



K&L GATES

# CARBON QUARTERLY

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# What's Inside

The Carbon Quarterly is a newsletter covering developments in carbon policy, law, and innovation. No matter your views on climate change policy, there is no avoiding an increasing focus on carbon regulation, resiliency planning, and energy efficiency at nearly every level of government and business. Changes in carbon—and more broadly greenhouse gas—policies have the potential to broadly impact our lives and livelihoods. Carbon Quarterly offers a rundown of attention-worthy developments, including:

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# Carbon Policy

## CLIMATE POLICY IN A BIDEN ADMINISTRATION AND DEMOCRATIC CONGRESS

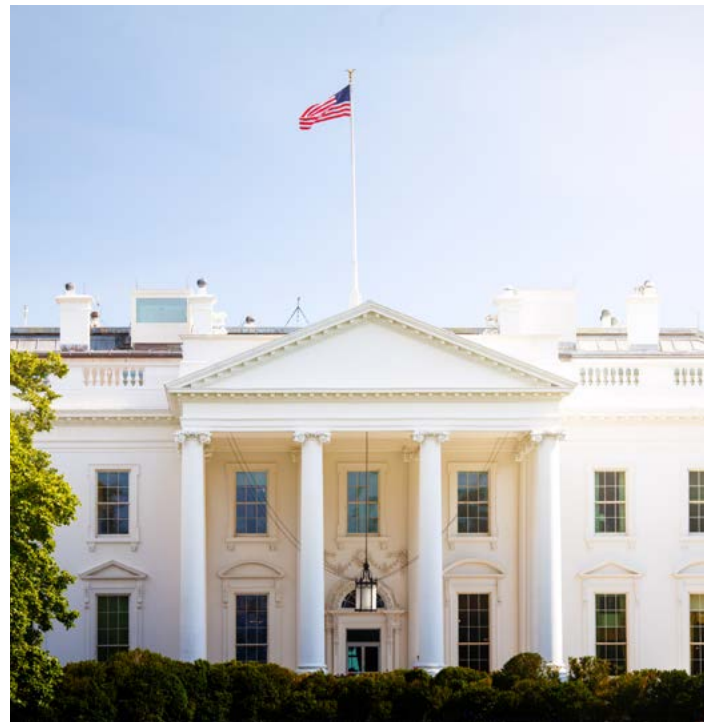
With control of the U.S. Senate now known and in the hands of the Democrats, the tone and tenor of the environmental agenda is becoming more high-pitched. While it is unclear how environmental issues will play out, one thing is clear: This is going to be a busy year for climate policy, bringing risks and opportunities. This update explores examples (not a comprehensive list) of what Democratic control of the White House and Congress may mean for climate and environmental policy in 2021.

### The Biden Administration

Only a few hours after taking the oath of office, President Biden got right to work issuing a series of executive actions on a variety of issues, including climate change—one of his top four priorities. In one of his first actions, President Biden issued an order to rejoin the **Paris Climate Agreement**. In a simple, one-sentence “instrument” signed by President Biden, he formalized his goal of having the United States rejoin the Paris Climate Agreement. There will be a 30-day waiting period until the United States can officially rejoin the accord. Then, the United States will be obligated legally to set and work to meet emissions reduction goals.

In one of the most sweeping actions, President Biden issued an Executive Order (EO) **Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis**. In contrast to the short instrument President Biden signed on the Paris Climate Agreement, this EO is extensive, including a number of health- and climate-related actions. Below are some of the most high-profile climate provisions included in the EO.

- **Review of Trump Administration Rules**  
The EO ordered federal agencies to review climate-related rules issued during the entirety of the Trump administration along with a **List of Agency Actions for Review** listing 104 regulations across government agencies, including 48 actions for U.S. Environmental Protection Agency (EPA) review (the most of any agency), 31 for the U.S. Department of the Interior, and 10 for the U.S. Department of Energy related to energy conservation and energy efficiency. The EO also requires the Council on Environmental Quality to review National Environmental Policy Act regulations issued in July, which apply across government agencies, and to



rescind draft guidance that limited the considerations agencies could give to the impact of greenhouse gas emissions in their environmental reviews.

- **Methane Emissions Regulations**  
Through the EO, Biden called on the EPA to review the Trump rollback of methane emissions regulations and determine if additional actions to implement new, comprehensive methane emission reduction requirements are needed.
- **Fuel Economy Standards**  
The EO orders the Biden administration to revise fuel economy standards that were weakened during the Trump presidency, and it will allow California to again set more stringent vehicle emissions standards than the federal government.
- **Social Cost of Carbon**  
This provision of the EO is not getting the attention of Biden's commitment to join the Paris Climate Agreement, but accounting for the social cost of greenhouse gas emissions is probably Biden's most significant step toward a zero emissions economy. The EO calls for a working group to establish metrics to measure the social cost of carbon, the social cost of nitrous oxide, and the social cost of methane.

