

## Efficiency Regs Emerge As Flashpoint In Trump Energy Shift

By **Keith Goldberg**

*Law360, New York (April 4, 2017, 8:27 PM EDT)* -- New lawsuits from states and environmentalists over the delay of energy efficiency rules reflect growing concern that the Trump administration will stymie efficiency regulations as part of a broader regulatory rollback, but experts say that thwarting those rules would be an uphill battle both because of bipartisan political support and legal obligations already on the books.

Eight states including New York and California, along with Pennsylvania's environmental regulator, New York City, and environmental and consumer groups urged the Second Circuit in separate petitions Friday to overturn the Department of Energy's March 20 delay of final, new efficiency standards for ceiling fans. They also threatened to sue the agency within 60 days over its delay of final efficiency testing standards and procedures for walk-in coolers and freezers, certain types of air conditioners, compressors and heat pumps, as well as commercial boilers.

The suits were filed three days after President Donald Trump issued his sweeping executive order aimed at promoting energy development and rolling back climate change regulations. While much of the attention fell on the U.S. Environmental Protection Agency being directed to withdraw its Clean Power Plan, the order also contained a directive that the heads of all federal agencies review all agency actions that "potentially burden the development or use of domestically produced energy resources."

The order is worded broadly and its legal effect is limited, but it should still give energy efficiency proponents pause given the DOE's recent actions, experts say.

"There should be some anxiety about what the executive order could mean for these standards," said Ali Zaidi, a former Obama White House climate change official who is now a senior energy and climate adviser at Morrison & Foerster LLP. "This is what provides the certainty in leading to better products. I think that's definitely a live ball coming out of the executive order."

Other actions suggest the Trump administration takes a dim view of energy efficiency, including Trump's 2018 budget blueprint that slashes the DOE's energy efficiency funding and restricts it to early-stage, applied energy research, as well as kills a federal-state weatherization program. Trump's budget blueprint also eliminates the voluntary Energy Star program, which promotes energy-efficient products and is jointly administered by the EPA and DOE.

It's something that has the attention of one of energy efficiency's biggest champions in Congress: Sen.

Jeanne Shaheen, D-N.H., who has pushed broad-based, bipartisan, energy efficiency legislation with Sen. Rob Portman, R-Ohio, since 2013. The latest version of the bill cleared the Senate energy committee last week, and portions of previous versions have made it into law.

"America's clean energy industry is thriving, contributing billions into our economy and employing almost 3 million Americans with 2.2 million jobs due to energy efficiency alone," Shaheen said in a statement issued to Law360. "The president's recent actions to dismantle the Clean Power Plan would endanger American businesses and the multiple benefits energy efficiency and clean energy technologies bring to our country."

Not only does energy efficiency enjoy popular and bipartisan support, any attempts to unwind energy efficiency rules or slow down their implementation will run headlong into the Energy Policy and Conservation Act, which among other things, gave the DOE authority to develop minimum efficiency standards and test procedures for dozens of industrial, commercial and residential products, provided that they're technologically and economically feasible. Subsequent laws have amended the EPCA to expand the number of appliances covered by energy efficiency requirements, as well as imposed deadlines for the DOE to set new and amended requirements.

"The Energy Policy and Conservation Act has very clear, strict directions for the Department of Energy on maintaining the efficiency standards program and on moving it forward, making standards stronger over time," said Kit Kennedy, who directs the energy and transportation program at the Natural Resources Defense Council, one of the green groups suing the DOE in the Second Circuit. "The courts have proved themselves willing to enforce the law."

The DOE has previously landed in legal hot water over blowing deadlines to craft energy efficiency rules. In 2006, the agency inked a consent decree agreeing to finalize a slew of energy efficiency rules in order to settle suits brought by several states and environmental and consumer groups.

"It's not just something that's hypothetical, it's a source of legal respite," Zaidi said.

The DOE declined to comment Tuesday on the litigation, as well as whether it planned to examine additional energy efficiency rulemakings in compliance with Trump's executive order.

While Trump's order doesn't change the DOE's statutory mandates for energy efficiency regulation, it could change how the agency implements them, according to Orrick Herrington & Sutcliffe LLP partner Bob Lawrence.

"You could see them potentially saying the bureaucracy associated with conservation mandates is unnecessary," Lawrence said. "There are lots of ways this [executive order] could go. It is comprehensively broad; it's almost impossible to find any boundaries."

But while the DOE will face resistance in the courtroom from states and consumer and green groups if it attempts to hold off or slow-play implementation of energy efficiency rules, Zaidi said the agency could also face resistance in the rulemaking process from electric utilities and product manufacturers that have a lot invested in energy efficiency progress.

"A lot of these standards are products of consensus processes," Zaidi said. "The agencies are going to hear from folks in the utility space as well as more broadly, in the manufacturing sector, people who are saying, 'Hey, we're counting on these changes happening. That's part of our business model.'"

The bottom line is that energy efficiency is intuitive, and dovetails with basic economic goals, he said.

"Reversing course will feel like trying to put the toothpaste back in the tube," Zaidi said.

--Additional reporting by Juan Carlos Rodriguez and Michael Phillis. Editing by Katherine Rautenberg and Jack Karp.

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