



2017

REGULATORY FORECAST

ENVIRONMENTAL &
ENERGY POLICY

BALCH
& BINGHAM LLP

2017

REGULATORY FORECAST

ENVIRONMENTAL & ENERGY POLICY

With an incoming administration promising substantial changes to current energy and environmental policies, regulated businesses are closely monitoring and evaluating what 2017 will bring. A new administration creates opportunities for extensive policy changes ranging from the withdrawal or reconsideration of rules to the introduction of new ones. Regulatory reform is seen as a top priority for the 115th Congress, too. The compliance landscape in 2017 will surely differ from recent years.

Pulling from deep experience serving as counsel in highly-regulated industries and careers on Capitol Hill, Balch & Bingham's team of energy and environmental attorneys have contributed to this report to forecast what to expect in 2017.

BALCH'S ENVIRONMENTAL & ENERGY PRACTICES

Balch & Bingham was formed in 1922 for the purpose of serving as legal counsel for the then-emerging electric power industry. In the ensuing years, the firm developed specialized experience in the areas of energy, environment, and natural resources law and policy. Today, our team of more than 40 energy and environmental lawyers is actively engaged in litigation and regulatory compliance for our clients, as well as state and federal legislative processes impacting energy, environmental, and natural resources issues and related agency rulemaking proceedings.

MEET THE CONTRIBUTORS



KAREN BILLUPS
PARTNER

kbillups@balch.com
(202) 661-6340

Karen Billups' practice focuses on energy and environmental policy, natural resources and infrastructure development, and federal government relations. She brings decades of work experience in the Congress, federal government and the private sector, most recently as Staff Director of the U.S. Senate Committee on Energy and Natural Resources, crafting and negotiating complex energy, mining, forestry and environmental legislation and regulations.



MARGARET CARAVELLI
PARTNER

mcaravelli@balch.com
(202) 661-6342

Margaret Caravelli focuses on energy, environmental, and transportation issues for petroleum refiners and electric utilities. Margaret works closely with her clients on legislative and regulatory matters involving the Clean Air Act and the refining of transportation fuels and generation of electricity. With over a dozen years of federal policy experience, including serving as lead counsel for Clean Air Act issues on the Senate Environment and Public Works Committee and the House Energy and Commerce Committee, Margaret's background in transportation fuels and clean air policy makes her unique in that she participated in the drafting and negotiating of comprehensive energy and transportation legislation enacted in the last decade.



SEAN CUNNINGHAM
PARTNER

scunningham@balch.com
(202) 661-6344

Sean Cunningham has more than seventeen years of legal, energy policy, and congressional staff experience. His practice focuses on representing electric utilities in regulatory, litigation, and legislative matters pertaining to energy policy. As counsel to the House Energy and Commerce Committee, Sean served as lead staff negotiator and primary drafter for the electricity and energy efficiency provisions of comprehensive energy legislation passed by the House and adopted by House and Senate conferees in 2003 (Energy Policy Act of 2003).

