

Western states race to counter Trump's retreat on climate change policy

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Competing conceptions for carbon regulation in the United States have risen above the background noise in 2018 to create policy headlines from Washington, D.C., to the West Coast. What are U.S. states and other subnational jurisdictions contributing to the legal landscape of greenhouse gas regulation, and how are the scales tipped, given the rollback of climate change policy on the federal level?

Consider these numbers:

- Over 1.8 million. The Environmental Protection Agency's tally of public comments received to date on the proposed Affordable Clean Energy rule and repeal of the Clean Power Plan.¹ If enacted, ACE will repeal and replace the CPP adopted in 2015 under President Barack Obama's administration. Public comments were due in the ACE rulemaking by Oct. 31.
- 259,622. The number of signatures gathered to put Initiative 1631 on the ballot in Washington state this November. Initiative 1631 would have put a \$15 a ton fee on GHG emissions from many sectors. Supporters of the initiative raised over \$11 million and spent more than \$9 million to advocate for its passage. Opponents raised over \$22 million and spent roughly \$2 million to defeat the initiative.²
- \$1 million. The amount of money ExxonMobil pledged in October 2018 to

the organization Americans for Carbon Dividends, which advocates for a carbon tax of over \$40 a ton.³

- 17 percent. The percentage of Fortune Global 500 companies that have made commitments to GHG emission reduction targets through the Science Based Targets Initiative.⁴

The prospect of carbon regulation in the U.S., across the 50 states and by the federal government, shifts from day to day. Here is what's in play in Washington, D.C., and on the West Coast.

FEDERAL ACTION

Since taking office, President Donald Trump has been bullish on scaling back climate-related regulations and initiatives on the federal level. On the global stage, Trump announced in June 2017 that the United States would withdraw from the Paris Agreement on climate change, breaking from the 183 other countries that have signed on to the accord.

In October 2017 the president proposed the repeal of the CPP and in December 2017, solicited public input on its potential replacement through an advance notice of proposed rulemaking. The EPA issued the draft ACE rule in August 2018, with public comment accepted through Oct. 31.⁵

The CPP's current stay in federal court means that its repeal and replacement would not have an immediate appreciable effect on the

regulated community, though stakeholder involvement is not expected to slow as the ACE program moves to a final rule.⁶

Also related to electricity generation, in September 2017, Energy Secretary Rick Perry asked the Federal Energy Regulatory Commission to guarantee additional payments to any electricity generator able to stockpile at least 90 days' worth of fuel on-site, in the name of ensuring reliability of the electrical grid. Practically speaking, only coal and nuclear power plants stood to benefit from this proposal.

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FERC's January 2018 order in response found that there was insufficient evidence that existing market rules were unjust and unreasonable, a prerequisite for FERC to step in and manipulate wholesale energy markets in favor of coal and nuclear plants.⁷

Comments from the majority of FERC commissioners underscored that the aim of the Energy Department proposal had more to do with subsidizing uncompetitive generation technologies than grid resilience and reliability.⁸

Undeterred, this summer, the president issued a directive to Perry to prevent coal and nuclear plants from closing, shortly after an Energy Department memo outlining options for subsidizing coal and nuclear facilities was leaked. The White House says it is still reviewing its options to prevent retirement of struggling coal and nuclear plants.

On the transportation side, the EPA has moved to reconsider federal GHG emissions standards for cars and light trucks, which were set to rise over the next several years.



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The agency is also threatening to rescind California's waiver to set its own, more stringent, fuel efficiency standards. Seventeen states filed suit in May 2018 to challenge the EPA's actions.⁹

ACTION ON THE WEST COAST

Undeterred by actions on the federal level, West Coast states have floated ambitious schemes to reduce GHG emissions and put a price on carbon. Washington and Oregon have seen fits and starts in enacting regulations on carbon, while California continues its trend since 2005 of ever more stringent GHG reduction targets

Legislation, lawsuits, ballot initiatives and regulatory programs — the West has seen it all, but continues steadily on a track toward curbing GHG emissions.

