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Dismantling climate regulations will not be as easy as Trump administration thinks

By Catherine Malina and Sky Stanfield

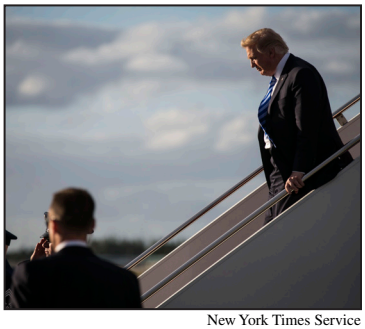
Recent headlines have been deeply worrying to millions of Americans concerned about the serious threat of climate change. The appointment of global warming skeptics to positions of power and a proposed federal budget slashing programs, scientific research and staff at the Environmental Protection Agency, plus the firestorm of executive orders taking aim at President Obama's Clean Power Plan and other climate rules, are especially troubling.

However, the new administration's efforts to dismantle recent progress in the fight against climate change will not be easy, thanks to existing laws and the complex process required to write and undo federal regulations under the Administrative Procedure Act (APA). As lawyers engaged in agency rulemaking know well, the government must provide prior notice, issue draft proposals, hold public hearings, solicit public comments and publish final decisions supported by the record — a process that often stretches the span of many years.

The administration also faces an uphill battle with a broad coalition of state attorneys general and advocacy organizations ready to present legal challenges every step of the way. States may be especially concerned about the administration's actions where federal law preempts state regulations and where agency decisions might stymie the ability of states to meet their own climate goals.

Two new lawsuits were recently filed in the 2nd U.S. Circuit Court of Appeals, one by a coalition of 10 states — New York, California, Connecticut, Illinois, Maine, Massachusetts, Oregon, Pennsylvania, Vermont and Washington — plus the city of New York. A separate band of public interest groups, including the Natural Resources Defense Council, Sierra Club, Consumer Federation of America and Texas Ratepayers' Organization to Save Energy, filed the other.

Both of these high-profile lawsuits challenge the Trump administration's decision to delay the effective date of already-finalized energy efficiency standards for ceiling fans — standards that are impressively projected to eliminate more than 120 million tons of carbon pollution over 30 years, or the equivalent of the annual emissions of 25 million cars.



New York Times Service

President Trump arrives in West Palm Beach, Fla., April 13.

Under laws signed by Presidents Gerald Ford and Ronald Reagan, the U.S. Department of Energy (DOE) is charged with establishing energy efficiency standards for more than 60 consumer products, from refrigerators and air conditioners to water heaters, furnaces and television sets. The DOE's standards must be designed to achieve the maximum improvement in efficiency that is technologically feasible and economically justified, and its rules must result in a significant conservation of energy. The agency also has the duty to review and revise its standards every six years, and an "anti-backsliding" provision prevents any new rules from weakening already established standards.

In fulfillment of these responsibilities, DOE initiated a rulemaking process to update its existing ceiling fan standards in 2013. After three years of proposals, public meetings and stakeholder engagement, the agency issued its final rule in November 2016. The rule's new standards will make ceiling fans 25 percent more efficient — saving consumers up to $12 billion on their utility bills over three decades. Atop the benefit of significantly reducing energy use and harmful pollution, the standards could also spur technology and innovation, as they give manufacturers flexibility on how to achieve the minimum efficiency levels.

After its publication in the Federal Register, DOE's final rule was set to take effect on March 20. But soon after taking office, the Trump administration quickly published two new final rules in the Federal Register, twice delaying the standards' effective date so DOE can "further review" and reconsider the regulations. While the APA requires agencies issuing new rules to provide prior notice and opportunity for public comment, DOE now asserts, in a conclusory statement, that "good cause exists to forego" the APA's requirements in this case, because the procedures "would be impracticable, unnecessary, and contrary to the public interest."

Of course, the states and advocates who have filed suit disagree. Accordingly, both coalitions have petitioned the 2nd Circuit to set aside the DOE's actions as unlawful violations of the APA and the "anti-backsliding" provision that governs DOE rulemaking, since delay and reconsideration effectively weaken the finalized standards.

The states and advocates have simultaneously put DOE on notice that they intend to file additional lawsuits in 60 days if the agency does not formally publish five other rules, which DOE officials signed and finalized in December 2016.

Those five rules establish energy efficiency standards for consumer products including commercial packaged boilers and uninterruptable power supplies. Combined with the ceiling fan standards, the rules will save consumers about $24 billion on their utility bills over three decades and enough electricity to power over 36 million homes for a year. And they should yield tremendous environmental and public health benefits, together eliminating over 30 years 292 million tons of carbon dioxide, 1.2 million tons of the potent greenhouse gas methane, 743,000 tons of the pollution that creates soot and smog and 1,000 pounds of toxic mercury emissions.

The December 2016 rules are currently trapped in limbo, because the DOE's rulemaking process gives the public 45 days to review final rules for technical or typographical errors before they are published in the Federal Register. While this "error correction" waiting period is over, DOE has failed to publish these rules. In their notices of intent to sue, the states and advocates assert that the agency has a non-discretionary duty to immediately publish the five rules so they may take effect.

The states may be especially troubled by the DOE's failure to act because federal law generally preempts states' ability to establish energy efficiency standards for products under DOE's purview. Obstructing the publication of federal rules across cumulatively significant consumer product categories may also have a dangerous ripple effect, hindering the success of state climate policies that depend on gains in energy efficiency and conservation.

To be sure, these energy efficiency lawsuits are just the beginning of the serious legal challenges the administration faces as it attempts to roll back climate progress. The APA will be a key weapon for states and advocates defending existing federal regulations, along with case-specific laws like the anti-backsliding provision and error correction rule that govern DOE's energy conservation standards.

One of the most important regulations to watch next is the Clean Power Plan. The administration will not be able to undo Obama's signature climate policy with the stroke of a pen, given the APA's requirements and EPA's landmark 2009 "endangerment finding," which has been upheld in court and legally requires the EPA to regulate greenhouse gas emissions under the Clean Air Act.

With extensive legal battles ahead and the effects of climate change already being felt, it's reassuring to know that administrative procedure and existing law err on the side of progress.

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