The ultimate result of this EO is expected to be monetization of damages associated with greenhouse gas emissions. As reported in TechCrunch, “Now, in the same way there are general principles for accounting for finance, there will be principals for accounting for the impact of climate through what’s called the **social cost of carbon.**”

- **Revoke Keystone XL Pipeline Permit**

The EO states that the Keystone XL permit was being revoked because it did not “serve the U.S. national interest.” Echoing the same action taken by President Obama, President Biden seems to have shut down the project. While TC Energy, the pipeline’s developer, could take the federal government to court, the company issued a statement that “as a result of the expected revocation of the Presidential Permit, advancement of the project will be suspended,” and it canceled plans to raise money to pay for the project. In addition, in an email to employees, the company stated, “Over 1,000 positions will be eliminated in the coming weeks, the majority of these unionized workers representing the building trades....”

- **Pause on Arctic National Wildlife Refuge Energy Production**

The EO places a temporary moratorium on oil and gas drilling in the Arctic National Wildlife Refuge and was signed just two weeks after President Trump had approved nine 10-year leases for drilling in the refuge.



A week later, on 27 January, President Biden also signed an Executive Order on **tackling the climate crisis at home and abroad** and held a **press briefing** along with **Presidential envoy for climate John Kerry and National Climate advisor Gina McCarthy** where they announced that President Biden will host a Leaders Summit on Climate Change less than three months from now, on 22 April, Earth Day, which will include a leader-level reconvening of the Major Economies Forum.

Of note, President Biden also issued an EO **revoking certain EOs issued by President Trump**. Among the EOs repealed is EO 13771, Reducing Regulations and Controlling Regulatory Costs, which directed all agencies to repeal at least two existing regulations for each new regulation.

At the EPA, we expect the agency to hit the ground running and begin the process directed by President Biden to review the 48 regulations issued during the Trump administration. Although very few of President Biden’s cabinet officials have been confirmed by the Senate, the White House is moving quickly to get other senior political officials in place at various agencies. **EPA political leadership** is beginning to take shape with the announcement of 16 officials.

## Congress

Congressional Democrats, following President Biden, have also made it clear that climate change is a top priority. We expect climate to be considered, if not included, in every major piece of legislation moving in the 117th Congress, including an infrastructure package that may be among the earlier bills to move forward. It is likely that the Moving Forward Act passed by the House in the 116th Congress will be the starting point for the next House infrastructure package. The Moving Forward Act includes many clean energy and climate provisions, including installation of electric vehicle charging stations across the United States; funding for a zero-emissions port infrastructure; identification of priority areas on public lands for wind, solar, and geothermal energy projects; funding for improving the resiliency, performance, and efficiency of the electricity grid; and support for expanding mass transit.

With control of both chambers, Democrats have several tools at their disposal to advance this agenda. For example, Democrats have already passed a new rules package for the 117th Congress that, among other things, exempts climate legislation from the pay-as-you-go (Paygo) requirement. This change in the House rules clears the way for the House to pass major climate mitigation legislation without offsetting tax increases or budget cuts.

Although the Paygo rule change may be important in advancing climate legislation in the House, moving a major climate and clean-energy infrastructure package through the Senate will be more difficult. With the slimmest of majorities (50/50 with Vice President-Harris breaking ties), the opportunities for Senate Democrats to pass major climate or clean-energy legislation will be more challenging because it takes 60 votes to overcome a filibuster and pass controversial legislation. While there has been some early discussion about eliminating the filibuster, doing so is anything but certain.

Even if the filibuster is not stricken, there is another legislative vehicle that would allow for a major package to pass the Senate with a simple majority: budget reconciliation. Because budget reconciliation legislation only requires 51 votes in the Senate, it could be a legislative vehicle to carry policy changes that would otherwise be filibustered. But by law, provisions included in a budget reconciliation bill are restricted to those that have a budgetary impact. This means that changes for purely policy reasons may be challenged and excised from a bill.

One other tempering factor on climate legislation in the Senate is that several moderate Democratic senators are unlikely to support sweeping climate legislation. Joe Manchin (D-WV), who will chair the Senate Committee on Energy and Natural Resources (ENR) has noted his opposition to the Green New Deal, a sweeping climate change bill. The comments below by incoming ENR Chair Manchin are instructive to understanding his climate priorities:



. . . I am concentrating on how our country can produce affordable, reliable, dependable energy 24/7 that will help us meet our emissions reductions goals . . . I think we need to focus on real solutions that recognize the role fossil fuels will continue to play . . . Whether it be successfully commercializing emissions-reducing technologies in the power, manufacturing, or transportation sectors, the U.S. must lead the world in innovation. And we must do so in a way that creates meaningful opportunity for those communities here in the U.S. that have already been left behind instead of punishing them with burdensome mandates.



