

Environmental Moves Biden Could Make Day 1

By Michael Phillis

Law360 (November 18, 2020, 1:26 PM EST) -- The incoming administration will be able to leverage its bureaucratic expertise to make an immediate impact on environmental policy when President-elect Joe Biden takes office, by stepping up enforcement and reversing the Trump administration's prioritization of oil and gas extraction to instead emphasize fighting climate change.

Major priorities like clamping down on carbon emissions at existing power plants will take longer because those efforts must follow the formal rulemaking process. And some of Biden's ambitious climate plans will require the cooperation of a Congress whose control remains up in the air, pending the results of two Georgia Senate runoffs.

President Donald J. Trump continues to dispute the election results, both publicly and in a series of court challenges around the country. Legal experts have said it's unlikely the challenges will overturn the results.

By leveraging the transition team's understanding of the federal bureaucracy, Biden's team is positioned to make some quick moves to turn away from the Trump administration's deregulatory agenda and step up enforcement while gearing up for bigger policy shifts.

Among the earliest expected changes will be Biden rejoining the Paris agreement that outgoing President Donald J. Trump formally withdrew from on Nov. 4. Environmental groups see that as a vital signal that policy and regulation will be based on science and will establish that the federal government prioritizes the climate.

"I think there will be an opportunity, and I think we will see it immediately, to set an agenda grounded in science, grounded in justice, that focuses on protecting all peoples' health, our planet, economic recovery, and I think we'll see that vision outlined at the executive level immediately," Jill Tauber, the climate & energy vice president of litigation at Earthjustice, told Law360.

And the Biden administration is expected to be armed on Day One with legal justifications for its actions, Kelly Johnson, a partner at Holland & Hart LLP, said. That's a key element that could help the new administration avoid the pitfalls that have hampered some of the Trump administration's regulatory changes: rules that were issued too quickly being overturned by the courts.

Biden will come in with people who understand the bureaucracy, how to work inside agencies and how to legally justify their actions, she said.

"That was never what the Trump administration wanted to do. The Trump administration has been openly antagonistic with the bureaucracy," Johnson told Law360.

The procedural mechanisms the Trump administration used to accomplish its policy goals will be a key factor in how the Biden administration attempts to unwind recent changes. Trump policies enacted through memos instead of the more cumbersome and formal notice and comment rulemaking process will make easier targets to dismantle.

For example, the U.S. Department of Justice's shift on the use of environmental improvement projects in enforcement settlements under Trump was implemented in part in a March memo by the DOJ's environmental division head, Jeffrey Bossert Clark. It drew blowback from environmental groups that said the DOJ overturned decades of policy when it barred settlement provisions that require businesses to take on environmental projects that provide a public benefit, like helping a community that's home to a factory or facility that has violated environmental laws.

The incoming Biden administration could immediately reverse course on that enforcement mechanism through a new memorandum, according to John McGahren, a partner at Morgan Lewis & Bockius LLP who also serves as deputy chair of the firm's global environmental practice.

"That is a tool that has long been used in the environmental field to settle enforcement actions and is a mechanism that allows the agency to address things like environmental justice," McGahren told Law360.

Regulated industry should also be prepared for Biden to shift course on the EPA's overall enforcement philosophy. Memos issued by Susan Bodine, EPA's assistant administrator for the Office of Enforcement and Compliance Assurance, outlined plans to give EPA regional offices and states a leading role in that area.

In 2018, the U.S. Environmental Protection Agency said regulated entities could expect the agency to focus on compliance programs rather than harsher enforcement actions. The Trump administration backed away from Obama-era policies it said were too strict, and an EPA-watchdog report earlier this year said enforcement activity is significantly down over a recent 10-year period.

But a Biden administration could quickly steer environmental enforcement policy in a different direction, overturning the states' lead role in enforcement efforts and concentrating power in Washington, said Francis X. Lyons, a partner at Schiff Hardin LLP.

"In terms of increasing enforcement at the federal level, the government can do that any time it wishes to without even formally withdrawing that memo that said states are the presumptive lead agency," Lyons told Law360. "I think it would be neater and cleaner to formally withdraw that policy in writing in order to step up enforcement. But they could simply step up enforcement at EPA starting on Day One so long as the political will is there to do so."

That might start with information gathering and the "reinvigoration" of a pipeline of evidence that would lead to more federal enforcement actions down the road, Lyons said.

Another area where Biden could move quickly is in the designation of national monuments — areas where oil and gas and other extraction activities are often curtailed. Early in the Trump administration, the president shrunk the borders of the Bears Ears and Grand Staircase-Escalante national monuments,

prompting lawsuits from Native American tribes and environmental groups that are still playing out in D.C. federal district court.

The tribal and environmental groups continue to assert that Trump didn't have the authority to downsize the monuments. When he takes office, Biden could reverse the measure quickly, according to Tauber of Earthjustice.

"A Biden administration could immediately reverse that decision, [it] could re-designate all of Bears Ears," Tauber said. "We are hopeful that they will take swift action to do that."

Another Day One action promised by the Biden team is to stop issuing new permits for oil and gas activity on public lands and waters. That would be a stark change from the Trump administration's push for more oil and gas leasing and permitting on public lands.

"They could hit a pause button on new leases and say we aren't going to do any more new leases, we are going to study this," Tauber said. "What comes after that will take more analysis."

And that change in public lands energy policy is just one piece of the new administration's promise to take significant action to shift away from Trump's fossil fuel-focused term toward fighting climate change.

Biden's promise to immediately rejoin the Paris agreement is a vital move for "restoring our role in the global community on climate," Tauber of Earthjustice said. That action will make it clear to the world the United States wants to take the science of the threat seriously, not ignore the problem by pushing conventional energy sources, she said.

Biden is expected to set priorities for federal agencies that emphasize the importance of climate change and bring the "full force of the federal government" to tackle warming, said Brenda Mallory, director of regulatory policy at the Southern Environmental Law Center.

That will "cause the federal agencies to then look at their own statutory authorities and their mandate and how they can use those authorities in a way that will promote climate change and be consistent with the law as it stands," she said.

Climate change could impact the government's legal tactics and how resources are expended to tackle rollbacks of Trump administration regulations.

"One way to think about those choices is what is going to be the most impactful about actually meeting the goals of tackling climate change," Mallory said.

Biden also promised to make other concrete changes, such as ensuring that government buildings are more efficient, according to his campaign website. Those efforts can change the priorities of the government so that it tries to "operate in a sustainable way," Mallory said.

--Additional reporting by Juan Carlos Rodriguez and Keith Goldberg. Editing by Rebecca Flanagan.