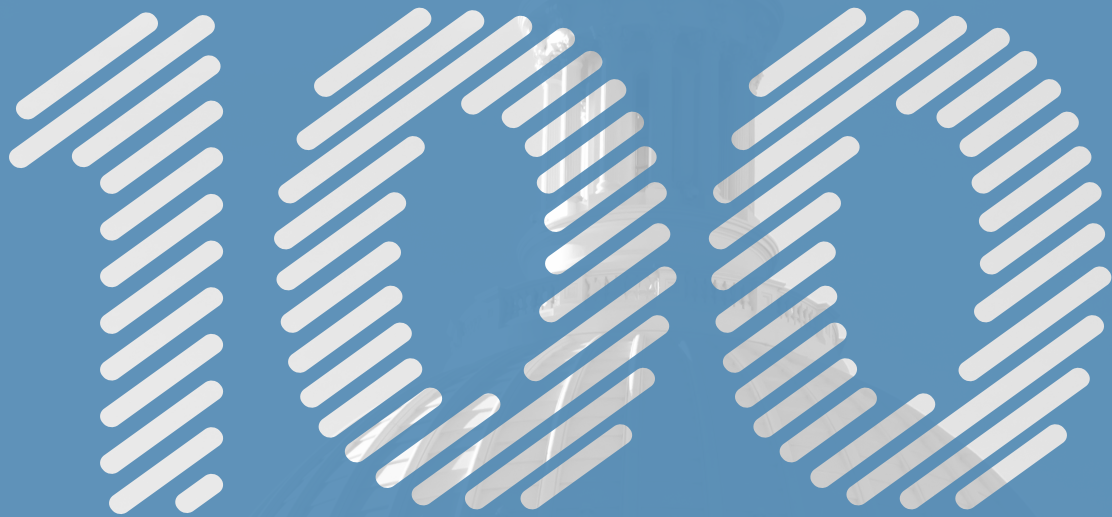


DAVID MITCHELL
PARTNER

dmitchell@balch.com
(202) 661-6341

David Mitchell has broad experience handling matters arising under major federal and state environmental programs, with a particular focus on the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act. David represents industrial clients and trade associations in litigated matters and enforcement proceedings involving the federal government and in all phases of administrative rulemakings. David also has significant experience providing regulatory compliance advice and solutions to clients in the electric utility industry.

The First



Days

ENERGY & ENVIRONMENTAL PRIORITIES FOR THE NEW ADMINISTRATION

Trade, immigration, national security, and the future of the Supreme Court received top billing in this year’s presidential race, but a range of energy and environmental issues were also frequently discussed. Who can forget Ken Bone, a coal power plant employee in his red sweater, asking the candidates to discuss their views on energy policy at the debate in St. Louis, Missouri? Throughout the campaign, Secretary Hillary Clinton spoke about her plans to make the United States a “clean energy superpower” and touted her goal of installing half a billion solar panels in the U.S. in her first term.

For his part, President-elect Donald J. Trump touted an “America First” energy policy. He discussed energy and environmental issues in many, if not most, of his campaign speeches, and he gave two major speeches focused on energy issues—first, in May 2016, at an oil and gas conference in North Dakota, and again, at a shale energy conference in Pennsylvania in September 2016.



Trump also made a point to include locally significant environmental topics at many of his campaign stops. For example, at his Florida rallies, he often highlighted support for restoring and protecting the Florida Everglades and addressing concerns about the Herbert Hoover Dike at Lake Okeechobee. In a competitive district in Maine, Trump criticized President Barack Obama’s designation of the Katahdin Woods as a national monument. He also committed in many of his speeches to end U.S. involvement in the Paris Climate Accord and to rescind Obama’s Climate Action Plan. And though he was criticized in the primary season for proposing to abolish the Environmental Protection Agency (EPA), Trump spoke in the general election about “refocusing” the EPA on its “core mission” of clean air and clean water, and working cooperatively with state environmental agencies to achieve environmental goals.

With the rigors and rhetoric of a campaign now in the past, the focus of the nation turns to the first 100 days of the new administration. At a major campaign speech in Gettysburg, Pennsylvania, in the final weeks of the campaign, Trump outlined a plan for his first 100 days in office that included, among his top five action items, a plan to seek enactment of an “American Energy and Infrastructure Act.” Major action items on the early agenda of the new administration are discussed below.

EXECUTIVE ACTIONS

As part of his America First Energy Plan, Trump pledges to “rescind all job-destroying Obama executive actions,” and “eliminate all barriers to responsible energy production.” Following through on that promise, Trump is expected to reverse programs under the umbrella of Obama’s 2013 Climate Action Plan. This will likely include reconsideration of EPA’s finalized Clean Power Plan (which regulates carbon dioxide emissions in the power generation sector), the Department of Interior’s final rule on fugitive methane emissions, and the Department of State’s denial of a permit for the construction of the Keystone XL Pipeline. The Trump administration will also likely rescind EPA’s final rule expanding Clean Water Act jurisdiction under the “waters of the United States” standard, and reconsider the Department of Interior’s leasing restrictions on domestic energy reserves (e.g., shale, oil, natural gas). Other prominent actions by the Obama administration—such as tightening of the ozone standard and revisions to the regional haze rules—are also likely to be revisited.