With control of both chambers, Democrats have yet another tool to advance their climate agenda by reversing recently issued Trump regulations. The Congressional Review Act (CRA) provides a fast-track process to Congress to reject by a simple majority vote of both chambers any major rule finalized within 60 legislative days from when the previous Congress adjourned. The parliamentarian will ultimately decide the lookback period, but some have estimated that rules issued after mid-August would be within the timeframe. Among the major climate-related rules issued that could be subject to CRA include EPA's **Reclassification of Major Sources as Area Sources, Cost-Benefit Procedures in Future Air Regulations, Greenhouse Gas Framework Rule for Regulating Stationary Sources, and New Source Performance Standards for Oil and Gas Industry related to Methane Emissions.**

Last, but certainly not least, Democratic control of the Senate means that it will be inherently easier for President Biden to get his environmental team confirmed by the Senate and in place more quickly. The Biden climate team includes:

- **Energy Secretary: Jennifer Granholm**  
The former Michigan governor (2003–2011) and attorney general (1999–2003), Jennifer Granholm, will come to Washington with a strong relationship with the auto companies, part of the transportation industry which leads all other industries in CO<sub>2</sub> emissions. According to the Detroit Free Press, Granholm “played a role in pushing clean energy initiatives and investment in Michigan and could be an integral player in Biden’s plan to create jobs by encouraging more development in electric vehicles.”
- **CEQ Chair: Brenda Mallory**  
President Biden will nominate Brenda Mallory to chair the White House Council on Environmental Quality, where she previously served as general counsel during the Obama administration. Mallory also spent many years at the EPA after a career in environmental law. Mallory is currently the director of regulatory policy at the Southern Environmental Law Center, an organization focused on protecting the right to clean water and air for all Americans.
- **Climate Czar: Gina McCarthy**  
Gina McCarthy will take the position as Senior Climate Advisor to President Biden, where she will direct the domestic climate policy agenda across the administration. McCarthy is the former Obama administration EPA Administrator and is currently president of the Natural Resources Defense Council,



which has sued the Trump administration over 100 times regarding issues ranging from energy efficiency rules to endangered species. She is a strong supporter of low-emission standards and designed the Clean Power Plan, which set the first national limit on emissions for power plants.

- **EPA Administrator: Michael Regan**

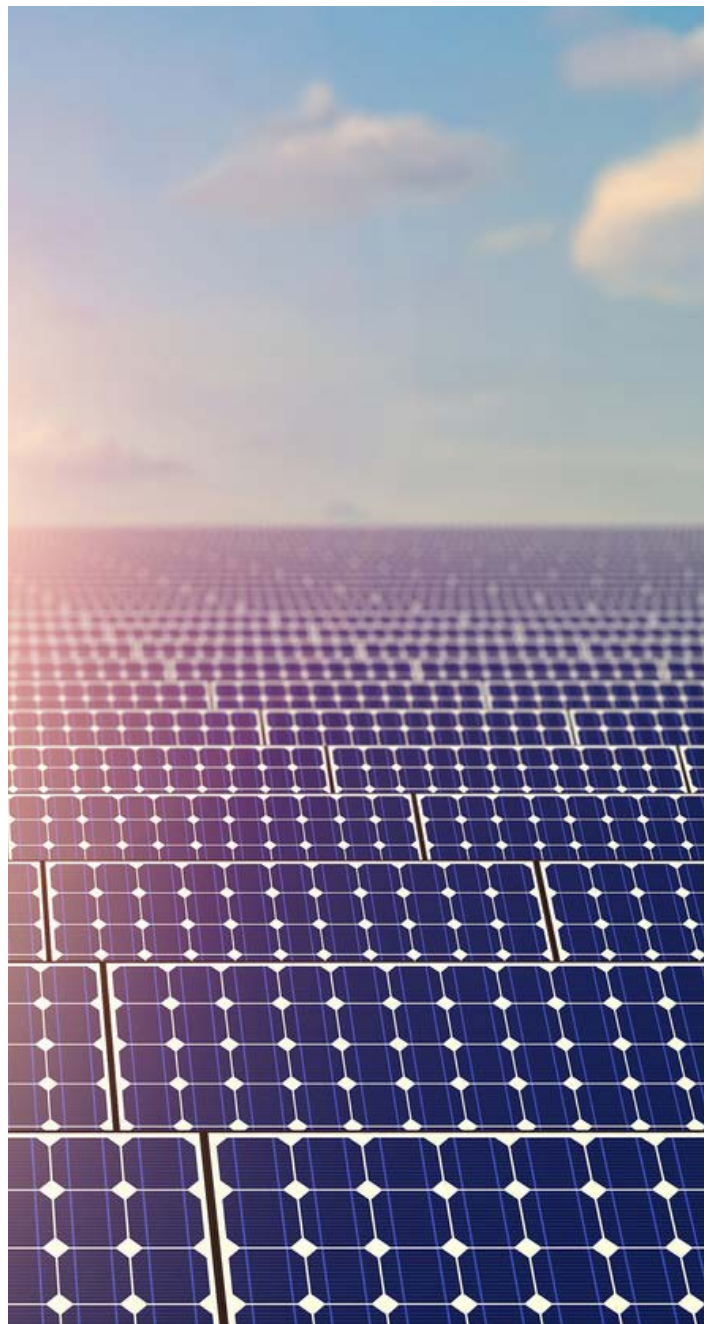
For the position of EPA Administrator—the top environmental regulator in the cabinet—Biden has chosen current Secretary of the North Carolina Department of Environmental Quality, Michael Regan. Regan gets high marks from environmental groups for his aggressive stance on cleanup of PFAS chemicals in the Cape Fear River and for his leadership in negotiating a plan to reduce power plant emissions in North Carolina by 70 percent in the next decade. Regan made climate change and environmental justice central to the work of the North Carolina Department of Environmental Quality, perfectly aligning him with two of President Biden's highest priorities.

