

Attorneys Expect Enviro Policy Whiplash With Biden Win

By Juan Carlos Rodriguez

Law360 (November 8, 2020, 5:21 PM EST) -- President-elect Joe Biden is expected to bring swift, sweeping changes to environmental policy when he takes control of the White House, from ensuring the U.S. is an active member of the Paris Climate Accord to reversing course on the Trump administration's deregulatory efforts.

Biden won the presidential race Saturday after his projected victories in Pennsylvania, and while President Donald Trump is continuing to fight the results in court, the former vice president said he was moving forward with his transition plans.

Biden made clear during his campaign that climate change will be a priority for his first term in office. And even if the Democrats end up not controlling the Senate, his administration will try to hit the ground running and get right to work at the U.S. Environmental Protection Agency, U.S. Department of the Interior and the White House Council on Environmental Quality, where over the past four years Trump officials have made it their mission to roll back and loosen regulations on power plant and vehicle emissions and Clean Water Act jurisdiction, among many other things.

The Biden administration's work will begin with the process of freezing and rolling back Trump-era rules and policies that are themselves rollbacks of Obama-era regulations, according to Biden's "Plan for a Clean Energy Revolution."

At the top of the list, as it was for the Trump administration, are rules governing greenhouse gas emissions from existing power plants and the extent of the federal government's jurisdiction under the Clean Water Act.

Starting with the power plant issue, Amanda Shafer Berman, counsel at Crowell & Moring LLP, said rather than reverting to the Obama administration's Clean Power Plan — which the U.S. Supreme Court had blocked from taking effect while it was litigated — Biden may choose to create a new rule that "looks like the Clean Power Plan in structure," but is more aggressive in emission reduction goals.

Berman said one new addition to a Biden administration rule could be to add some demand-side elements, which weren't present in the Clean Power Plan.

"That would basically allow power plants to meet emissions reduction standards set by the state, which could base a standard on the idea that utilities can encourage customers to do things that reduce demand," she said, mentioning installing more energy efficient appliances or generally reducing electricity usage. "It would probably be considered a little legally suspect, but it's possible."

And judging from the D.C. Circuit's recent oral arguments regarding challenges to the Trump administration's Affordable Clean Energy rule, which replaced the Clean Power Plan, a Biden EPA would probably be likely to reintroduce the idea of allowing states to shift power generation to more renewable sources.

There is a lot of litigation besides the ACE rule currently pending in federal courts across the country. Environmental groups have challenged the Trump administration's Safer Affordable Fuel-Efficient Vehicles Rule, which revoked California's Clean Air Act waiver that allowed it to set its own vehicle GHG emissions standards: the Navigable Waters Protection Rule, which narrowed the scope of the executive branch's power under the Clean Water Act from a broader rule passed by the Obama administration; and the rollback of methane rules issued by the EPA and BLM during the Obama era.

U.S. Department of Justice lawyers are likely to immediately begin asking courts to pause those cases while the relevant agencies review the rules at issue and possibly revise or rescind them.

"I think that the Biden team is going to have a top-notch group of lawyers looking at all of these issues, trying to figure out how to make progress," Beth A. Viola, senior policy adviser at Holland & Knight LLP, said. "And I think some of it's going to mean having to try to find some settlement on some of the legal issues that are pending and figure out whether they're going to roll back things or promulgate new rules."

But the Biden administration's new legal team is going to have to be careful about its legal strategies considering conservatives' new 6-3 majority on the Supreme Court, Misha Tseytlin, a partner at Troutman Pepper Hamilton Sanders LLP, said.

"There are some areas in which folks have speculated where the replacement of Justice [Ruth Bader] Ginsburg with Justice [Amy Coney] Barrett could have a very meaningful difference, because the chief justice or in some cases, Justice [Neil] Gorsuch, were aligning more with the traditional left of center of the court," he said.

Tseytlin said the Biden administration is probably hoping to avoid the Trump administration's problem of taking a long time to install key political officials atop agencies.

"With the Trump administration, the ramp up on personnel was historically slow, and I would expect the Biden administration to not be as slow," he said.

And along those lines, Viola said she would not be surprised if Biden appointed some kind of "climate czar" to oversee the executive branch's efforts in that area.

Aside from the regulatory and litigation fronts, there is the question of whether Congress could address some key issues. While it's not likely to be known which party will control the Senate until January following two Georgia run-offs, a large-scale infrastructure effort is widely considered to be the mostly likely type of legislation to gather the necessary bipartisan support. And with Biden at the helm in the White House, such a bill will look very different than it would have under Donald Trump.

"A Biden administration will probably be more protective of the current permitting and regulatory process," he said. "They're not going to be as interested in building pipelines. They're going to be focused on implementing more of a green agenda initiatives — the process of electrification, and things like that."

Viola agreed, saying the Biden administration would see such legislation as an opportunity not only to address infrastructure needs, but also to create jobs that allow for the country to significantly reduce GHG emissions. The White House would likely look again at the CEQ's National Environmental Policy Act implementing regulations that were revised under Trump as part of that, and probably will anyway.

"The Biden administration will want to see some kind of big, robust stimulus package that puts money into building green infrastructure," Viola said. "And one big difference from a Biden administration is it will also be done through a lens of environmental justice and equity. It will look at making sure that underserved communities also receive a significant amount of those monies if appropriated by Congress."

--Editing by Ronald Pechtimaldjian.