NOMINATIONS

To ensure a paradigm shift in regulatory priorities, Trump has already selected conservative leaders to key Cabinet positions at the EPA, the Energy Department, and the Interior Department. Oklahoma Attorney General Scott Pruitt, named to lead EPA, is expected to elevate the role of states in environmental regulation. While Trump’s energy and environmental nominees are certain to face stiff opposition and criticism from Senate Democrats, especially on topics like climate change, confirmation for most of his picks is not in serious doubt because of, ironically, changes in the Senate precedents governing the



TRUMP IS EXPECTED TO REVERSE PROGRAMS UNDER THE UMBRELLA OF OBAMA’S 2013 CLIMATE ACTION PLAN.



OBAMA RULES UNDER THREAT OF REVERSAL

- ✓ Clean Power Plan
- ✓ Endangerment Finding
- ✓ Waters of the US Rule
- ✓ Stream Protection Rule
- ✓ Ozone NAAQS
- ✓ Emissions Standards for Oil and Gas Wells
- ✓ ESA Critical Habitat Rule



REGULATORY REVERSAL

TOOLS IN THE NEW ADMINISTRATION'S TOOLBOX

- ✓ Stand-alone legislation
- ✓ Appropriations riders
- ✓ Congressional Review Act
- ✓ Traditional rulemaking process
- ✓ Informal agency actions
- ✓ Litigation options

confirmation process put in place by Senator Harry Reid (D-NV) in 2013 when his party controlled both the Senate and the White House. This means that Trump's nominees to key agency positions will only need the support of a simple majority (as opposed to three-fifths) to be confirmed.

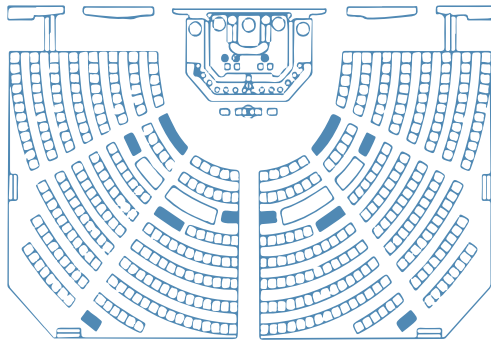
He has also said that he wants to empower states to have a lead role in upgrading the nation's infrastructure. (For further information, the Trump Infrastructure Plan is available [online](#)¹).

LEGISLATIVE PRIORITIES

While significant parts of the Trump agenda can be achieved through agency actions, the full thrust of his energy and environmental agenda will depend significantly upon enacting legislation in these areas. In his Gettysburg pledge, Trump announced that he would work with Congress on a number of agenda items, including the passage of an American Energy & Infrastructure Act. A review of his campaign speeches and policy position papers posted on his campaign website suggests that this legislation would, at a minimum, seek to promote production of domestic energy (including coal, oil, gas, and other sources) while also spurring major new investments in roads, bridges, drinking water and wastewater infrastructure, ports and waterways, and energy infrastructure (such as pipelines and coal export facilities).

HIS PLANS ARE BASED ON A VISION OF ACHIEVING \$1 TRILLION IN NEW INFRASTRUCTURE INVESTMENTS, WHILE ALSO LINKING INCREASES IN INFRASTRUCTURE SPENDING TO REGULATORY STREAMLINING OF PERMITTING DECISIONS AND IMPROVEMENTS TO THE PROJECT DELIVERY SYSTEM.

TRUMP WILL LIKELY ENCOURAGE CONGRESS TO RE-ORIENT ENVIRONMENTAL PRIORITIES BY SHIFTING EPA APPROPRIATIONS TOWARD ITS CORE PROGRAMS AND AWAY FROM INITIATIVES OF MORE RECENT VINTAGE.



