

## Energy Policy To Watch In 2022

By **Keith Goldberg**

*Law360 (January 3, 2022, 12:02 PM EST)* -- Climate change and clean energy development will remain Biden administration priorities in 2022 with further regulation and executive orders, but expecting similar moves from Capitol Hill may be too optimistic.

Energy attorneys are expecting federal agencies to take actions to curb greenhouse gas emissions as well as boost development of transmission and other electricity infrastructure. But with Democrats holding a slender majority in Congress and midterm elections looming, more major legislation, such as the bipartisan Infrastructure Investment and Jobs Act enacted last fall, will be a tough sell. The \$1.75 trillion Build Back Better Act, for one, stalled in the Senate in December after passing the House in November, though Senate Democrats have vowed to try again this year.

"I think you'll see a return to a focus on the appropriations process and oversight process," said Greg Louer, a managing director at Arnold & Porter and former congressional staffer. "There simply won't be energy to do another big-ticket bill."

Here, Law360 breaks down four areas energy lawyers should keep tabs on this year.

### Federal GHG Regulation

With the Biden administration having made climate change a priority, attorneys will be closely watching any federal agency efforts to address greenhouse gas emissions.

The U.S. Supreme Court threw sand in the gears of any immediate plans by the Environmental Protection Agency to craft new rules limiting GHG emissions at existing power plants when it granted petitions from states and the coal industry that seek to severely restrict the agency's Clean Air Act authority to regulate GHGs.

Experts told Law360 that if the EPA is hesitant to move ahead on new GHG rules amid a high court review, it will likely fall back on regulating other hazardous air pollutants it has clear authority over. For example, pushing for greater state and regional compliance with national standards for ozone, particulate matter and regional haze could indirectly clamp down on GHGs, as coal plants and others that use fossil fuels are major contributors to those.

The EPA finalized stricter vehicle GHG standards just before the new year but is still working on rules to limit emissions of methane, a short-lived but potent greenhouse gas. The agency in November proposed

sweeping controls of methane emissions from both new and existing oil and gas infrastructure and said it would flesh out the details and finalize a rule by the end of 2022.

"How far-reaching is it going to be?" Holland & Hart LLP oil and gas partner Liz Titus said. "Not just the limits, but how far it's going to go?"

Energy attorneys also expect ramped-up GHG scrutiny from the Federal Energy Regulatory Commission, which is responsible for approving pipelines and other gas infrastructure projects. The agency is mulling changes to its 1999 pipeline approval policy, and deeper climate change and environmental justice reviews are among the items being considered.

"I still think you're likely to see a lot more Scope 3 emissions analysis coming into that environmental review for pipeline projects," said Phil Lookadoo, Haynes and Boone LLP's administrative partner in Washington. "I think that there's going to be a requirement that you give an explanation as to how your pipeline project fits into an energy economy that's in transition toward [dealing with] climate change."

### **FERC Transmission Policy**

Under Chairman Richard Glick, FERC has prioritized the encouragement of new transmission development to accommodate increasing amounts of renewable energy. The centerpiece of those efforts is an advanced notice of proposed rulemaking issued by the agency in July that kick-started a process to potentially overhaul the agency's existing transmission rules.

"The transmission ANOPR is probably the biggest one, because the decisions coming out of there will be the major policy choices that FERC makes as far as how to encourage transmission and, probably more importantly, who's going to pay for it," Morgan Lewis & Bockius LLP energy regulatory partner Dan Skees said.

The ANOPR sought feedback on a host of issues, from transmission planning and developer incentives to allocating transmission project costs and improving the process for hooking up new power projects to the grid.

FERC has received hundreds of public comments, which have laid bare some significant policy differences between stakeholders, including states, regional grid operators, utilities, transmission developers, and consumer and environmental advocates. But FERC appears determined to turn its ANOPR into some concrete transmission policy proposals this year.

Arnold & Porter energy regulatory partner Sandy Rizzo said a key indicator of that was FERC rejecting requests from regional transmission organizations and others to push back the end of the public comment period to January 2022.

"Why wouldn't you give the RTOs an extra couple of weeks or 30 days, unless you are hellbent on getting comments in and moving forward?" Rizzo said. "That was a strong sign to me."

### **Transmission Project Siting**

A crucial part of transmission development that FERC isn't addressing in its ANOPR is how to ensure projects can be sited and built. That authority is generally reserved for states, and many a proposed project has died due to state and local opposition, but Congress has provided an opening for the feds to

take a bigger role.

The IIJA clarified that the U.S. Department of Energy has the authority to designate national transmission corridors and that FERC has the authority to site lines within those corridors even if a state regulator rejects them.

"It'll be interesting to see what DOE and FERC end up doing, given this federal-state conflict, and whether the feds are going to defer to the states, or override the states," Rizzo said.

FERC was given the ability to backstop states' siting authority in the Energy Policy Act of 2005 but has shied away from using it after a federal appeals court rejected an early implementation.

"The jurisdictional relationship between FERC and states can be tense at times," said Chip Cannon, who heads Akin Gump Strauss Hauer & Feld LLP's energy regulation, markets and enforcements practice. "It would take an awful lot of political will for FERC to actually use that authority aggressively to get the transmission built that really matters."

Skees said it's worth keeping an eye on what ultimately emerges from the joint task force formed last year by FERC and the National Association of Regulatory Utility Commissioners, the umbrella group for state utility regulators, aimed at improving federal-state cooperation on planning and paying for new transmission development.

"It has the potential to have everyone pushing in the same direction on transmission issues," Skees said. "It's a very interesting political approach from the chairman."

### **Implementation of Infrastructure Legislation**

In addition to clarifying the DOE and FERC's transmission siting authority, the IIJA devotes billions of dollars to transportation electrification and electricity grid upgrades. The DOE and U.S. Department of Transportation have plenty of discretion in determining how those dollars are spent, from building out a national network of electric vehicle charging infrastructure to handing out funding to states for building out their EV and zero-emission vehicle infrastructure.

Louer, who works and lobbies on transportation and infrastructure issues, said a key issue to watch will be how the DOE and DOT's Joint Office of Energy and Transportation, whose formation was called for in the IIJA, sets rules of the road when it comes to EV infrastructure funding and development.

"Just if you look at electrification of transportation, right there you have significant roles that the DOT and DOE are going to play, independently and jointly, to fulfill Congress' objectives," Louer said.

The IIJA also goes big on funding large-scale decarbonization technologies including hydrogen, advanced nuclear energy and carbon emissions removal. Louer said the linchpin of the bill's hydrogen funding is the DOE's creation of four regional hubs for hydrogen production.

"That is going to be a non-insignificant workflow the DOE is going to be responsible for," Louer said.

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