

Biden's Green Overhaul Will Have To Clear Trump's Judiciary

By Juan Carlos Rodriguez

Law360 (March 18, 2021, 6:55 PM EDT) -- As the pieces start to fall into place for the Biden administration's plans to revamp the country's environmental regulations, its new leaders will be moving ahead with a cautious eye toward the more conservative judiciary formed in the last administration.

Former President Donald Trump made a huge impact on the federal courts during his term, picking three new U.S. Supreme Court justices and many more trial and appellate judges. With those new judges in mind, the U.S. Environmental Protection Agency, U.S. Department of the Interior, the Council on Environmental Quality and others are likely to adopt a belt-and-suspenders approach to rulemaking they know will be challenged in court by states, interest groups and industries concerned about President Joe Biden's ambitious climate and environmental justice agenda.

The Supreme Court in recent years has shown an interest in environmental cases, so agencies will have to keep that in mind as they create rules, Tom Lorenzen, a partner at Crowell & Moring LLP, said.

"The Biden administration may offer up some aggressive legal reasons for why they can do a certain rule a certain way, but they'll have backup theories as well," Lorenzen said. "And they'll have, sort of, backup rules — they'll make parts of them severable."

Of particular interest will be if and how the EPA approaches carbon dioxide regulations for existing power plants, for example. The past two presidential administrations have tried and failed to push through a rule, with Obama's Clean Power Plan and Trump's Affordable Clean Energy rule both unable to clear the courts.

If the EPA were to attempt a new power plant rule, it may settle on a mix of components that don't all depend on each other, he said. The new administration may want to resurrect the Obama administration's approach that endorsed states shifting power generation from fossil fuel to cleaner sources and emissions trading programs, which the Trump administration said was an overreach.

The D.C. Circuit recently rejected the Trump administration's view, but that doesn't mean the Supreme Court would follow suit, he said.

"If they do try something like a generation-shifting regime, I wouldn't be surprised to see them also create other parts to the rule, for instance, an expansion of the ... heat rate improvements component,"

Lorenzen said. "So that even if the Supreme Court says you can't do generation shifting, they've got another component of rule that satisfies that Supreme Court's conservative leanings."

In general, legal challenges to regulations tend to fall into two broad categories, Robert Glicksman, a professor at George Washington University Law School, said. First, whether the agency has statutory authority to adopt a regulation, and second, whether the agency is providing an adequate explanation for the rule, including factual explanation of the policy justification for exercising its statutory authority the way it did.

He said he expects to see challenges to Biden administration actions on both grounds, with the conservative justices in the majority paying particular attention to whether the agency that adopted the rule exceeded the scope of the authority delegated to it by its originating statute.

"Unless the statute can fairly be interpreted to allow the agency to do what it's trying to do, you're going to, I think, get some opposition from some of the justices on the Supreme Court and in the lower courts as well," Glicksman said. "The justices I'm speaking about seem to have an aversion to trying anything new ... that, if it hasn't done before, it can't be a good idea and it can't be something that Congress envisioned."

That could pose a problem to the Biden administration if it attempts to break new ground to accomplish its climate and other goals, he said. But he did note that some Trump deregulatory actions suffered in court, even before conservative judges, because they failed to adequately justify their decisions.

Some newer conservative judges have shown skepticism when reviewing agency actions, Sambhav Sankar, senior vice president of programs at Earthjustice, said. Sankar said that those judges have relied on the Constitution's nondelegation doctrine — which prohibits Congress from giving its legislative authority to agencies — questioned the deference traditionally afforded to agencies under the high court's 1984 ruling in *Chevron v. Natural Resources Defense Council*, and relied on textualism in those rulings.

And he agreed with Glicksman that federal agencies will have to make every effort to ensure their administrative record and legal arguments are thorough and well-considered before finalizing rules. Sankar said that the Trump administration got into trouble with several of its rules, like the power plant rule and others that attempted to delay or roll back Obama-era rules, because the process wasn't as airtight as it should have been.

"If you want to make a really good rule that will be ironclad in front of hostile courts, you've really got to take the time, you've got to do a lot of process, you've got to have all the science, you've got to refute every industry argument carefully and in detail, and that takes time, energy and expertise," Sankar said.

Glicksman said lower courts are going to be on the minds of agencies as they craft rules, especially since challenges may come from both environmental and industry groups, which tend to file lawsuits in jurisdictions thought to be more sympathetic to each of them.

The court system is at the "high water mark" of Trump's influence right now, he said. That will change over time.

But environmental and other public health groups that may be seeking to make rules more stringent will still aim for the courts in California or elsewhere in the Ninth Circuit, while industry challenges are more

likely to end up in Texas or other states that feed into the Fifth Circuit, for example.

"I think that pattern is likely to continue," he said.

--Editing by Breda Lund.

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