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Speeding Up and Breaking Down: Consequences of Administration's Deregulation and Deconstruction Agendas

When the administration arrived in January 2017, it took the helm of a vast federal bureaucracy (3 million civilian employees) comprised of 15 Cabinet-level departments and hundreds of agencies, boards, bureaus and commissions. In February 2017, then White House Chief Strategist Steve Bannon took aim at this bureaucracy, declaring that the White House would be engaged in a daily battle for "deconstruction of the administrative state," and that all Cabinet heads would be chosen with that priority in mind.

While the administration called for deconstruction, it also fundamentally recognized that the administrative state was how the government executes its policies. To that end, it reiterated goals of cutting regulations that the administration saw as overburdening the American economy and making government more efficient. Both agendas have consequences, which can bring opportunities or obstacles that, once recognized, can be navigated.

Approximately 17 months into this administration, we can better assess the consequences of the administration's dual—and sometimes dueling—agendas of deregulation and deconstruction, and forecast how these priorities may affect agency action going forward.

The Deregulation Agenda

In its first year and a half, the administration has taken a broad array of steps toward its goal of ensuring that government, while setting and enforcing the rules of the road, does not stop traffic completely. In so doing, it (and a supportive Congress) has shown a readiness to rescind, rewrite or reinterpret regulations. In the enforcement context, it has exhibited less appetite to construe enforcement powers broadly.

For instance, in the first months of 2017, numerous Obama-era regulations were rescinded through the Congressional Review Act, a Clinton-era law that gives lawmakers 60 legislative days, with a simple majority vote in each chamber of Congress, to revoke any regulation imposed during the final six months of the previous administration. In this window, Congress overturned more than a dozen rules, including one that limited how mining operations disposed of debris when clearing earth and another that banned certain hunting of bears in Alaska. Congress also rescinded an Obama-era rule requiring energy companies to disclose payments made to foreign governments and a rule requiring internet service providers to get their subscribers' permission before selling their online information.

The administration also issued executive orders to impose both targeted reforms and across-the-board regulatory constraints. Executive Order (EO) 13771, for example, directed agencies to repeal two existing rules for every new rule promulgated, and meet a \$0 net regulatory cost target for fiscal year 2017. Similarly, EO 13777 directed agencies to examine which regulations may be appropriate for repeal, replacement or modification. By the end of 2017, the administration claimed to have formally revoked 67 rules, withdrawn 635 planned regulations, placed 244 regulations on "inactive" status and "delayed" 700 regulations.

It also used another Clinton-era law, the Illegal Immigration Reform and Immigrant Responsibility Act, to waive applicable environmental laws "to ensure expeditious construction of barriers" along the U.S. border, and has proposed amending various environmental laws and regulations to streamline infrastructure permitting decisions. Its trillion-dollar infrastructure plan, for instance, calls for a "One Agency, One Decision" environmental review structure that builds on the new framework—known as "[One Federal Decision](#)"— set forth in EO 13807. EO 13807 seeks federal agency cooperation on environmental review and permitting for major infrastructure projects, and directed federal agencies to use a single, coordinated process to comply with the National Environmental Policy Act (NEPA) and other federal environmental laws. It also instructed that NEPA be

completed within an average of two years from its formal start to the government's decision to approve a proposed project. The order further directed all federal permits for the approved project be issued within 90 days of the government's decision. In April 2018, the heads of a dozen federal agencies executed a memorandum of understanding (MOU) on implementing EO 13807, which directed agencies to expedite environmental review and permitting for major infrastructure projects. The Office of Management and Budget and the Council on Environmental Quality (CEQ) also issued a guidance memorandum to accompany the MOU. And CEQ recently [announced](#) it was considering updating its regulations for NEPA. In its advanced notice of proposed rulemaking, CEQ sought comments until July 20, 2018 about any changes that will make the NEPA process more efficient and consistent with NEPA's stated environmental policies.

The administration, led by the U.S. Department of the Interior, has also taken steps to steer implementation of federal wildlife statutes. In the Endangered Species Act (ESA) context, Interior issued Secretarial Order 3349, which directed a reexamination of mitigation policies and practices across Interior. It also issued [a guidance memorandum](#) regarding when an incidental take permit may be appropriate for projects that modify habitat of ESA-listed species. This guidance emphasized that the ESA section 10 permit process is voluntary and set a standard that a permit is needed for habitat modification only where it "actually kills or injures wildlife." Interior is also examining amendments to its ESA section 4 and section 7 regulations, which will likely take a more restrictive view of what species are afforded protection when listed as "threatened," and what actions trigger procedural and substantive obligations under ESA section 7. Interior also recently reversed a long-standing federal position and stated that the Migratory Bird Treaty Act (MBTA) does not impose liability for the incidental take of protected birds.

These examples illustrate that the administration is intent on carrying out its commitment to reducing what it sees as excessive regulatory burdens and speeding up federal decisionmaking. And, through actions like Interior's guidance on habitat modification and its recent MBTA opinion, it has indicated a desire to ensure enforcement powers are not read overly broadly.

The Deconstruction Agenda

These actions require implementation and assistance from the civil servants that comprise the federal bureaucracy. Accordingly, they must be considered in the context of the administration's deconstruction agenda. More than a year into the new administration, over half of the 656 most notable political positions across the government are unfilled. Attrition is also up, with large numbers of federal employees choosing to leave the government. In the first nine months of the administration, more than 79,000 full-time workers quit or retired, a 42% jump over that period in the Obama administration. Administration officials have also expressed frustration with career civil servants they oversee. Secretary of the Interior Ryan Zinke, for instance, ordered the involuntary reassignment of dozens of the department's most senior civil servants and claimed that nearly a third of his staff was disloyal. He promised a "huge" change by restructuring staff positions and moving decisionmaking points and stated that he wanted to get rid of 4,000 Interior employees, either through layoffs, attrition or buyouts.

Gaps in permanent senior leadership, coupled with attrition and qualitative changes involving uncertainty and morale among those in the civil service, may have an impact on the administration's ability to focus and coordinate resources toward the type of decisionmaking that it desires. These factors may also affect project proponents' efforts to work cooperatively with agency staff in undertaking actions necessary for resource management and development, and in ensuring that federal actions are defensible if challenged.

Conclusion

The administration's deregulation and deconstruction agendas bring opportunities. But these objectives also interact in complex and potentially conflicting ways, which makes it difficult to predict future agency activity

with precision. At a minimum, it is important for stakeholders to keep these missions in mind and seek counsel from those who can help navigate these changes. In addition, all stakeholders should expect continued political interest in regulatory reform and increased speed in decisionmaking on the one hand, and continuing concerns about attrition, the loss of institutional knowledge, and morale by career civil servants charged with implementing existing agency missions and higher-order changes, on the other.

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