- **Transportation Secretary: Pete Buttigieg**

President Biden has chosen former presidential candidate and mayor of South Bend, Indiana, Pete Buttigieg, as his Secretary of Transportation. As U.S. Department of Transportation Secretary, Pete Buttigieg will play a significant role in shaping an infrastructure package that will be focused on sustainability, net zero carbon, and resilient infrastructure. In addition, because the transportation sector is now the number one source of greenhouse gas emissions, we expect Buttigieg to bring additional focus to reducing emissions across the transportation sector from passenger vehicles to airlines to the shipping industry.

- **Interior Secretary: Deb Haaland**

New Mexico congresswoman Deb Haaland, who just finished her first term in Congress, will make history by being the first Native American to lead a cabinet-level agency. Haaland served as Vice-Chair of the House Committee on Natural Resources and Chair of the Subcommittee on National Parks, Forests, and Public Lands. She was endorsed by the Sunrise Movement and has garnered significant attention by embracing the “30 By 30” Resolution to establish a national goal of conserving at least 30 percent of the land and 30 percent of the ocean within the U.S. territory by 2030. As Interior Secretary, Haaland will have ultimate authority over the Bureau of Land Management, which manages resources on U.S. public lands, where she could lead the Biden administration's efforts to restrict oil and gas development.



- **John Kerry: Climate Envoy**

President Biden has chosen former Secretary of State and Senator John Kerry for the new position of Special Presidential Envoy for Climate. Kerry, who was instrumental in drafting the Paris Climate Agreement, will bring great stature to this position, sending a clear signal to the world that President Biden is going to take climate change very seriously. Moreover, Biden's creation of a Climate Envoy in the White House sends an unmistakable message that we should expect many executive actions on climate change coming out of the White House, EPA, and other federal agencies.

# Carbon Litigation and Regulation

## INCENTIVIZING CARBON CAPTURE, UTILIZATION, AND STORAGE: CARROT OR A STICK

As carbon reduction commitments continue to take hold around the world, one unknown is how these commitments will be implemented in a sustainable way for industry players. Carbon capture, utilization, and sequestration (CCUS) is one approach to bridge the energy transition gap and achieve carbon reduction objectives. CCUS is a method to remove greenhouse gas emissions from the atmosphere, capturing carbon emitted through fuel combustion or industrial operations and either using the CO<sub>2</sub> to develop products or storing the CO<sub>2</sub> in manufactured goods or deep in the earth.

CCUS offers advantages for carbon reduction objectives that other strategies cannot meet. These benefits include the fact that CCUS: (1) can be retrofitted with existing plants, (2) can address carbon emissions in certain industry sectors previously thought to be unable to adequately meet carbon reduction goals outside of cap-and-trade and that historically have large carbon footprints, and (3) will allow for economical zero-carbon or carbon-neutral hydrogen and biofuel production that can then be sold or used, allowing this byproduct to further reduce subsequent manufacturing emissions. It is also seen as one of the more, if not the most, economical means to achieve carbon reductions at scale, and this is in part because of the ability to “use” the carbon, either by allowing companies to sell their byproduct fuel or use it to manufacture products of their own.

How to fully integrate CCUS into the mainstream market, however, remains unclear without economic drivers to propel CCUS investment. For instance, cement, iron, steel, chemicals, and other energy-intensive industrial operations necessitate high temperatures to run, and there are few economic alternatives to using fossil fuels to meet this operational need. To justify the price tag, there must be an economic incentive. Economic drivers that have been proposed to adequately integrate CCUS are: (1) tax credits for CCUS investment, (2) government funding for research and development (R&D) of CCUS, (3) government funding for implementation of full-scale projects, and (4) CO<sub>2</sub> taxation (i.e., government-mandated CO<sub>2</sub> pricing).

