



DAILY NEWS

Trump May Take Softer Approach On GHGs Than Feared, Industry Lawyers Say

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Several industry attorneys who have long worked on Clean Air Act and climate issues expect that President-elect Donald Trump will scale back campaign vows to dismantle EPA greenhouse gas rules and will end up taking a softer approach than anticipated.

The attorneys' analyses come as many in the energy and environment world are seeking hints about how the president-elect will ultimately approach climate policy -- namely whether the incoming administration will take [a pragmatic or an aggressive stance](#) on rolling back GHG regulations.

During the campaign, Trump made a number of hard-line promises aimed to aggressively curtail EPA's ability to regulate GHGs, including pledges to dismantle the entire agency, revoke its signature power plant GHG rule and undo the global Paris climate agreement. As a signal of this intent, shortly before the election, Trump named noted climate denier Myron Ebell to head his EPA transition team.

But just last week, Trump backed away from his vow to undo the Paris Agreement, telling the *New York Times* Nov. 22 that he has "[an open mind to it](#)" after publicly acknowledging for the first time that, "I think there is some connectivity" between human activity and climate change. He has previously called global warming a "hoax" perpetrated by the Chinese.

However, over the weekend, Trump's incoming chief of staff Reince Priebus sought to walk back Trump's shift, telling *Fox News* on Nov. 27 that Trump will "have an open mind about it but he has his default position, which most of it is a bunch of bunk."

Trump's original remarks came one day after EPA Administrator Gina McCarthy offered a strong defense of the agency's climate work and predicted that the United States would [be left behind](#) the rest of the world if Trump backs away from the Paris Agreement and EPA's power plant existing source performance standards (ESPS).

At the same time, automakers are signaling they would prefer to continue with current light-duty vehicle GHG rules in place through model year 2025 in exchange for [certainty on trade](#), and industry groups are downplaying the likelihood that a new EPA GHG rule for medium- and heavy-duty trucks will face [a congressional rollback](#).

Amid Trump's recent movement on the issue, three industry attorneys are suggesting the president-elect will ultimately take a more pragmatic view regarding environmental policy.

Though they all expect the incoming administration to deliver on the promise to roll back the ESPS and dramatically slow the pace of climate regulation, they are downplaying the possibility a Trump administration would pursue more aggressive stances, such as revoking EPA's endangerment finding giving it the legal requirement to regulate GHGs, in part due to public opinion and in part due because they expect him to take a more nuanced view of the issue once in office.

For example, Richard Stoll, a long-time Clean Air Act attorney, recalls his time working for EPA in 1980 when then-incoming President Ronald Reagan was elected, remembering how distressed his coworkers were.

"Things really did look bad for a while. Remember Anne Gorsuch Burford, Rita Lavelle, James Watt and many others with similar agendas?" he writes in [a Nov. 18 blog post](#) for the American College of Environmental Lawyers, remembering early Reagan-era EPA leaders, some of whom ended up in prison. But Stoll then notes "the intense and angry public reaction when it appeared that core environmental protections for clean air and clean water were in jeopardy," noting those leaders were forced out of office.

“With that history as a guide, I don't think the Trump administration . . . will try to make any significant changes to the vast bulk of protective air, water, waste, etc. rules now on the books,” Stoll adds.

And despite Trump's promise that he will pass a rule in his first 100 days requiring that for every new regulation, two old regulations be removed, Stoll adds, “I think that after four years of a Trump administration, fewer than 1 percent [of EPA rules] will be deleted or amended.”

Endangerment Finding

Stoll anticipates negative public reaction if the Trump EPA were to seek to reverse EPA's 2009 finding that GHGs endanger public health and welfare. As long as the endangerment finding remains, then some level of GHG regulation is required under the Clean Air Act.

He calls such a reversal of the finding “extremely unwise” and one that would be extremely vulnerable in the courts because it would require a building of a “massive new factual record” that would counter growing scientific consensus that is supported even by conservative judges.

Trump's earlier pledge to review and maybe scrap the finding already prompted many to warn of the [significant legal risks such a step faces](#).

And Stoll echoes such legal risks in his blog, noting that having EPA deny there is any climate problem would “more easily foment the kind of intense and angry public reaction that the early Reagan EPA suffered.”

A second industry source, speaking to *InsideEPA/climate* on background, also does not expect a broad effort to repeal EPA GHG authority, either through a reversal of the endangerment finding or congressional action to undo *Massachusetts v. EPA* -- the 2007 Supreme Court ruling that held GHGs are a pollutant under the air law.

Republican lawmakers [thus far have hedged](#) on whether they will target EPA's underlying GHG authority, instead focusing largely on the [rollback](#) of specific regulations like the agency's power plant rules.

“That table has been set,” the industry source says of the endangerment finding and EPA's GHG authority. “How you address that situation going forward, I think, is interesting. In the near term, a transition can put that on hold, but in the longer term they have to have answers.”

