Trump, Calif. Poised For Energy And Climate Policy War

By Keith Goldberg

Law360, New York (April 21, 2017, 10:04 AM EDT) -- While President Donald Trump has called climate change a hoax and is embracing fossil fuels, California is moving ahead with some of the most aggressive climate and clean energy policies in the U.S.

That's bound to lead to courtroom collisions between the federal government and the state that boasts the world's sixth-largest economy. California has already vowed to fight efforts by the Trump administration to delay or roll back implementation of tighter greenhouse gas emissions standards for automobiles, and it's one of several states that recently sued the administration over its decision to delay certain energy efficiency rules.

Here, attorneys identify four energy-related battlegrounds where they expect to see the Trump administration and the Golden State square off.

Automobile Emissions and California's Clean Air Act Waiver

Attorneys say the fuse was lit for an all-out war between the federal government in California when the U.S. Environmental Protection Agency and U.S. Department of Transportation said last month that they will revisit President Barack Obama-era standards on greenhouse gas emissions for 2022 to 2025 model cars and light trucks and potentially revise them, bowing to pressure from auto manufacturers who claim the standards aren't feasible.

California has vowed to keep imposing the new standards, using a Clean Air Act waiver given by the EPA that allows the state to impose tougher tailpipe standards. That's led to speculation that the EPA will look to revoke or modify the waiver, which would spark a fierce legal response, given that the EPA has fully or partially granted more than 50 waivers to California since the CAA was enacted to help the state deal with its unique air pollution issues.

“It will certainly be litigated, and there are arguments on both sides of the authority and preemption issues,” said Pillsbury Winthrop Shaw Pittman LLP environmental partner Mike McDonough, who is based in Los Angeles. “We don’t have precedent for revoking waivers that have been in place for decades, and it’s unclear how the court will approach that issue.”

A big reason California will put up such a fight is that losing the ability to impose tighter tailpipe standards could undermine the auto-heavy state’s aim of slashing greenhouse gas emissions by 40 percent from 1990 levels by 2030, attorneys say.
“Those goals are incredibly steep, and they depend on a rollout of a tremendous number of zero-emission vehicles,” said Paul Hastings LLP environment and energy partner Kevin Poloncarz, who is based in San Francisco. “The only way that's going to happen is that the standards are as stringent as they are today. That is really the front-and-center fight that's brewing.”

**Clean Power Plan and International Climate Efforts**

California is one of the most ardent defenders of regulations to slash carbon emissions from U.S. power plants — the Clean Power Plan for existing power plants, as well as a rule for new plants. The state won't sit idly by while the EPA, at Trump's behest, reviews and potentially rescinds those rules, attorneys say.

“States have invested a lot of time alongside the EPA in creating what is a collaborative product that a lot of folks are ready to go out and implement,” said Ali Zaidi, a former Obama White House climate official who is now a senior policy adviser at Morrison & Foerster LLP. “Efforts to pull the rug out from under processes like that are going to be met by significant pushback from states like California.”

That could come in the form of legal challenges to any revision or revocation of the CPP and new plant rule or suits seeking to force the Trump administration to take regulatory action on greenhouse gas emissions.

“Previously, the rules that were promulgated were done so with consent decrees,” Poloncarz said. “Those same states will be making the same demands under Trump.”

The federal government and California could also cross swords over international climate change efforts. While the Trump administration is mulling the exit of the U.S. from the Paris climate agreement, California has looked beyond U.S. borders to advance its climate goals, linking its cap-and-trade program with Quebec's cap-and-trade program and looking to hook up with Ontario's cap-and-trade program as well.

“Could the federal government say, 'California, through establishing these linkages, that is a violation of your limited authority as a state?'” Poloncarz asked.

**Calif. Cap-and-Trade vs. Out-of-State Electricity**

California's cap-and-trade program, in which the California Air Resources Board auctions off emissions allowances to refiners, utilities and other GHG polluters as the emissions cap gradually declines, includes a controversial policy requiring entities that import out-of-state electricity to report the greenhouse gas emissions of that power, and purchase allowances to cover them. And these costs are passed onto out-of-state generators in the form of higher bids they must offer.

That's raised questions over whether the state is unlawfully regulating out-of-state generators, attorneys say.

“There are potential dormant commerce clause implications,” Poloncarz said. “It is not unthinkable that the federal government could comment in ongoing rulemaking to suggest that California doesn't have that authority.”

The state has already beaten back dormant commerce clause challenges to its Low Carbon Fuel Standard in federal court, but other state climate programs have been shot down on those grounds. There's also a question of whether the cap-and-trade program's requirements on out-of-state power intrude on the Federal Energy Regulatory Commission's exclusive jurisdiction over interstate, wholesale electricity markets.
Under the Obama administration, FERC didn't appear to have any serious qualms with California's program. But with Trump poised to appoint at least three new commissioners, that stance could change, according to Stanford law professor Michael Wara. Acting FERC Chair Cheryl LaFleur has recently expressed concern over the potential effect of state climate programs on wholesale power markets, and the agency is holding a technical conference on the issue next month.

“I think a lot of that stuff might be in play, but there’s so much uncertainty because we don’t have warm bodies filling the seats,” Wara said.

And while prices for GHG allowances are currently low enough as to not be that financially painful for out-of-state generators — under $14 per metric ton of carbon in the most recent allowance auction — that could change with the proposed 10-year extension of the program designed to help the state hit the 40-by-2030 target, Wara said.

“You could easily see a situation where a carbon price could be a big piece of a bid for generators if they want to sell into California,” he said. “When the carbon price gets high enough to matter, will FERC take a second look at this? Under an Obama-appointed FERC, that outcome was much less likely.”

**Methane Regulations for the Oil and Gas Sector**

The Trump administration and California are moving in opposite directions when it comes to regulating methane emissions from the oil and gas sector. While Trump has directed the EPA to withdraw its methane rule for new and modified oil and gas infrastructure, and the EPA recently said it would stop collecting information from companies on methane emissions and emissions controls, CARB last month finalized sweeping regulations that would require oil and gas companies to identify and plug methane leaks as part of an effort to slash methane emissions from the oil and gas sector by 40 percent to 45 percent by 2025.

Attorneys say that the divergence could spark a legal backlash from energy companies in California, which is fourth-largest producer of crude oil in the U.S., according to the Energy Information Administration.

“While [Trump] appears to be moving to rescinding the methane rule, federally, the state has marched full speed ahead, and the oil operators here would argue that this puts them at a competitive disadvantage compared to the rest of the country, and they would argue that you can’t apply it on federal lands,” said Craig Moyer, who chairs Manatt Phelps & Phillips LLP’s land, environment and natural resources group and is based in Los Angeles.

But attorneys say it might not be a high priority for the Trump administration to wade into any battles between industry and California over the state’s efforts to regulate methane compared to other issues.

“I don’t think EPA will pick a fight over methane any time soon — most of the battle right now is over the federal regs and inventories, and the tailpipe standards are a much more important fight to the administration,” McDonough said.

--Additional reporting by Juan Carlos Rodriguez. Editing by Christine Chun and Rebecca Flanagan.