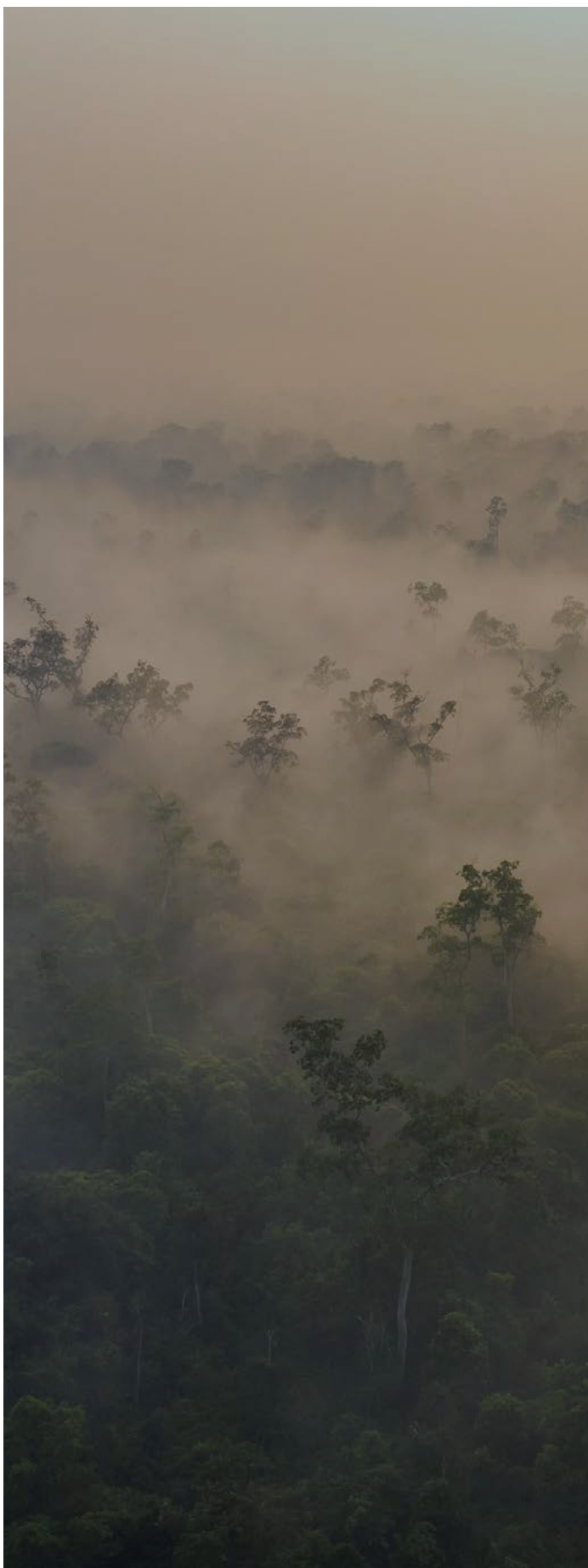
Several of these drivers are already in play. First, the U.S. Internal Revenue Code (I.R.C.) already provides a tax credit

on a per-ton basis for CO<sub>2</sub> that is sequestered. Since 2008, Section 45Q of the I.R.C. has provided a tax credit for carbon that is either geologically sequestered or used. In 2018, the tax credit was increased from US\$20 to US\$50 per metric ton, if the CO<sub>2</sub> was geologically stored, and from US\$10 to US\$35 per metric ton if used for enhanced oil, natural gas recovery, or utilization in another qualified manner, including photosynthesis, chemosynthesis, or chemical conversion—such as making cement out of biofuels generated from CO<sub>2</sub>-bred algae.

Second, the U.S. Department of Energy (DOE) already invests in funding for R&D of CCUS. The DOE has indicated it will make CCUS R&D funding a priority during the Biden administration with the goal of reducing the cost of CCUS to make it more efficient and effective for companies. However, because the DOE is not an enforcement agency, it holds no authority to force companies to invest in CCUS themselves if financing CCUS ultimately does not pencil out on the balance sheet.

In sum, nothing is forcing any industry to reduce their carbon emissions, despite attractive tax credits and funding incentives. The closest is a cap-and-trade system. But while some states already have a cap-and-trade system (i.e., in California and the Northeastern states that are part of the Regional Greenhouse Gas Initiative), critics argue that cap-and-trade alone will not reduce the nation’s carbon footprint. In contrast to a carbon tax, which puts a price on each ton of carbon, a cap-and-trade system issues a set number of emission “allowances” per year that can be auctioned to the highest bidder and then traded on secondary markets. However, in a cap-and-trade system, certain regulated entities can wind up with a large allocation of allowances if they are the highest bidder, and the allowance prices are susceptible to volatility on the secondary market.

If it is cheaper to buy a carbon allowance in a cap-and-trade scheme than invest in CCUS infrastructure, then a carbon allowance may be the most efficient pathway to carbon reduction. But if a mandated tax on carbon is high enough, then installing CCUS technology could be more economical than buying a carbon allowance. Proponents of a nationwide, regulated carbon tax maintain it could create a stable incentive for companies across all industries to invest in CCUS infrastructure on an even scale, coast-to-coast.