Over the last two years, the trajectory of these Western states has also mirrored that of private entities nationwide that are increasingly committing to carbon reductions, even in the absence of direct regulation.

Washington

On Nov. 6 Washington voted down Initiative 1631, which sought to institute an aggressive carbon pricing program in the state.

The initiative would have imposed a carbon fee of \$15 per metric ton of GHGs beginning in 2020. This fee would have increased by \$2 per metric ton of GHGs emitted every year thereafter, plus inflation, until the state's GHG reduction goals were met.

Revenue from the fee would have been placed in a "Clean Up Pollution Fund" overseen by a Public Oversight Board within the governor's office.

Seventy percent of monies in the fund would have been invested in clean air and clean energy programs. Twenty-five percent would have gone toward clean water and healthy forests programs, and the remaining 5 percent would have been dedicated to promoting healthy communities.

The Alliance for Jobs and Clean Energy put Initiative 1631 on the ballot after GHG legislation failed in the Washington Senate earlier this year. That legislation, Senate Bill 6203, would have imposed a tax on carbon emissions, beginning at \$12 per metric ton in 2019 and increasing by \$1.80 per ton each year starting in 2021 until the tax reached \$30 a ton in 2030.

This follows two other major moves in Washington to institute carbon regulation. Initiative 732, a carbon tax ballot initiative, was defeated in 2016 with 59.25 percent of voters deciding against it.

In 2016 the Washington Department of Ecology adopted a Clean Air Rule, only to have it struck down in state court last year for lack of statutory authority.¹⁰ If Initiative 1631 had passed this election day, Washington would have become the first state to adopt a carbon tax or fee.

Oregon

The 2018 legislative session in Oregon saw the proposal of two bills that would have established a comprehensive carbon regulation system.

The federal government and states such as California, Oregon and Washington and have largely been moving on opposite tracks on climate change policy since Trump took office.

SB 1507 and House Bill 4001, the Clean Energy Jobs Bill, would have created a "cap and invest" program starting in 2021, with a cap on GHG emissions and an auction system to issue permits for emissions under the cap. The GHG cap would have declined each year until 2050, at which point Oregon GHG emissions would have been at least 80 percent lower than 1990 levels.

About 100 companies would have been regulated under the cap, including fossil fuel importers and entities emitting at least 25,000 metric tons of GHGs a year. Emissions from agriculture and forestry operations and marine and aviation fuels were not subject to the cap.

Energy-intensive industries exposed to foreign competition, like paper mills and aluminum smelters, would have been issued some permits at no charge. Electric and gas utilities would also have received permits at no cost, with any proceeds used to reduce energy bills.

The bills proposed to invest 85 percent of the funds collected at auction in clean energy jobs, including energy efficiency in building, electric grid improvements, fuel-efficient transportation, renewable energy jobs, and projects that promote resiliency in forestry, agriculture and coastal areas.

Ultimately SB 1507 and HB 4001 failed to move out of committee, though the Oregon

Legislature did pass budget items to create a Carbon Policy Office and for the state Department of Environmental Quality to lay the groundwork to implement a cap-and-trade program by 2021. We expect the Clean Energy Jobs Bill to come back in some form in the next legislative session.

To that end, the speaker of the Oregon House and the president of the Oregon Senate are co-chairing a Joint Committee on Carbon Reduction designed to work through some of the more contentious issues in the legislation and obtain bipartisan support.

The committee will consider whether utilities like PacifiCorp should be shielded from paying for coal emissions until 2030; the fairness of "trade-exposed industries"

being allocated permits at no cost; the difficulty of monitoring carbon offsets; and sufficiently eliminating or reducing pollution emitted in vulnerable neighborhoods. Oregon Gov. Kate Brown, a Democrat, has launched the Carbon Policy Office to continue working toward a cap-and-trade program by 2021.

California

California capped off its 2018 legislative session with the passage of SB100, increasing the state's renewable portfolio standard to 50 percent by 2025 and 60 percent by 2030, and also transitioning the electricity grid to 100 percent carbon-free energy by 2045.

