs, retail electric competition and customer choice, net metering, community solar and related policies.

For example, before the election, New York updated its clean energy standard to require half of the state's electricity to come from renewable sources by 2030, and is actively engaged in reshaping its energy policy through a multi-faceted proceeding known as Reforming the Energy Vision (REV).

California recently extended its landmark climate change program, Assembly Bill 32, the California Global Warming Solutions Act, and has enacted laws mandating the expansion of distributed generation and energy storage.

Given statements during the campaign and thereafter reflecting commitments to federalism and the principle that decisions ought to be handled at state and local levels as often as possible, we would not expect the Trump administration to try to dampen materially state and local efforts promoting renewable generation and clean energy and technology.

In the second installment of this article, we will consider the impact on the energy sector of the Trump administration's attitudes towards the Clean Power Plan, the Paris Agreement, and other energy and environmental regulations and policies established under President Obama.

Chris Carr is a partner in Morrison & Foerster's San Francisco office, where he serves as chair of the Environment and Energy Group, and as co-chair of the firm's UAS/Drone Group and the Clean Technology Group. Bob Fleishman is Senior Of Counsel in the firm's litigation department, resident in the Washington, D.C., office, where he defends energy and financial industry participants and individuals in the energy markets against charges of market manipulation, particularly before the Federal Energy Regulatory Commission (FERC), and other regulatory bodies.