

Energy Regulation And Legislation To Watch In 2017

By **Keith Goldberg**

Law360, New York (January 2, 2017, 1:03 PM EST) -- The election of Donald Trump to the presidency will likely bring seismic changes to U.S. energy policy, starting with attempts to unwind President Barack Obama's legacy on climate change.

Trump, an avowed supporter of increased fossil fuel development, has pledged to roll back climate regulations, chief among them the U.S. Environmental Protection Agency's Clean Power Plan and U.S. participation in the Paris climate change agreement. His Cabinet nominations reflect that approach: Proposed EPA administrator Scott Pruitt made a point of fighting the Obama EPA's regulations as Oklahoma attorney general, while Trump's pick for secretary of energy, former Texas Gov. Rick Perry, famously proposed eliminating the Department of Energy in a 2011 presidential debate.

What's more, Trump will have the support of a Republican-controlled Congress that has opposed the Obama administration's climate and energy policies at virtually every turn.

"I think they're going in with the narrative that we ought to roll back regulations, particularly ones seen holding back energy production," said K&L Gates LLP partner Tim Peckinpugh, who leads the firm's political action committee.

Here are the energy-related regulatory and legislative actions energy attorneys will be watching this year.

Attempts to Kill the Clean Power Plan

The D.C. Circuit is currently mulling the legality of the Clean Power Plan, the centerpiece of Obama's climate change policy, which calls for slashing greenhouse gas emissions from existing power plants. But regardless of the appeals court's ruling, attorneys say Trump's election means the CPP will likely never be implemented.

"I think it's pretty much dead," Perkins Coie LLP partner Brian Potts said. "There are multiple ways that Trump could scrap the Clean Power Plan. He could promulgate a rule that would withdraw it — that would take six months to a year; he could appoint a Supreme Court justice that ultimately overturns it; or he could refuse to keep defending it in court."

But while rescinding the CPP might be straightforward, it won't necessarily be easy, attorneys say.

"A recrafted rule would need to be supported by new technical analysis and new findings," said Gerry

Pels, who chairs Locke Lord LLP's environmental section for energy and industry. "It can't be as simple as 'we're not going to enforce those rules.' They're on the books."

A Potential Exit From the Global Climate Agreement

In addition to rescinding the CPP, Trump pledged on the campaign trail to revoke another key climate commitment from the Obama administration: U.S. participation in the landmark global climate change agreement brokered by more than 190 nations in Paris in December 2015, which went into effect in November. However, Trump appeared to soften that stance somewhat in recent interviews, leaving some observers guessing as to what he'll actually do.

"Where a Trump administration is going to land on the Paris agreement is evolving almost daily," Dentons counsel Jon Sohn said.

Given that the U.S. ratified the agreement via executive order, attorneys say that undoing it could be an easier task than undoing the CPP, though formally withdrawing from the pact is a multiyear process under the terms of the agreement.

But Sohn says the U.S. could pay a political price for withdrawing from the agreement, noting that other nations have called for carbon taxes or other tariffs to be imposed on U.S. goods if it pulls out of the deal.

"Those are ... interesting considerations to take into account before you just leave the agreement," Sohn said. "Other countries that have isolated themselves are Syria, North Korea and Nicaragua. Is that the group the U.S. wants to be associated with on climate change?"

Emergence of the Congressional Review Act as a Weapon

Trump's presence in the White House and the GOP's control of Capitol Hill provide an opportunity to deploy the seldom-used Congressional Review Act to nullify energy and environmental regulations recently crafted by the Obama administration, attorneys say.

"For Congress, it fits entirely into their objective," Peckinpaugh said. "I'm sure the House would be anxious, especially on high-profile controversial rules, to say they ought to be put forward for a vote."

Under the CRA, Congress can pass a resolution disapproving major federal regulations within 60 legislative days of their release by a simple majority vote, and if the resolution is signed by the president, then the regulation is nullified and the decision isn't subject to judicial review.

A recent report by the Congressional Research Service concluded that rules finalized after June 13, 2016, are vulnerable to CRA review and disapproval. Regulations in the danger zone include the Bureau of Land Management's rule limiting venting and flaring from gas wells on public lands, which industry groups and several states have already challenged in court,

But attorneys say the CRA must be wielded carefully, because using it to nullify a regulation prevents similar regulation from being implemented in the future unless Congress passes a law allowing it.

"It's a very blunt instrument, so you can't just use it willy-nilly," said Aaron Cutler, a partner in Hogan Lovells' legislative practice group and a former senior adviser to former House Majority Leader Eric Cantor, R-Va. "If there's some good in the regulation, you're not going to propose to eliminate the whole

thing. I think they're going to spend a lot of time on the EPA and target the rules and regulations that have been rushed out the door."

A Fast Track for Infrastructure Projects

Along with opening up more public lands and waters to fossil fuel development, Trump vowed to remove federal regulatory barriers to increased coal, oil and gas production and fast-track energy infrastructure projects, including by streamlining permitting. He'll have plenty of support from the GOP-controlled Congress, attorneys say.

"I have to believe that expediting infrastructure, making it more of a streamlined process, making it easier to build natural gas pipelines, is going to be the tip of the spear," said Stefan Krantz, who heads Hogan Lovells' energy regulatory group. "If you're a developer of natural gas pipelines, you've got to be pretty optimistic about the change [in administration]."

