

## What To Expect From Trump's Environmental Policies

By Andrew Wheeler, FaegreBD Consulting

*Law360, New York (November 15, 2016, 12:26 PM EST)* -- Every four or eight years the United States goes through a presidential transition and with this year's results, which bring in a new administration and new Congress, the change in government leadership will greatly impact environmental policy. We anticipate significant changes, challenges and opportunities for environmental policy as a result.

### Climate Policy

No single environmental issue will be impacted by the change in administration more than climate policy. President Barack Obama's Clean Power Plan and the Paris accord under the United Nations Climate Convention are the highest profile and most likely targeted policies. The CPP is currently under review by the D.C. Circuit, but regardless of the legal outcome of the case the regulation is now destined to be revoked or completely rewritten. President-elect Donald Trump campaigned against both the CPP and the Paris accord throughout his campaign, providing the necessary mandate for action.

Regarding the CPP, he has several legal options. If the D.C. Circuit remands the CPP back to the U.S. Environmental Protection Agency, in whole or part, he can use that opportunity to significantly change the regulation. He can also immediately order the revocation of the rule through the regular notice and comment rulemaking procedures before the circuit court issues its decision. Whatever his course of action, it's important to note that he has the backing of 29 states, which will bolster the legal justification for a revocation.

The Paris accord will be easier to overturn. While the rest of the world views the accord as a treaty, the Obama administration went to great lengths (and questionable legal authority) to call the accord a "nonbinding agreement" and it was implemented by Obama by executive order. It can therefore be reversed by executive order. President-elect Trump could also submit the accord to the Senate for ratification where it will likely meet the same fate as the Kyoto Treaty: to die in limbo. The reversal of the Paris accord also strengthens President-elect Trump's hand on the CPP since the Obama administration has used the accord to justify the carbon dioxide reductions in the CPP. While the legal instruments within the accord require a four-year process for individual country withdrawal, there are no binding legal penalties for inaction and the withdrawal repercussions will be diplomatic, not legal.



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Along with the CPP and Paris accord, the Trump administration will likely pull back from the new methane requirements by the EPA, the Social Cost of Carbon policy and climate reviews now embedded into the National Environmental Policy Act process, and the rest of the priorities in Obama's climate action plan.

### **Water Policy**

The next most endangered Obama regulation would be the Waters of the U.S. (WOTUS), which is currently stayed by the Sixth Circuit and sets out the regulatory process of defining and permitting wetlands through the EPA and Army Corps of Engineers. Recent revelations regarding the disconnect and difference of opinions between the EPA and the Army Corps of Engineers on the drafting of the regulation could help justify the withdrawal of the regulation, or the Trump administration could simply decline to defend the regulation and formally revoke the rule. Wetlands policy has for years been framed by regulatory attempts by administrations and U.S. Supreme Court decisions. Absent a statutory definition to clarify navigable waters, this issue will continue to be redefined by rulemaking attempts and judicial decisions.

In addition to wetlands policy, water infrastructure will remain a priority for both Congress and the new administration. Congress is attempting to deal with the fallout from the Flint, Michigan, lead issue through language incorporated into the Water Resources Development Act slated for action during the lame duck session. If the legislation fails to move over the next two months, expect action on the popular bipartisan issue early next year. Additionally, President-elect Trump ran on investing new resources in infrastructure (\$750 billion over 10 years). This new infrastructure investment includes additional funding for drinking water and wastewater facilities.

### **Chemical Policy**

Earlier this year, the Frank R. Lautenberg Chemical Safety for the 21st Century Act passed Congress with broad bipartisan support and was signed into law by Obama. This was the first major rewrite of the Toxic Substances Control Act since the law was originally passed in the 1970s. The next two to three years will be pivotal as the EPA makes major implementation decisions regarding the new law. The EPA is currently working on rulemaking efforts to establish the EPA's process and criteria for identifying high-priority chemicals for risk evaluation and low-priority chemicals, as well as the risk evaluation process rule. The new Trump administration will play a large role in crafting how this new law is interpreted.

Additionally, changes in the Senate Environment and Public Works Committee place Sen. John Barrasso, R-Wyo., as chairman and Sen. Tom Carper, D-Del., as the highest-ranking Democrat. Both were early supporters of the chemical law rewrite, and Carper replaces retiring Sen. Barbara Boxer, D-Calif., who opposed the law right up until its final passage. Sens. Barrasso and Carper are expected to closely follow the implementation of the new law by the EPA through the committee oversight process.

### **Congressional Changes**

In addition to the changes in the Senate Environment & Public Works Committee noted above, the House Energy and Commerce Committee will also have new Republican leadership; either Congressman John Shimkus, R-Ill., or Greg Walden, R-Ore., is expected to assume the committee chairmanship in House elections later this month. The important House Energy and Power Subcommittee is also expected to have a new chairman next year, with either interim Chair Pete Olson, R-Texas, to retain the

position since he assumed the duties from early retiring Chairman Ed Whitfield, R-Ky., or a new subcommittee chair to be selected later this year.

While much of the Trump administration's environmental policies will be framed by his political appointees, it is important to remember that he did not shy away from taking positions on the major environmental issues during the campaign and his appointees will be expected to follow his direction.

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