The incoming Biden administration has not provided a clear answer on whether it will advance a carbon tax, cap-and-trade, or other approach to incentivize carbon reductions. In the meantime, as an alternative to a federal carbon tax, an industry-based carbon tax has been proposed by the Federal Energy Regulatory Commission (FERC). In October 2020, FERC issued a proposed policy statement clarifying it has jurisdiction over organized wholesale market rules that incorporate state-determined carbon prices in those markets and encouraging regional electric market operators to explore the benefits of establishing such carbon price rules.<sup>1</sup> But FERC's policy statement neither mandated anything from regional transmission organizations (RTOs) nor did it attempt to stretch its jurisdiction beyond the utility sphere to manufacturing and industrial operators.<sup>2</sup> Questions also remain over whether FERC has the authority to even consider a carbon pricing mechanism. Accordingly, even if FERC's policy statement provokes RTOs to establish carbon pricing rules, such rules will not touch many manufacturing and industrial operators throughout the country and, therefore, will not have the same impact or reach as a federal carbon tax. So, is a federal pricing system the answer?

Critics of a carbon tax maintain that it does not provide the same degree of certainty on expected emissions reductions as cap-and-trade programs. It is also criticized by the environmental justice community, who maintain that a tax will only allow corporations to acquiesce in the status quo of their operations rather than encourage operational changes. However, cap-and-trade programs have yet to reach a broader set of industry actors. Ultimately, a federal carbon tax framework or a cap-and-trade system could allow for widespread and far-reaching incentives for all industries to reduce their carbon emissions. What remains to be seen is whether a national carbon policy under the Biden administration will incentivize widespread deployment of CCUS.



## A CARBON BORDER ADJUSTMENT MECHANISM TO ACHIEVE THE EUROPEAN UNION'S GREEN OBJECTIVES

In 2019, the European Commission (Commission) unveiled the European Green Deal (Green Deal), a set of environmentally friendly policies that aim to transform the European Union into “a modern, resource-efficient and competitive economy [where] there are no net emissions of greenhouse gases by 2050.”<sup>3</sup> Despite the COVID-19 emergency that handicapped 2020, the Commission has stood firm to its green commitments to develop and implement one of its most ambitious and far-reaching policies of the Green Deal—a carbon border adjustment mechanism (CBAM) for selected sectors—and to not postpone the legislative process to develop a CBAM. A legislative proposal for CBAM is currently expected in the second quarter of 2021.

A CBAM would feature a key mechanism for avoiding carbon leakage. In the absence of a CBAM, market forces would be expected to result in the transfer of at least some European production to countries that do not share the same climate ambition as the European Union and the replacement of EU products with more carbon-intensive imports. This, in turn, would have the potential to offset European emissions reductions and frustrate the efforts of the European Union and its industries to meet the global climate objectives of the Paris Agreement.

The forthcoming CBAM proposal could take one of the following forms:

- A border tax or customs duty on select carbon-intensive products.
- An extension of the EU Emissions Trading System (ETS) to imports, which could require the purchase of emission allowances under the ETS by either foreign producers or importers.
- A specific pool of ETS permits for foreign producers.
- A carbon tax (e.g., excise or value-added tax type) at the consumption level on select products whose production is in sectors that are at risk of carbon leakage.

Importantly, the Commission has indicated that its CBAM proposal will be designed to comply with the European Union's obligations under the Paris Agreement and World Trade Organization.<sup>4</sup>

It is widely expected that the Commission's CBAM proposal will only apply to certain sectors where the risk of carbon leakage is highest. The 2020 Guidelines on ETS state aid<sup>5</sup> provide an idea of which sectors are likely to be impacted due to their exposure to carbon leakage, including, among others, the production of aluminum, iron and steel, and pulp and paper.

Meanwhile, the European Parliament has started looking into the CBAM agenda. The Environment, Public Health and Food Safety (ENVI) Committee, which will be responsible for the CBAM file, has already started laying out its CBAM vision through a draft own-initiative report entitled “*Towards a WTO-compatible EU carbon border adjustment mechanism.*”<sup>6</sup> The ENVI Committee has endorsed the introduction of the CBAM, emphasizing that it should serve to better address emissions embedded in international trade, thereby incentivizing climate action both within the European Union and by the European Union's trading partners and not as an instrument for protectionism.

Also, the Commission recently published a report<sup>7</sup> outlining the views of stakeholders who responded to the CBAM public consultation. Although the respondents' views do not bind the Commission's policymaking, they do provide a distinct picture of stakeholders' expectations on the development of the CBAM. In fact, the report underlines that most stakeholders would prefer the CBAM to take the form of a tax applied on imported products associated with sectors at risk of carbon leakage. As for the potentially targeted sectors, most respondents opted for a wide spectrum of industries, including electric power generation, transmission, and distribution; manufacture of cement, lime, and plaster; manufacture of iron and steel and of ferro-alloys; manufacture of basic chemicals, fertilizers, and nitrogen compounds, plastics, and synthetic rubber; and extraction of crude petroleum.

While the CBAM has gained supporters in the European Union, it is expected that the forthcoming Commission proposal will have a tortuous legislative and political path ahead. More generally, two of the key challenges ahead for a CBAM are the absence of a commonly adopted price for carbon emissions, as well as the reaction of the European Union's two biggest trading partners—the United States and China—as well as the business communities in those countries.