And more broadly, the industry attorneys expect a shift in the way Trump views climate policy once he takes office, predicting the president-elect will soften his stance from his campaign rhetoric.

For example, industry attorney Bob Wyman says he expects Trump to approach environmental and energy issues through a lens of trade and U.S. competitiveness to a greater degree than past administrations, and he thinks that could be a beneficial thing.

Wyman runs the National Climate Coalition -- a group of businesses including 3M, the AES Corporation, Boeing, Calpine Corp., LS Power Group, NRG Energy and Southern California Edison -- that formed to influence EPA climate policy. He tells *InsideEPA/climate* that the coalition is still working on a position in response to Trump's victory, but shares some personal thoughts on the incoming administration.

Overall, Wyman says no one knows exactly what the incoming president will do on domestic or international climate policy, but he notes Trump's focus on trade and competitiveness, amidst a backdrop where it has become clear that EPA holds the nation's GHG regulatory authority and has effectively displaced a judicial role by exercising it.

Wyman expects the Trump administration to weigh the implications “of an executive branch backing off its use of Clean Air Act authority,” with one potential consequence being to move climate policy from the executive to judicial branch. He notes the incoming administration would likely not find this scenario to be preferable, “nor would, I think, the business interests he is focusing on.

“And when viewed in that context I would expect Trump to shift or pivot from an anti-EPA or anti-GHG regulatory thrust to more of a shaping and crafting role, both to preserve the executive branch control over the governance of that issue but also to ensure that cost is minimized,” Wyman says.

This also goes back to Trump's guiding principle to ensure that the United States is more competitive in the world, and it could mean more streamlined GHG rules but also possibly market-based mechanisms that are more nationally uniform and lower cost for the power sector, according to Wyman.

ESPS Rollback

Despite their expectations that Trump will ultimately soften his anti-GHG regulatory push, the industry attorneys do anticipate the president-elect will move quickly to repeal the Obama EPA's signature power plant rule.

For example, Stoll believes there is a good chance the Trump EPA will not wait for a final court ruling on the fate of the rule “but rather will soon undertake a rulemaking to revoke at least the more far-reaching and controversial elements” of the ESPS, which requires existing power plants to curb GHG emissions by about 32 percent by 2030.

By the more controversial elements, Stoll is referring to requirements in the rule that call for fuel switching to renewable energy in place of coal or require other measures that go beyond the fenceline of a regulated power plant.

Stoll does not view this as something that would prompt a public outcry. “Cutting the most controversial parts out of the [Clean Power Plan (CPP)] would not jeopardize the legal basis for core clean air and water protections,” he writes. “So even if revisions to the CPP provoke lots of noise from traditional public interest groups opposing any cutbacks in GHG regulation, that noise may not resonate much with a general public.”

The second industry lawyer also expects a Trump EPA to re-propose a narrower ESPS that could be limited to within the fenceline of a facility and rely on efficiency measures.

Noting that the U.S. Court of Appeals for the District of Columbia Circuit is poised to issue a ruling on the fate of the ESPS, this source compares that to when Obama administration took office in early 2009 and the controversial Bush-era Clean Air Mercury Rule was poised to go up to the Supreme Court.

Instead, the Obama administration pulled back a *cert* petition for a re-examination and ultimately replaced the rule -- which allowed trading -- with the more traditional Mercury & Air Toxics Standard in existence today -- which does not.

Acknowledging that “nothing requires the court to stand down” and back away from issuing a ruling in the case, *West Virginia , et al. v. EPA, et al.*, the source says the incoming administration can still send a strong signal to the judges.

The source also notes that however a Trump EPA proceeds in rolling back the ESPS has risks. Any re-proposal “is going to have to be done pretty carefully and they’ll have to be careful of the record and be precise in how they approach it from a legal perspective.” The new administration could, for example, posit a different view of the legal authority and could win court deference for it.

But EPA’s McCarthy has argued that a future administration would face a “heavy lift” in [rescinding the rule](#), telling a 2015 event shortly after she signed the final version of the ESPS that it would be “quite a significant hurdle” for a future administration to reverse.

Others at the time, however, warned that a GOP administration could quickly announce it would take a second look at the rule’s time lines and targets.

Meanwhile, Tom Reynolds -- a former White House and EPA spokesman who now works as a communications adviser -- tells *Inside EPA/climate* that “we are still in the fog of war with a lot more questions than answers” about what to expect from a Trump EPA.” But he calls the early signals “a little disturbing” because even if there is not an effort for a wholesale undoing of Obama’s work, “there are certainly ways to be creative and do a lot of damage.”

However, he also notes that campaigning is far different from governing “and I hope the Trump administration realizes the public does not want” wholesale rollbacks of environmental protections.

Reynolds adds that the environmental community will rally to prevent such efforts “and I think there is some hope that there is a moderate bloc of Republicans that understands these sort of tyrannical approaches to rolling back [environmental rules] is not good politically and not good public policy.” -- Dawn Reeves (dreeves@iwppnews.com)

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