Of course, enacting legislation will require close coordination with congressional leaders like Speaker of the House Paul Ryan (R-WI), who has announced his own “Better Way” agenda. In fact, for those looking to predict key legislative actions in the year ahead, it is helpful to overlay the Trump policy agenda with the Better Way agenda to identify areas of common support. This would seem to include priorities like expanding energy production on federal lands and offshore areas, approving energy infrastructure projects like the Keystone XL pipeline, and reforming the EPA.

Beyond this infrastructure blueprint, Trump will also likely support legislative efforts to curb agency discretion under major federal environmental programs. The new administration is expected to work with Congress on re-working EPA’s Clean Water Act jurisdiction over “waters of the United States,” and limiting EPA regulation of carbon dioxide emissions. Likewise, Trump will likely encourage Congress to re-orient environmental priorities by shifting EPA appropriations toward its core programs (e.g., attainment of clean water and air), and away from initiatives of more recent vintage.

OTHER AGENDA ITEMS

Upon assuming the presidency on January 20, 2017, Trump will need to address a number of issues where his approaches differ from the outgoing Obama administration. For instance, the administration’s new team at the Justice Department will need to consider how to navigate necessary changes in litigation positions in certain high-profile environmental cases. This would include *West Virginia v. EPA*, in which a number of states and industry groups challenged the validity of Obama’s Clean Power Plan. The case is now before the U.S. Court of Appeals for the D.C. Circuit. It is possible, although unlikely, that the D.C. Circuit could rule in that case ahead of the inauguration. A stay of the Clean Power Plan by the U.S. Supreme Court (still in place) would presumably remain in effect. The Trump administration will also be faced with politically thorny issues related to the Yucca Mountain nuclear waste repository, with one critical issue being whether the leadership of the Energy Department— including the nominee for Energy Secretary, Governor Rick Perry— will support continuation of the licensing process for this facility.

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In short, with Republican control of Congress, Trump will have an opportunity to pursue a comprehensive environmental and energy agenda. Certainly, the first 100 days of the new administration will bring about major shifts in federal energy and environmental policies, likely through a combination of legislation, executive actions, and formal and informal decisions by the agencies.

¹<https://www.donaldjtrump.com/policies/an-americas-infrastructure-first-plan/>

WHAT ABOUT

CLIMATE CHANGE

Environmental Groups Likely to Continue to Press EPA to Act on Climate Change

President-elect Donald J. Trump campaigned on the promise to rescind the Obama administration's landmark program to regulate emissions of greenhouse gases from power plants—the Clean Power Plan.

That effort is certain to draw direct legal challenges from environmental groups and some states. Even if the effort does survive direct challenges, the fight would still likely continue. For example, even if the Clean Power Plan is successfully withdrawn, environmental groups may attempt to force the Environmental Protection Agency (EPA) to replace the Clean Power Plan with an alternative regulatory scheme for addressing greenhouse gas emissions.

Under the Obama administration, environmental groups frequently used a “sue-and-settle” approach to force EPA to act on various rulemaking obligations. Pursuing a litigation strategy, environmental groups may file lawsuits against EPA to force the agency into binding consent decrees, requiring proposed and final rules to be issued under court-approved deadlines. This strategy was employed by environmental groups in recent rulemakings involving the regional haze program and the National Ambient Air Quality Standards. Environmental groups may seek to continue to pursue this strategy even under Trump's EPA. And, although the new EPA would not be expected to invite such suits, it may not be able to avoid them. Typically, the sue-and-settle tactic involves contexts where the Clean Air Act imposes deadlines for EPA