# Carbon Business

## Final Carbon Capture Credit Regulations May Help Drive Tax Equity Investment in U.S. Carbon Capture Facilities

The U.S. Department of Treasury (Treasury) released final regulations under Code<sup>8</sup> Section 45Q on 6 January 2021. Code Section 45Q provides for a U.S. federal income tax credit at varying rates to taxpayers that participate in various aspects of the process of sequestering carbon oxide and disposing of it in secure geologic storage, use it as a tertiary injectant in a qualified enhanced oil or natural gas recovery project, or utilize it in certain processes. Key issues for taxpayers wishing to claim the credit are whether the carbon capture equipment is qualified and whether the captured carbon is properly stored or utilized. In addition, when the carbon is stored rather than utilized, is it possible for the credit to be recaptured?

The final regulations are broadly similar to the proposed regulations published in May 2020, with revisions focused primarily on making the credit broadly available and as flexible and useful as reasonably possible for businesses of all sizes. By tying the final regulations to industry standards, as well as well-known and understood regulatory requirements used elsewhere in the Code and regulations, Treasury appears to be signaling an intent to make compliance with the requirements of Code Section 45Q as straightforward and practicable as possible. In addition, certain provisions indicate that Treasury intends to allow parties to allocate contractual and physical risk in ways that could make investment in CO<sub>2</sub> sequestration projects more appealing to even the more risk-averse tax equity investors.

Simplification was clearly high on the list of Treasury's goals. Among other things, Treasury redefined "carbon capture equipment" to focus on functionality and the date on which the credit becomes available (i.e., its placement in service date) by reference to existing regulations. In addition, the regulations expressly permit the use of subcontractors for disposal, injection, and utilization and, in the case of renovated equipment, tailor the qualification test to refer only to carbon capture process train equipment, rather than other equipment in the larger project into which such equipment is integrated. The final regulations also clarify that carbon capture equipment may be owned by a taxpayer other than the taxpayer that owns the industrial facility at which such equipment is placed in service.

However, the ability of the Internal Revenue Service to evaluate taxpayer compliance was also apparently a Treasury priority. For example, when an election under Code Section 45Q(f)(3)(B) is made, only the person in direct contractual privity with the person authorized to make the election will be permitted to claim the credit. In addition, while Treasury agreed to permit a taxpayer to claim a credit even if the taxpayer's contractual counterparty fails to comply with its reporting requirements, Treasury will not permit the taxpayer to claim the credit when the taxpayer fails to comply with its own reporting requirements.

In addition, the final regulations generally incorporated guidance released in early 2020 that allows multiple taxpayers to claim the credit by investing through a partnership and aggregate multiple carbon capture facilities as a "single project." The preamble to the final regulations indicates that these rules, and the rules applicable to renovated property discussed above, will be interpreted in the same manner as that used in the context of other income tax credits (e.g., the Code Section 45 production tax credit and Code Section 48 investment tax credit).

Certain other provisions clarified what types of carbon capture equipment qualify, including equipment incorporated into a co-generation facility and certain naturally occurring deposits. These provisions are generally consistent with the implication in Code Section 45Q that the carbon oxide that is ultimately sequestered be produced as part of a process that creates a commercial product or using direct air capture.

One potential area of consternation in the final regulations is the decision not to adopt an interim allowance of the Code Section 45Q credit. The credit is available for 12 years after a qualified facility is placed in service. However, it is possible that placement in service could occur prior to approval of the facility's Environmental Protection Agency Monitoring, Reporting, and Verification Plan or analysis of life cycle greenhouse gas emissions, which the final regulations require in order for a taxpayer to begin claiming credits. A significant delay in receiving either of these approvals could cause the taxpayer to lose some of the 12-year period during which the credits may be claimed. In the preamble to the final regulations, Treasury indicated that it is not receptive to any deviation from the placement in service standard or its rejection of an interim credit allowance concept. However, if this proves to be a significant complication, perhaps Treasury would reconsider.

# Carbon Spotlight

## Microsoft and Environmental Justice

In July 2020, Microsoft announced one of its most significant corporate sustainability initiatives through its largest-ever individual power purchase agreement. The precedent-setting agreement with Sol Systems, a leading solar project developer in the United States, provides a mechanism for Microsoft to both achieve its carbon reduction goals and ensure that the benefits of those efforts are felt by those communities disproportionately affected by pollution and climate change. The agreement provides for Sol Systems to finance, develop, and operate a collection of over 500 MW of solar projects in the United States and sell that energy to Microsoft. This development is an increase in renewable procurement of nearly one quarter from the current 1.9GW of renewable power the company has already acquired.<sup>9</sup>

The installations will be targeted in areas historically impacted by environmental injustice, including:

- Urban neighborhoods that typically do not have access to economically priced clean energy resources.
- Urban neighborhoods that have had to cope with pollution in drinking water, air, and soil found near parks and playgrounds.
- Rural communities crippled by job losses from the closure of fossil fuel plants or that have historically invested solely in natural resource extraction operations with large carbon footprints, such as oil, gas and coal.
- Tribal reservation lands that have historically been disproportionately impacted by the effects of climate change (especially subsistence-based communities).

