What Now? U.S. Environmental Protection Agency Post-Election Outlook

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Seyfarth Synopsis: With a dramatic change from a progressive democratic to a conservative republican administration, we anticipate that EPA is not only likely to pivot away from an enforcement heavy to a more business friendly agenda, but is also likely to abandon many of the previous administration’s landmark climate regulations and take a more measured approach to climate change.

The U.S. presidential election outcome has left many with questions about what to expect with the new administration and a Republican-controlled Congress. However one thing is certain: we will experience a 180 degree shift in current environmental policy when Donald Trump takes office in January 2017. Below is a synopsis of the key environmental changes we expect to see under the Trump administration, although, of course, nothing is certain given the overall lack of information regarding Mr. Trump’s policy proposals and no background as to how he will act as an elected official.

Regulatory Reform

Mr. Trump has stated that he will likely issue a temporary moratorium on all new environmental regulation, and plans to strike regulations which his administration deems “unnecessary” and that “kill jobs and bloat government.” Specific rules Mr. Trump has singled out to “eliminate” include: the Interior Department’s proposed Stream Protection Rule to safeguard communities from coal mining operations; the EPA and Army Corps of Engineers’ Clean Water Rule redefining water bodies subject to federal jurisdiction and protection; and EPA’s Clean Power Plan which requires states to develop strategies to reduce carbon dioxide emissions from power plants.

In addition, currently proposed EPA rules will likely not be made final, and environmental regulations facing challenges in the courts could be weakly defended by the Justice Department at the direction of the new administration. It is also possible any regulations that make it to the U.S. Supreme Court will be struck down by a conservative Court. Rescinding regulations that do not fall in line with the new administration is a possibility, but one that requires another EPA rulemaking process that may face challenges by environmental groups and states in support of the regulations.

Energy

Mr. Trump has indicated he has plans to revamp U.S. energy policies to make the U.S. a net energy exporter by opening onshore and offshore leasing on federal lands and waters to encourage production of energy resources. He also has hinted at plans to review all “anti-coal regulations,” rescind the coal mining lease moratorium on new federal coal leases announced in January 2016, and open up more public land for fossil fuel extraction. Eliminating the proposed Stream Protection Rule
will remove regulatory requirements for the coal mining industry to consider the effects of their operations on groundwater, surface water, and endangered species, making it cheaper and easier to mine coal. At the same time, the new administration is likely to focus on promoting policies and regulations to develop the infrastructure necessary for the export of fossil fuels.

While the fossil fuel industries may receive less scrutiny under environmental regulations under the Trump administration, the new administration may not change the renewable energy sector significantly because individual states have made significant progress in this area. For example, many states now require utilities to draw a percentage of their generation capacity from renewable energy sources and have implemented policies and set future goals to increase the use of renewable sources. Corporations are increasingly procuring their own power, from rooftop solar energy to utility-scale wind farms, all of which are contributing energy to the electric grid. Federal regulation that may interfere with states’ progress in the renewable energy sector is unlikely given Mr. Trump’s disfavor for regulations and the Republican position against limiting states’ rights.

Climate Change

Under the new administration, and with climate change skeptic Myron Ebell on the shortlist to become EPA Administrator, regulations for controlling greenhouse-gas emissions face a high likelihood of being scrapped, including the Clean Power Plan, mentioned above, and the Obama administration’s Climate Action Plan. It is also highly likely the U.S. will back out of the Paris Agreement, where more than 190 countries agreed to reduce their carbon dioxide emissions and limit global warming to below two degrees Celsius. The agreement calls for “appropriate financial flows, a new technology framework and an enhanced capacity building framework” to support action by developing and vulnerable countries. While formally withdrawing from the agreement may prove difficult due to a time-specific exit clause barring exit for three years from the date of ratification, followed by a one-year waiting period upon a request to withdraw, the new administration could opt to ignore the agreement and refuse to provide financial aid. Without the participation of the U.S., the world’s second-largest greenhouse gas polluter, the goal to limit global warming may be unattainable.

Supreme Court and Agency Decision-making

With a Republican president and Republican-controlled Congress, a conservative Justice will almost certainly be appointed to the U.S. Supreme Court and as a result, we expect the Court to be less deferential to agency decision-making. We had previously blogged about the U.S. Supreme Court’s decision in Perez v. Mortgage Bankers Association and indicated that conservative leaning Supreme Court justices have called into question whether agency interpretations of their own regulations should be given any judicial deference. The appointment of a conservative Justice could tip the scale in favor of curbing the level of deference given to agency interpretations, thereby prompting agencies like the EPA to undertake the formal rulemaking process more frequently to amend their interpretations of existing rules.

EPA’s National Enforcement Initiatives

The EPA selects National Enforcement Initiatives (NEIs) every three years, to prioritize its resources on the most significant environmental risks that can be mitigated by government action, and those issues where noncompliance is a significant contributing factor. The NEIs for fiscal years 2017 - 2019 went into effect on October 1, 2016, and include: a focus on reducing air pollution from the largest sources and reducing hazardous air pollutants; ensuring energy extraction activities comply with environmental laws; reducing pollution from mineral processing operations and reducing risks of accidental releases at industrial and chemical facilities; and protection the nation’s waters from industrial pollutants, raw sewage, contaminated stormwater, and animal waste.

These enforcement priorities will very likely shift under the new administration which has the ability to redirect resources from one priority to another. Given Mr. Trump’s focus on revamping the U.S. coal industry, he is likely to de-emphasize the enforcement of environmental laws in the energy extraction sector and instead opt for a business-friendly approach. The EPA as a whole may begin to approach enforcement more reactively when incidents prompt intervention, rather than proactively.
to prevent environmental disasters. Enforcement may be replaced by increased agency initiatives to promote compliance assistance and more heavily consider the costs of environmental compliance on the regulated community. Decreased enforcement activity could in turn lead to citizen suits to force the EPA to enforce its regulations.

**Conclusion**

Navigating environmental policy under the new administration will likely involve paying closer attention to state regulatory regimes that will move to the forefront in instances of reduced federal regulation. EPA could shift a large portion of environmental regulation and enforcement to the states, subjecting multi-state companies to different state-specific regulatory requirements. We will continue to monitor the changes sure to take place for environmental compliance and enforcement under the Trump administration and will provide more clarity as the situation unfolds. However, keep in mind that the EPA is like a cargo ship out on the ocean; it takes time to change course.

For more information on this or any related topic please contact the authors, your Seyfarth attorney, or any member of the Seyfarth [Environmental Compliance, Enforcement & Permitting Team](mailto:).

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