to (1) promulgate new rules, (2) issue Federal Implementation Plans, and/or (3) review existing regulations or standards. Because there is no statutory language specifically prescribing deadlines for EPA action on greenhouse gases, environmental groups will likely turn to Supreme Court precedent and past EPA policy positions to support their efforts. In *Massachusetts v. EPA*, the Supreme Court addressed EPA’s obligation to establish emission standards for motor vehicles under Section 202 of the Clean Air Act, and a slim majority of justices found that greenhouse gases fall within the definition of “air pollutant” in Section 202. In the wake of this decision, EPA issued its “endangerment” finding in 2009, where it generally concluded that “greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare.” In 2011, the Supreme Court in *American Electric Power Co. v. Connecticut* stated that the Clean Air Act “speaks directly’ to emissions of carbon dioxide from the defendants’ plants.” The Court further discussed EPA’s authority under Section 111 of the Clean Air Act and noted that “[i]f EPA does not set emissions limits for a particular pollutant or source of pollution, states and private parties may petition for a rulemaking on the matter, and EPA’s response will be reviewable in federal court.” Environmental groups may also seek to revive lawsuits under common law nuisance theories if EPA disavows regulating greenhouse gases under the Clean Air Act.

The Trump administration should be prepared to address this precedent and the agency’s past policy positions. Whether using a sue-and-settle tactic or formal petitions for rulemaking, environmental groups, as well as certain states, are likely to pursue any means possible to require EPA to regulate greenhouse gas emissions.



ENVIRONMENTAL GROUPS MAY ALSO SEEK TO REVIVE LAWSUITS UNDER COMMON LAW NUISANCE THEORIES IF EPA DISAVOWS REGULATING GREENHOUSE GASES UNDER THE CLEAN AIR ACT.



INFRASTRUCTURE

A Key Element of Trump's Energy Plan

When President-elect Donald J. Trump declared victory in the hard-fought presidential race against former Secretary of State Hillary Clinton, it became clear that change was coming to Washington.

In a short but triumphant speech on election night in New York City, President-elect Donald J. Trump reiterated a major campaign policy priority: the Trump administration would “rebuild America’s infrastructure,” and put “millions of people to work” in the process. Months earlier, at an oil and gas conference in North Dakota, Trump had also declared that a focus on infrastructure was not only good for the economy, but also necessary to achieving “complete energy independence.”

This theme became a centerpiece of Trump’s America First Energy Plan (available [online](#)²), which pledges to eliminate President Barack Obama’s “job-destroying executive actions” and remove “all barriers to responsible energy production.” At several campaign rallies, for example, Trump asserted that he would reverse Obama’s obstruction of controversial energy infrastructure projects like the Keystone XL pipeline. That approach is also reflected in Trump’s infrastructure plan (available [online](#)), which sets a goal of spurring \$1 trillion in new infrastructure investments over the next decade. Along with transportation, drinking water, and other infrastructure needs, the infrastructure plan covers energy infrastructure that is “needed to enable new economic development in the U.S.” His plan also touts approval of various “private sector energy infrastructure projects—including pipelines and coal export facilities—to better connect American coal and shale energy production with markets and consumers.”

Following is a summary of the actions likely to be taken in achieving the president-elect’s energy and infrastructure goals:

APPROVE PENDING PROJECTS

In his first 100 days, Trump plans to lift the “roadblocks” that stalled private infrastructure projects during the Obama administration. According to the *Wall Street Journal*, “more than a dozen [energy infrastructure] projects, worth about \$33 billion, have been either rejected by regulators or withdrawn by developers since 2012, with billions more tied up in projects still in regulatory limbo.” The Trump administration would seem very willing to press these kinds of projects through the approval process.

Reconsideration is especially likely in the Department of State’s denial of a permit for the Keystone XL Pipeline, as well as the U.S. Army Corps of Engineers’ denial of an easement for the Dakota Access Pipeline. The new administration will also have to contend with the decision to kick-start the license process for the nuclear waste repository at Yucca Mountain, Nevada, which would be one of the largest energy infrastructure projects ever.

