

House Flip Could Mean Oversight 'Frenzy' At Enviro Agencies

By Juan Carlos Rodriguez

Law360 (January 24, 2019, 8:52 PM EST) -- Though the partial government shutdown has muted the oversight activity of new Democratic leadership in the House, as soon as the shutdown ends, freshly staffed-up committees that have jurisdiction over environmental matters won't waste any time launching investigatory requests that experts say could distract, if not derail, the Trump administration's deregulatory agenda.

The U.S. Environmental Protection Agency and Department of the Interior have largely avoided the kind of scrutiny that's expected from Democrats since President Donald Trump was inaugurated in 2017, which allowed those and other agencies to roll back Obama-era regulations and craft new policies more in line with the president's view that the regulatory burden on industry needed to be reduced.

But that's about to change and it could have a big impact on the agencies' progress, said Byron Brown, an attorney at Crowell & Moring LLP with experience during similar power shifts both at the EPA and as a staffer on a senate committee. Brown worked for the EPA in 2006, when Democrats engineered a major flip during the presidency of George W. Bush. He remembers that the new Democratic leadership began by sending a number of requests to the agency that it preserve certain documents, set very tight deadlines, and then roasted the agency when the deadlines weren't met.

"That created a certain amount of frenzy within the agency to try to respond quickly, but at the same time those same leadership people are trying to do their day jobs," Brown said. "It does create a tension within the agency between the policy and decision-makers who are trying to execute the president's agenda and also trying to be responsive to the congressional oversight."

In the two years of Trump's presidency, the EPA has proposed replacing the Clean Power Plan, freezing Obama-era fuel economy and greenhouse gas emissions standards for vehicles and replacing an Obama-era rule designating which waterways in the country are subject to Clean Water Act jurisdiction.

The DOI has finalized a plan to eliminate most of an Obama-era rule aimed at reducing the amount of methane that oil and gas companies release on federal and Native American lands and proposed a set of rules that would roll back a nearly 40-year-old rule that extends the same protections afforded to species listed as endangered as to those listed as threatened, which denotes a less imperiled status.

The Democrats now in charge of the House have a stage and spotlight to shine on such efforts, and agencies will have to redirect staff that previously had been free to concentrate on whatever policy-related matter was in front of them, said Brenda Mallory, director of the Conservation Litigation Project and former EPA principal deputy general counsel and White House Council on Environmental Quality general counsel under President Barack Obama.

“Normally when you have a change that is going to result in, or is it expected to result in, increased congressional oversight, then people start to look at the infrastructure that they have in place to deal with it,” Mallory said. “I think this administration would start with some training of the senior leaders and political appointees who are kind of new to the government on the whole oversight process.”

Agencies could get help from the White House, Mallory said, noting that past administrations have used the regular meetings that they have with their political teams as an opportunity to spotlight oversight activity that’s going on across the government. That opens lines of communication across the federal government and also lets people get a sense of what they can expect and what’s worked well for different agencies in dealing with sensitive requests, she said.

Brown said although Congress can’t directly intervene in a rulemaking process, it can help shape the final rule and the public narrative surrounding it.

“The oversight can also impact how the agency defends the rule in court and in the court of public opinion, because a lot of times what the congressional investigators will uncover are the internal agency disputes about the merits of certain policy approaches or the legality or legal defense ability of a certain regulatory approach,” he said. “That could do real damage to the agency’s ability to defend the action when it gets litigated down the road.”

Squabbling between agencies can be a gift for rule opponents, he said, pointing to disputes between the U.S. Army Corps of Engineers and the EPA about the Clean Water Act jurisdictional rule that became public after a congressional investigation. The disputes helped Republicans push their argument that the rule went too far.

Kevin Minoli, a partner at Alston & Bird LLP and a longtime EPA attorney who served the agency in various capacities from 2000 to 2018, including as acting general counsel for the Trump administration, said although the House committees may be enthusiastic about their new oversight powers, they should temper their expectations as they relate to policy matters that aren’t final.

“The executive branch’s position has historically been that Congress doesn’t get oversight on ongoing projects, including ongoing rulemaking,” Minoli said. “They can get oversight after the agency has completed the work that it’s going to do on a particular project or rule, but it’s not supposed to interfere while they’re in the middle of it.”

But he did acknowledge that Congress does still have the right to access material that an agency is generating, whether by email or in other ways.

The really unusual factor in this transition from Republican to Democratic majority in the House is the shutdown, Minoli said. The longer the shutdown goes, the less satisfaction Congress will get because it will take the agencies a while to get back up and running. But he said agencies also will find themselves way behind on regulatory and litigation schedules, which, coupled with increased oversight, could hamper this administration's ability to follow through on some of its remaining priorities.

"None of this happens overnight," Minoli said.

--Editing by Pamela Wilkinson and Kelly Duncan.