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Agency Vacancies Threaten Trump Rollback Of Energy Regs

By **Keith Goldberg**

Law360, New York (April 28, 2017, 8:04 PM EDT) -- President Donald Trump's offshore drilling executive order inked Friday is the latest directive calling for the review and rollback of energy and environmental regulations crafted by the Obama administration, but former government officials say Trump's efforts will be compromised by dozens of vacancies in politically appointed positions at the agencies responsible for carrying out his orders.

Trump has ordered the U.S. Environmental Protection Agency to rescind the Clean Power Plan, the Clean Water Rule and methane rules for new oil and gas infrastructure. He's also ordered the U.S. Department of the Interior to withdraw its hydraulic fracturing rule, and on Friday, directed it to review and potentially revise its latest five-year offshore leasing plan, which closed off the Atlantic Ocean and large portions of the Arctic Ocean. In addition, the DOI was told to review Arctic drilling regulations and rules for blowout preventers for offshore drilling rigs.

Any potential revision or withdrawal of regulations will require the same formal rulemaking process used to originally craft them. Yet there's a void of leadership below the cabinet heads of the EPA, DOI and other energy-related federal agencies. Up to this point, out of dozens of administrative and sub-agency positions that require Senate confirmation, Trump has only put forth two nominees: Dan Brouillette **to be the deputy energy secretary** and, as of Friday, Brownstein Hyatt Farber Schreck LLP natural resources practice chair David Bernhardt **to serve as interior secretary** Ryan Zinke's deputy.

"It's going to be extraordinarily challenging for the administration to accomplish its stated objectives," a former high-ranking Obama energy and environmental official, who asked not to be identified, told Law360. "The lack of personnel that they have will hinder them substantially."

Identifying regulations for revision or withdrawal is the easy part, former agency officials say. Following through is a long, complicated slog that requires policy and legal guidance from political appointees to agency staff tasked with crafting the nuts-and-bolts of the regulatory action, for anything from performing a cost-benefit analysis to determining the scope of a National Environmental Policy Act review, if necessary, and carrying it out.

"It's not a one-person shop where a person at a desk is scratching out a regulation that has been passed," said Rubin & Rudman LLP partner Bicky Corman, a former EPA deputy general counsel. "The process involves understanding the legal standards that need to be met and the factual or scientific basis for the rulemaking."

The biggest challenge in revising or rescinding regulations like the CPP or the Clean Water

Rule isn't the rules themselves — it's the hundreds of pages worth of scientific and legal justifications for the rules, said Venable LLP environmental partner Fred Wagner, a former chief counsel for the Federal Highway Administration.

"Not only do you have to deal with the justification [for revising the rule], you also have to say why the original justification is no longer valid," Wagner said. "The career staff are not going to do that on their own. They need input from the political appointees. The secretary's office is not equipped to deal with all of this."

There's also the matter of interagency collaboration and multi-agency approval of many regulations, not to mention review by the White House's Office of Management and Budget before rules are published. The OMB isn't currently at full strength either, although Trump nominated George Mason University law professor Neomi Rao to lead the OMB's Office of Information and Regulatory Affairs, which reviews agency actions, earlier this month.

It's not just the lack of political appointees at agencies that could undermine Trump's regulatory rollback orders. **His own budget proposal**, which slashes billions of funding dollars and thousands of jobs at the EPA alone, could hamper that agency's ability to review and rescind rules like the CPP, former officials say.

"There is certainly tension between the administration's proposal to reduce agency personnel and accomplishing its regulatory goals," the unnamed former Obama energy and environmental official said.

Not only will the agency vacancies make regulatory changes more difficult and time-consuming, any revisions that do emerge run a greater risk of being overturned in court, former officials say.

"Judges are used to Administrative Procedure Act rules. That's how they review these things, and it provides the agencies with some cover if they follow those [APA] rules," Wagner said. "If those rules aren't followed or the agency deviates too much from those procedures that judges are comfortable with, it does create vulnerability."

The Trump administration has already suffered judicial rebukes to a hastily formed travel ban and an order to yank federal funds from so-called sanctuary cities for immigrants, which means any slapdash revision or repeal of energy and environmental rules could meet a similar fate.

"We've seen people lining up on both sides challenging or defending existing regulations, which is automatically showing there is going to need to be attention paid to the process as well as the intended objective," Corman said.

The White House didn't return a request for comment for this story. However, Trump told the Washington Examiner on Wednesday that he doesn't plan on filling all the vacant politically appointed positions.

Meanwhile, the EPA brushed off concerns that it won't be able to carry out Trump's orders with a skeleton crew of administrative staff.

"We're not worried about our ability to give power back to the state and protect health and the environment in a way that doesn't impede economic growth because we've already made great strides," agency spokesman Jahan Wilcox said.

But the longer the agency positions go unfilled, the more apparent it will be for agency heads that they won't be able to get to everything outlined in Trump's orders, former officials say.

"They're going to have to pick and choose the ones that give them the biggest bang for their buck, whether it's substantively or politically," Wagner said.

It all adds up to a highly uncertain regulatory environment for companies that in some instances have already complied with regulations on the books or even helped craft them.

Even if you're clamoring for regulatory relief, the rollback actions taken by the Trump administration could be a case of "be careful what you wish for," according to Wagner. In a lot of cases, regulatory certainty is more important than regulatory relief, he said.

"If some of these rules are potentially on the chopping block, but may not get there, or the timing is up in the air, what does that all do?" Wagner said. "The clock moves forward, and before you know it, there are midterm elections and another presidential election cycle. What if things flip again?"

--Editing by Pamela Wilkinson and Philip Shea.

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