REFOCUS SPENDING PRIORITIES

On the campaign trail, Trump emphasized the need to overhaul federal infrastructure spending. At a rally in south Florida, for example, he argued that the federal government should scale back expenditures on global priorities and focus more on domestic needs like modernizing water treatment facilities across the country. This position was reflected in Trump’s Contract with the American Voter, in which the president-elect

pledged to “cancel billions in payments to U.N. climate change programs and use the money to fix America’s water and environmental infrastructure.” At the same time, Trump has said that he wants to link infrastructure spending increases with reforms that streamline permitting and approvals, improve the project delivery system, and cut agency waste. Of course, fiscal recalibration will require cooperation with leaders on Capitol Hill.

“AMERICAN ENERGY & INFRASTRUCTURE ACT”

At a major speech delivered in Gettysburg, Pennsylvania, during the final weeks of the presidential campaign, Trump announced that, in his first 100 days, he would “lift the leasing restrictions on the production of \$50 trillion dollars’ worth of job-producing American energy reserves, including shale, oil, natural gas and clean coal.” During the Obama administration, these restrictions were broadly imposed on those seeking to produce fossil fuels on public lands and offshore areas. Trump will likely reverse those policies through prompt executive actions and legislation. The White House is expected to work closely with the Department of the Interior, the Department of Energy, and other relevant agencies to fully implement the president-elect’s vision for his America First Energy Plan.

To this end, Trump also announced during his Gettysburg speech that one of his top five priorities in the first 100 days would be enactment of legislation he referred to as an “American Energy & Infrastructure Act.” The infrastructure portion of this legislation would likely draw from goals he has outlined—spurring \$1 trillion in new infrastructure investments over the next decade through changes in spending priorities, public-private partnerships, infrastructure tax credits, and other approaches. The infrastructure portion of his plan appears to be receiving bipartisan applause. For instance, in reacting to Trump’s victory speech after Election Day, U.S. House of Representatives Minority Leader Nancy Pelosi acknowledged that “we can work together to quickly pass a robust infrastructure-jobs bill” in a manner that is “strong and smart.”

STREAMLINE THE REGULATORY PROCESS

To ensure timely advances in infrastructure development, the Trump administration plans to downsize and streamline the regulatory process. In his Contract with the American Voter, Trump made dual pledges to “cancel every unconstitutional executive action, memorandum and order issued by Obama,” and to require “that for every new federal regulation, two existing regulations must be eliminated.” The president-elect has also stated that he will direct all Department heads to list and eliminate “every wasteful and unnecessary regulation which kills jobs, and which does not improve public safety.” This means that major regulatory actions from the Obama administration (e.g., the Clean Power Plan, the “Waters of the U.S.” Rule) will likely be rescinded. As a practical matter, the rescissions may further encourage private infrastructure investment if companies feel that regulatory processes will be more workable. Executive actions to streamline and improve the NEPA environmental review process are also likely.

Apart from these shifts in executive branch policy, the Trump administration also hopes to work with a Republican-led Congress in passing legislative “fixes” to improve the regulatory environment. A wide range of laws and regulations could be up for review in the new Congress. For instance, legislative proposals to amend the Migratory Bird Treaty Act (MBTA) could get attention. The Trump administration will have to assess whether it wishes to build on pending proposals like H.R. 493 (the “CLEAN Energy Producers Act of 2015”) or chart its own path for reform. Other statutes that may be candidates for amendments include the Clean Air Act, Clean Water Act, the National Environmental Policy Act, and many others.

² <https://www.donaldjtrump.com/policies/energy/>

³ <http://www.wsj.com/articles/fossil-fuels-unpopularity-leaves-a-mark-1464827381>

PRESIDENTIAL



President-elect Donald J. Trump is expected to use the veto pen more sparingly and sign legislation more often. Certainly, with unified Republican control of the executive and legislative branches, the Trump administration is expected to see significantly more signing ceremonies than the Obama administration experienced in its last two years. Yet, total legislative enactments have tended to decrease overall, regardless of whether the executive and legislative branches are controlled by the same party.

