Trump administration focuses on energy regulations

The opening days of the Trump administration have seen a flurry of activity focused on regulations affecting the oil and gas industry. President Donald Trump has issued a series of executive orders and presidential memoranda aimed at reducing regulations that impact the energy industry. Congress has also used its authority under the Congressional Review Act (CRA) to repeal several recently issued regulations. While the industry has largely applauded these moves, environmental groups have signaled they intend to challenge these actions aggressively in court.

Executive actions and presidential memoranda

On January 20, the new White House chief of staff issued a regulatory freeze memo instructing executive branch agencies to (1) withdraw rules that had been sent to the Federal Register but had not yet been published; (2) refrain from sending new rules to the Federal Register for publication until a senior official appointed by the administration had reviewed the contents of the rule; and (3) extend the effective date for those rules that had been published prior to Inauguration Day but had not yet taken effect.

On January 24, President Trump issued memoranda calling for the expedited review and approval of the Keystone XL Pipeline and Dakota Access Pipeline projects, which had been blocked or stalled during the previous administration. The president also directed the secretary of commerce to develop a plan within 180 days for using materials and equipment produced in the United States in all new, repaired or replaced pipelines.

On January 30, the president issued an executive order entitled “Reducing Regulations and Controlling Regulatory Costs” (informally known as “the Two-for-One Order”). The Two-for-One Order requires agencies to identify two regulations for repeal for every new regulation the agency proposes or promulgates. The Two-for-One Order also establishes cost caps for regulatory action. The net incremental cost cap for the remaining portion of fiscal year 2017 is zero, and the Office of Management and Budget (OMB) is directed to set the cost caps for future fiscal years. In other words, federal agencies cannot advance a new rule between January 20 and September 30 (the end of the current fiscal year) without first identifying two regulations for repeal under the Two-for-One Order, and the net incremental costs for new regulations must be zero.

On February 2, the Office of Information and Regulatory Affairs (OIRA), a division of the OMB, issued interim guidance to agencies on how to implement the Two for One Order. OIRA made several clarifications in the interim guidance:

- The guidance narrowed the application of the Two-for-One Order to significant rulemakings and guidance documents.
- Agencies do not have to comply with the Two-for-One Order if a statute or court decision requires otherwise.
- The Two-for-One Order does not apply to independent agencies (i.e., the Federal Energy Regulatory Commission), but those agencies are encouraged to identify existing regulations that could be repealed or revised to reduce costs.
- Agencies can use the savings acquired from regulations repealed by an act of Congress (i.e., Congressional Review Act resolutions) to offset the costs of new rules.
- Agencies can pair two rules from different divisions within the agency to achieve the required cost-savings. The rules repealed do not have to bear a substantive connection to the one that is being issued.
- Agencies are prohibited from using the regulatory impact analysis (RIA) created during the original rulemaking process. The RIA used to support the costs or proposed savings must be based on ongoing costs.

On March 28, the president issued the “Promoting Energy Independence and Economic Growth” executive order. The president directed agencies to review existing regulations that potentially burden the “development or use of domestically produced energy resources.” Of particular note, the president directed the Environmental Protection Agency (EPA) to review the Clean Power Plan final rule and the Emission Standards for New, Reconstructed and Modified Sources final rule. The president also rescinded the Council on Environmental Quality’s August Trump environmental regulation: Continued from page 1 2016 final guidance, which urges agencies to consider the effects of greenhouse gas emissions in their National Environmental Policy Act reviews. Finally, the president rescinded the six technical documents that the previous administration had relied on to support the Social Cost of Carbon, the framework to determine the benefits of reducing carbon emissions. (See related article on page 4.)
Congressional Review Act

Congress has used its authority under the CRA to pass joint resolutions of disapproval nullifying regulations finalized in the waning days of the Obama administration. The CRA allows Congress to take expedited action to overrule regulations issued by federal agencies within the previous 60 legislative days. To date, Congress has introduced 15 joint resolutions seeking to overturn a regulation finalized between June 13, 2016, and January 3, 2017. Of the 13 joint resolutions that have passed both houses of Congress, President Trump has signed eight into law. By comparison, prior to 2017 Congress had successfully used the CRA only once.

Several of these resolutions are of interest to the energy industry. The president has withdrawn the Department of Interior’s Stream Protection Rule, which would have imposed new limitations on coal mining operations; an Occupational Safety and Health Administration rule that would have made recordkeeping requirements a continuing obligation; and a Securities and Exchange Commission rule that would have required oil companies to disclose operations in foreign countries.

In February, the House of Representatives passed a joint resolution withdrawing the Bureau of Land Management’s rule establishing emission limits on oil and gas companies operating on public land. However, the Senate has yet to pass this resolution. Congress is also reviewing the EPA’s final rule amending the accident prevention and emergency response requirements of the Risk Management Program. The March 30 deadline to introduce new joint resolutions has now passed; however, Congress has until approximately May 9 to vote on the remaining joint resolutions.

Environmental non-governmental organization response

Environmental groups have already instituted lawsuits challenging several of these presidential and congressional actions. On February 8, Public Citizen, Natural Resources Defense Council and the Communications Workers of America filed suit in the U.S. District Court for the District of Columbia seeking declaratory and injunctive relief from the Two-for-One Order. Other groups have expressed an interest in seeking judicial reviewing of some of the other recent actions, including the executive order related to the Clean Power Plan final rule.

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