

Biden-Trump Contest Has Fate Of Green Regs At Stake

By Juan Carlos Rodriguez

Law360 (October 19, 2020, 7:33 PM EDT) -- The 2020 presidential election will determine whether the country gets four more years of environmental deregulation or a concerted effort to tighten existing pollution controls and be part of global efforts to curb climate change.

A second Trump administration would feature a continued push to deregulate wherever possible, building on a series of rollbacks of his predecessor's environmental rules and defending those rollbacks in court. And under President Donald Trump's leadership, federal agencies would continue to take a conservative approach to interpreting the country's key environmental statutes when crafting any new regulations.

If former Vice President Joe Biden wins, the U.S. Environmental Protection Agency, the White House Council on Environmental Quality and other agencies are expected to attempt to undo as many changes from the last four years as possible and bring a more aggressive approach to regulating pollution. The administration is also expected to try to align U.S. energy policies with global attempts to reduce emissions, like rejoining the Paris Climate Accord.

Climate change has been a central campaign issue for Biden, who touts a clean energy plan that includes significant attention to environmental justice issues and uses the Green New Deal as a starting point, although his plan does not endorse all the components of that effort.

"Using any regulatory tool available both at the Department of Interior and the Environmental Protection Agency, a Biden administration would continue to ratchet up regulations," said Nicolas Loris, who specializes in economic, energy and environmental policy at the Heritage Foundation.

Specifically, that could mean limiting fossil fuel exploration and production on federal lands and tightening emissions standards for pollutants like methane, while stopping short of a ban on fracking.

But Loris said major climate legislation could take a back seat early in the Biden administration if voters are more focused on seeing the government tackle the coronavirus pandemic.

And it's likely a Biden administration would look to get back on track with international agreements such as the Paris Climate Accord, said Matthew Leopold, a partner at Hunton Andrews Kurth LLP who just left his post as the EPA's general counsel.

"I'm sure there would be an effort to rejoin Paris," he said. "But beyond that there will likely be a renewed push to ratify the Kigali amendment to the Montreal Protocol, given [Democratic] administrations' historically greater focus on international environmental issues."

The Kigali amendment gradually reduces emissions from hydrofluorocarbons used in products like refrigerators and fire extinguishers.

And on enforcement, the EPA has for years been criticized for taking on fewer and fewer cases. The downward trend didn't start with the Trump administration, but it hasn't stopped with it either.

The EPA has said it's more interested in making sure polluters are in compliance with standards, so it's chosen to collaborate with businesses when possible to get them on the right track rather than taking a punitive approach.

Tom Lorenzen, a partner at Crowell & Moring LLP, said a Biden administration might reverse course on the U.S. Department of Justice's decision to prohibit its attorneys from using **supplemental environmental projects** in settlement deals with parties that have violated an environmental statute.

"I know that my industry clients like SEPs. It allows them to see the results of their settlements in the communities where they have effects. Almost universally, where they're presented with the option of settling with a SEP, they will do it," he said.

Loris said that if Trump is reelected, there won't be a focus on climate change like what Biden has touted.

EPA Administrator Andrew Wheeler has said several times that if Trump is reelected, he has five thematic priorities for a second term, none of which address climate change: promoting community revitalization, addressing water demands, the Superfund program, giving states more permitting power and creating a "holistic" pesticide program.

The Trump administration has already finalized many of its policy priorities, from rolling back the Clean Power Plan and replacing it with the Affordable Clean Energy rule, and rescinding and replacing a regulatory definition of "waters of the United States," which determines Clean Water Act jurisdiction.

Most of those moves have already been challenged in court.

Their staying power will largely depend on Trump winning again and his legal teams continuing to defend them. If Biden wins, it's reasonable to expect a different litigation strategy, which may involve backing away from some of those ideas, Lorenzen said.

"There are a variety of different areas where rules that are currently in litigation, and rules that have been promulgated but haven't taken effect or rules that were challenged but haven't been briefed and argued, are put on hold while the administration rethinks and potentially reverses course," he said.

On the other hand, if Trump wins, the various policies stand a better chance of success if there are areas where courts are likely to defer to agency expertise in regulatory matters.

Loris said if Trump is reelected, there will be a continued focus on systemic regulatory process across the board, such as rules for calculating costs and benefits of environmental rulemaking and for using science

in rulemakings at the EPA. For example, the agency has proposed a rule that would limit its ability to rely on certain scientific studies that are based on research that isn't publicly available.

Leopold also noted that so far the EPA has only proposed a cost-benefit analysis process for the Clean Air Act. It could propose similar restrictions for other cornerstone environmental laws, like the Clean Water Act, the Federal Insecticide, Fungicide and Rodenticide Act and the Toxic Substances Control Act.

"Issuing additional cost-benefit rules on a statute-by-statute basis will be a big undertaking, and then applying uniform cost benefit analyses to the unique aspects of each statute will be a focus," he said.

If Trump wins, Loris said he expects the EPA, the Department of the Interior and the DOJ's legal efforts to improve.

"I think one of the missed opportunities from the first four years, is there wasn't, in the legal space, a lot of the crossing of the T's and dotting the I's to make sure that these regulations would pass legal muster," he said.

--Additional reporting by Matthew Santoni and Michael Phillis. Editing by Brian Baresch.