LEGISLATING IN TIMES OF DIVIDED GOVERNMENT

Recent Congresses with the White House under Control of the other Party

Congress	Years	President	#of Vetoes	% Sustained	Total # of Laws Enacted
100 th	1987-1988	Reagan	8	63%	760
101 st	1989-1990	Bush	20	100%	665
102 nd	1991-1992	Bush	24	93%	610
104 th	1995-1996	Clinton	17	94%	337
105 th	1997-1998	Clinton	8	88%	404
106 th	1999-2000	Clinton	12	100%	604
110 th	2007-2008	Bush	11	60%	460
114 th	2015-2016	Obama	10	90%	244

SCORECARD

LEGISLATING IN TIMES OF UNIFIED GOVERNMENT

Recent Congresses with House, Senate & White House Controlled by Same Party

Congress	Years	President	#of Vetoes	% Sustained	Total # of Laws Enacted
95 th	1977-1978	Carter	18	100%	804
96 th	1979-1980	Carter	10	100%	736
103 rd	1993-1994	Clinton	0	n/a	473
107 th	2001-2002	Bush	0	n/a	383
108 th	2003-2004	Bush	0	n/a	504
109 th	2005-2006	Bush	1	100%	483
111 th	2009-2010	Obama	2	100%	385
116th	2017-2018	Trump	?	?	?

Source: <https://www.govtrack.us/congress/bills/statistics>

FEDERAL ELECTRICITY LAWS

Due for an Overhaul?



Developments in electricity market structure, recent Supreme Court decisions, and growing concerns about grid reliability and security suggest the time may be ripe for Congress to revise the nation's electricity laws.

Although substantial adjustments were made to the Federal Power Act (FPA) in 1992 and 2005, the basic State-Federal jurisdictional scheme of the Act was established when it was originally enacted in 1935. Under the FPA, the Federal Energy Regulatory Commission (FERC) regulates interstate transmission and wholesale power sales, while the states remain free to regulate generation,

DETERMINING THE PRECISE LINES BETWEEN TRANSMISSION AND DISTRIBUTION, WHOLESALE AND RETAIL, HAS INCREASINGLY BEEN THE JOB OF THE COURTS IN CASE AFTER CASE.

distribution, and retail sales. Determining the precise lines between transmission and distribution, and wholesale and retail sales, has increasingly been the job of the courts in case after case. Most recently, a pair of Supreme Court cases were decided against state efforts to regulate demand response (*FERC v. EPSA*) and to provide favorable rates for in-state generation (*CPV Maryland v. Talen Energy*). Giving wide leeway to FERC's authority over organized electricity markets, these decisions cast doubt on other state efforts to protect reliability and keep nuclear and coal-fired generation plants that sell into those markets from going offline, and could spur states to backtrack on electric competition by reinstating traditional cost-based regulation. To help states protect reliability and maintain balanced generation portfolios, Congress may seek to clarify the State-Federal jurisdictional divide. Although the recent House-Senate energy bill conference did not focus on FPA changes (except for hydropower), both

the House and Senate energy committees have built a hearing record that appears to be in preparation for substantial reforms of the FPA to address jurisdictional issues, as well as to update provisions on distributed generation technologies, grid security, siting, merger review standards, and hydropower. For more information, see detailed information on the U.S. House Committee on Energy and Commerce's [Federal Power Act: Historical Perspectives](#)⁴ hearing and the U.S. Senate Committee on Energy & Natural Resource's [Hearing on Energy Supply Legislation](#)⁵.

Beyond the FPA, Congress may also revisit the mandatory purchase obligation under the Public Utility Regulatory Policy Act (PURPA), a mandate that has proved uneconomic, unnecessary for the continued growth of renewables, and at odds with sound integrated resource planning for long-term reliability. On PURPA reform, see this 2015 [letter](#)⁶ to FERC from the chairmen of the House and Senate energy committees.

⁴ <https://energycommerce.house.gov/hearings-and-votes/hearings/federal-power-act-historical-perspectives>

⁵ <http://www.energy.senate.gov/public/index.cfm/2015/5/hearing-on-energy-supply-legislation>

⁶ http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=C004B917-0859-478B-A16C-1B52A3E76B2E

TIMING IS EVERYTHING

Does transition

delay immediate

policy changes?