Democratic Gov. Jerry Brown's signing of SB 100 was coupled with the issuance of Executive Order B-55-18, which directed the state to achieve carbon neutrality in all sectors by 2045 and net negative GHG emissions thereafter.

California's original emission reduction goals, reflected in Assembly Bill 32 in 2006, were first stated in a 2005 executive order by then-Gov. Arnold Schwarzenegger, a Republican. AB 32 has now been in place for a dozen years, having survived a panoply of legal challenges.

One cornerstone of the legislation, California's cap-and-trade program, was

statutorily extended last year through 2030, with deepened regulatory targets of reducing emissions 40 percent below 1990 levels by 2030.

Beyond its borders, since Trump announced his intent to withdraw the United States from the Paris Agreement, California has formed partnerships through several coalitions designed to reduce GHG emissions globally and mitigate the impacts of climate change, often involving other subnational jurisdictions that desire to go beyond national targets under the Paris Agreement.

For instance, the Under2 Coalition originated with California and a German state, and has since expanded to 206 jurisdictions that comprise 17 percent of the world's population and 40 percent of the global economy.

The U.S. Climate Alliance started with California, Washington and New York and has now expanded to include 17 U.S. states, representing 40 percent of the U.S. population. The parties in the alliance have committed to achieving the goals of the Paris Agreement and meeting or exceeding the targets that were set in the Clean Power Plan.

In September 2018 California convened the Global Climate Action Summit, where dozens of multinational corporations and subnational jurisdictions announced additional commitments to carbon reductions.

California, Oregon and Washington are also three of 10 states belonging to the We Are Still In movement that formed following Trump's decision to withdraw from the Paris Agreement.

Oregon and Washington, among other states, also joined California in its May 2018 suit against EPA, challenging re-evaluation of federal GHG emissions standards for cars.¹¹

CARBON REGULATIONS AND CARBON REDUCTIONS ON BALANCE

The federal government and states such as California, Oregon and Washington and have largely been moving on opposite tracks on climate change policy since Trump took office. Washington and Oregon have seen ambitious plans for carbon regulation

falter over the last several years, but each may move forward with carbon regulatory schemes in the next year.

California has doubled down on its GHG reduction mandates, and it has led other subnationals and private institutions to join it in coalitions taking action in the face of the federal rollback. If successor legislation to Oregon's Clean Energy Jobs Bill, or Washington's next move post-Initiative 1631, succeed, the West Coast could be home to some of the most aggressive carbon pricing policies in the nation.

With or without formal legislation, the West Coast states are likely to remain engaged in countering federal moves to limit regulation of GHG emissions. Like the gradual decline in cost of less carbon-intensive electricity that made coal-fired power plants uneconomic regardless of federal policy, the momentum of subnationals and Fortune 500 companies in choosing to regulate and reduce carbon emissions may now be too great to reverse the trend toward climate change mitigation and carbon pricing across the U.S. **WJ**

NOTES

¹ EPA Docket EPA-HQ-OAR-2017-0355, number of comments received as of Nov. 16, 2018, see <https://bit.ly/2Av2lyh>

² <https://bit.ly/2x3C1qn>

³ <https://bit.ly/2rwwENU>

⁴ <https://bit.ly/2NJ6Fj1>

⁵ 83 Fed. Reg. 44746 (Aug. 31, 2018), available at <https://bit.ly/2NRZwJM>.

⁶ *West Virginia v. EPA*, No. 15-1363, order issued (D.C. Cir. June 26, 2018).

⁷ 162 FERC ¶ 61,012, Docket Nos. RM18-1-000 and AD18-7-000, Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures (Jan. 8, 2018).

⁸ 162 FERC ¶ 61,012, Docket Nos. RM18-1-000 and AD18-7-000, Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures and concurrence of Commissioner Glick (Jan. 8, 2018).

⁹ <https://bit.ly/2H1fDa1>

¹⁰ *Ass'n of Wash. Bus. v. Wash. State Dep't of Ecology*, No. 16-2-03923-34 (Wash. Super. Ct.), see summary of the ruling from the bench at <https://bit.ly/2UhrU9>

¹¹ See *supra* note 9.



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