Among the steps attorneys see Trump and Congress taking to accelerate energy infrastructure development are revisions to the National Environmental Policy Act and rolling back any other project approval processes they deem to be overly burdensome, as well as perhaps greenlighting highly controversial oil pipelines that have been blocked by the Obama administration: TransCanada Corp.'s Keystone XL pipeline and Energy Transfer Partners LP's Dakota Access pipeline.

"I would expect you'll see legislation to accelerate permitting on use of federal lands for energy exploration," Peckinpugh said. "I think you'll see efforts to move forward on environmental clearances on projects, such as LNG terminals and refineries."

An Uncertain Future for Renewable Energy Tax Credits

While Trump has been full-throated in his support for fossil fuels, he hasn't said much about renewable energy. That has the industry nervous about the future of federal renewable production and investment tax credits that received multiyear extensions in a December 2015 omnibus appropriations bill.

"In the Midwest, the wind industry is booming, largely because of the tax credits," Potts said. "That would be a huge deal if they rolled them back; they're already scheduled to be phased out."

The production tax credit is set to expire in 2020, while the investment tax credit will drop in value in 2019 and reach its lowest level in 2022. That's one reason attorneys say they'd be surprised if Trump, even with a Republican-led Congress, tried to nix the the credits.

The credits have also sparked wind and solar development booms in several Republican-leaning states, and Trump may not want to spark a war with congressional Republicans who back renewable energy development within their states' borders.

"It is a bipartisan product now, and that's meaningful," said Rob Freedman, who co-heads Shearman & Sterling LLP's sustainable development group.

An Overhaul of the Renewable Fuel Standard

The EPA's Renewable Fuel Standard, which calls for increasing amounts of biofuels to be blended into the U.S. fuel supply, has been a political lightning rod for virtually its entire decadelong existence, with

lawmakers from both political parties having floated bills to either repeal the program or alter it drastically.

With Republicans in control of the White House and Congress, the legislative environment may finally be right for RFS changes, attorneys say.

"They are a mess right now and there's been a lot of public pressure to close the blender loophole and do something about the small refineries at a minimum, if not scrap the whole program," Perkins Coie's Potts said. "Everyone will agree that they're not working as they're supposed to."

The petroleum industry wants the RFS program scrapped, calling it a stealth tax on gasoline and saying the RFS' Renewable Identification Numbers system, in which RINs are used for trading renewable fuel credits that blenders and refiners can use to meet the EPA's biofuel requirements, is ripe for fraud. Most of the renewable fuel blended into gasoline comes from corn-based ethanol, so those producers support the program, but food and livestock groups oppose it, claiming it will ultimately drive up food prices. Meanwhile, advanced biofuel supporters claim the RFS doesn't offer their products enough support.

Given the range of stakeholders, reform of the RFS is more likely than a repeal of the program, according to Holland & Knight LLP senior policy adviser Beth Viola, who served on the White House Council on Environmental Quality during President Bill Clinton's administration and as an energy and environmental policy adviser to Vice President Al Gore and 2004 presidential candidate John Kerry.

"I think we'll see strange bedfellows come together," Viola said. "You have a bunch of groups in the middle that want to move advanced biofuels forward and roll back on ethanol in terms of the volume numbers."

Renewed Interest in Yucca Mountain

One issue that has stubbornly vexed U.S. energy policymakers is building a long-term storage and disposal site for spent fuel from the nation's nuclear power plants. A proposed waste site at Nevada's Yucca Mountain was canceled by the Obama administration amid heavy local opposition, but congressional Republicans who have consistently supported the site may now have backing from the Trump White House, attorneys say.

"There will be a push to revive Yucca Mountain," Peckinpugh said.

Also working in the site's favor is the retirement of Yucca Mountain opponents' most powerful ally: Senate Minority Leader Harry Reid, D-Nev.

"With Senator Reid's retirement and the work that has been done at Yucca over the last few decades, I think it's safe to say that it's going to get a relook," Squire Patton Boggs LLP principal Lem Smith said.

A Shakeup at FERC

The normally five-member Federal Energy Regulatory Commission currently has just three commissioners, all Democrats. That political balance will likely shift in 2017. Not only can Trump appoint his own chairman, but Commissioner Colette Honorable's term is also set to expire in June, meaning the commission's priorities will shift to reflect the priorities of the Trump administration, attorneys say.

"Typically, FERC has been a little less political than other agencies," Morgan Lewis & Bockius LLP partner Stephen Spina said. "I do think if you have a Republican chairman in this new administration, you may see a pullback on some of the proposed regulations from last year."

Those regulations include FERC's "connected entities" rule requiring the regional grid operators that run wholesale electricity markets to collect information about entities linked to market participants. The commission has already proposed scaling back its original proposal amid major industry pushback.

A Trump-crafted FERC could also take its foot off the gas when it comes to its market manipulation enforcement efforts. Current FERC Chairman Norman Bay previously led the commission's enforcement division, and both he and the commission have been increasingly criticized by enforcement targets and members of Congress over aggressive enforcement tactics.

"It's probable that the new FERC commissioners would look to ... pull back a little bit on the enforcement efforts," Spina said.

--Editing by Mark Lebetkin.