The deal will prioritize buying from minority and women-owned businesses, and will include investing US\$50 million in community-led grants to support educational programs, job and career training, and habitat restoration programs that promote access to clean energy and promotion of clean energy technology. The purpose of this effort is to not only curtail future carbon footprints, but to counteract environmental damage to communities as a result of historical operations.

Microsoft's deal with Sol Systems is a notable first step of its kind in the industry toward a different way

of conducting business, with an eye toward achieving carbon reduction goals while also addressing impacted communities and public interests.

The company's environmental justice initiative comes on the heels of Microsoft's launch of its US\$1 billion Climate Innovation Fund (the Fund) in January 2020. The Fund is part of Microsoft's larger plans to shift to 100 percent renewable energy by 2025, become carbon negative (i.e., removing more carbon than it emits) by 2030, and to have removed its entire carbon emissions since its inception in 1975 by 2050, which it announced earlier this year. The Fund is financed in part by Microsoft's internal carbon tax, which taxes the company's internal scope 1, 2, and (as of July 2020) 3 emissions.<sup>10</sup> Microsoft intends to use the Fund to invest in new technologies developed by startup companies that will help it meet its carbon reduction goals.

As more industry players move concurrently with Microsoft in getting closer to meeting their carbon reduction goals, consumer thought and public opinion may push such industry players to follow suit behind Microsoft's trailblazing efforts within the environmental justice sphere. Indeed, there may become a point where a zero carbon footprint is no longer the gold standard.

## Duke Energy Raises the Bar for Carbon Reduction Benchmarks

As one of the largest energy-holding companies in the United States, Duke Energy provides electricity to 7.8 million retail customers and natural gas to 1.6 million. In the spring of 2020, Duke Energy committed to a 50 percent reduction in carbon emissions from 2005 levels by 2030 and net-zero emissions by 2050. The company had previously set of goal of 40 percent reduction by 2030, but it pointed to sustained low natural gas prices and declining costs for renewables and storage as making the accelerated goal of 50 percent attainable.

While existing technologies will make significant reductions possible, according to Duke Energy's chairman, president, and CEO Lynn Good, investments in new technologies are needed today to make net-zero emissions possible by mid-century. According to Good, advances in battery storage and carbon capture are needed to not only to get to net-zero, but also to ensure that energy remains reliable and affordable in the process. Good discusses Duke Energy's goals and how to get there in this [video](#).



# Authors



## **ANKUR K. TOHAN**

**Partner**  
Seattle  
+1.206.370.7658  
ankur.tohan@klgates.com



## **CRAIG P. WILSON**

**Managing Partner, Harrisburg Office**  
Harrisburg  
+1.717.231.4509  
craig.wilson@klgates.com



## **LAURIE B. PURPURO**

**Government Affairs Advisor**  
Washington, D.C.  
+1.202.778.9206  
laurie.purpuro@klgates.com



## **GIOVANNI CAMPI**

**Policy Director**  
Brussels  
+32.(0)2.336.1910  
giovanni.campi@klgates.com



## **CLIFF L. ROTHENSTEIN**

**Government Affairs Advisor**  
Washington, D.C.  
+1.202.778.9381  
cliff.rothenstein@klgates.com



## **MOLLY K. BARKER**

**Associate**  
Seattle  
+1.206.370.7653  
molly.barker@klgates.com



## **ELIZABETH C. CROUSE**

**Partner**  
Seattle  
+1.206.370.6793  
elizabeth.crouse@klgates.com



## **AARON C. MEYER**

**Associate**  
Seattle  
+1.206.370.5893  
aaron.meyer@klgates.com



## **TAD J. MACFARLAN**

**Partner**  
Harrisburg  
+1.717.231.4513  
tad.macfarlan@klgates.com

# Endnotes

<sup>1</sup> 173 FERC 61,062, Docket AD20-14-000.

<sup>2</sup> If RTOs follow the policy statement and issue price rules, there could be legal challenges surrounding FERC's authority to consider a carbon pricing mechanism and whether such a carbon pricing mechanism would be discriminatory to certain types of generation plants.

<sup>3</sup> [https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en).

<sup>4</sup> <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12228-Carbon-Border-Adjustment-Mechanism>.

<sup>5</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC0925%2801%29>.

<sup>6</sup> [https://www.europarl.europa.eu/doceo/document/ENVI-PR-648519\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/ENVI-PR-648519_EN.pdf).

<sup>7</sup> <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12228-Carbon-Border-Adjustment-Mechanism/public-consultation>.

<sup>8</sup> All references to the "Code" herein are to the Internal Revenue Code of 1986, as amended.

<sup>9</sup> <https://www.rechargenews.com/transition/microsoft-claims-environmental-justice-first-with-biggest-renewable-energy-deal/2-1-846170>.

<sup>10</sup> Scope 1 emissions are those direct emissions that a company's activities' create; scope 2 are indirect emissions generated from a company's use of electricity or heat for buildings; and scope 3 are those indirect emissions that come from all other activities, including suppliers' and customers' carbon footprints that result from using a company's products.

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