In a presidential election year, the timing of the organizing process is particularly crucial, as the Senate must prepare to process hundreds of nominations. The business of the Senate will be impacted for months as committees process the over 1,000 presidential nominations that require Senate approval.

THE BEGINNING OF A NEW, TWO-YEAR CONGRESS (IN THIS CASE, THE 115TH CONGRESS) ROUGHLY COINCIDES WITH THE BEGINNING OF A NEW PRESIDENTIAL ADMINISTRATION.

Following the November election, the majority and minority caucuses of both bodies of Congress must move quickly to elect their respective leadership, determine the ratios for majority and minority members on committees, allow members to select committees (generally by seniority) and select new committee chairmen. In a presidential election year, the timing of the organizing process is particularly crucial, as the Senate must prepare to process hundreds of nominations.

The president-elect uses the transition period between the election and his or her inauguration on January 20 to begin to vet and select political appointees that are subject to confirmation by the Senate, usually beginning with the top-level Cabinet secretaries. Often, the actual nomination papers for many of the cabinet secretaries will arrive at the Senate on the day of the inauguration, and be voted on by (or discharged from) the committees of jurisdiction within days, and sometimes hours. But even after this initial “rush” of nominations, the business of the Senate will be impacted for months as committees process the over 1,000 presidential nominations that require Senate approval. For example, the Committee on Energy and Natural Resources has jurisdiction over 35 presidential appointments (including members of independent agencies whose terms may expire), and the Committee on Environment and Public Works must review over 28 nominees (in addition to the members of four multi-member commissions and boards).

Each nominee must submit paperwork that includes a thorough investigation by the Federal Bureau of Investigation, detailed financial records and a questionnaire about their personal and work history. Review of that paperwork, courtesy calls with members, hearings, responding to written questions for the Committee record, a Committee vote, and a floor vote by the Senate are customarily required for each nominee. The hearings and Committee votes can be conducted in batches of

four to five nominees, but all of the review still takes an enormous amount of member and staff time away from legislative business.

Some of the drama surrounding nominations has been eliminated by the change in Senate rules (commonly referred to as the “nuclear option”) that eliminated the need to obtain a 60-vote approval margin to proceed to a vote on a nomination on the Senate floor.

With only a 51-vote margin needed, and a president from the same party as the Senate majority, Senate confirmation will be an easier obstacle, although not guaranteed. While navigating the wave of nominations, the administration must also submit the president’s initial budget proposal for Congress’ consideration, which generally requires lengthy hearings before the authorizing and appropriations committees of jurisdiction.

To avoid having the Senate focused entirely on nominations and budget, the Majority Leadership produces an agenda of priority legislative items for the Senate, often with an expedited time frame for consideration. For example, in the 114th Congress, legislation approving the Keystone pipeline was approved by Committee and on the Senate floor within three days of the convening of the Congress. It is also not unusual for Committees to consider uncompleted legislative business from the previous Congress on an expedited basis. However, with regard to new issues, it is not unusual for several months of the new Congress to pass before Senate Committees begin the process of hearing and debating those items.



Margaret, in the 2016 Regulatory Forecast, you discussed the “wall of reality” encountered by the Renewable Fuel Standard contained in the Energy Independence and Security Act of 2007 (EISA ‘07). Does a new administration, and for that matter, a new Congress, change the outlook for that program?



MARGARET: The Renewable Fuel Standard (RFS), an amendment to the Clean Air Act, was first enacted as part of the Energy Policy Act of 2005 and was significantly altered and expanded in the Energy Independence and Security Act of 2007. The RFS continues to receive criticism due to concerns about flaws inherent in a program

enacted based on certain assumptions that, ten years later, proved inaccurate.

Ultimately reaching 36 billion gallons of renewable fuel by 2022, the RFS sets separate, yet nested, volumetric mandates for four categories of renewable fuels: total renewable fuel, advanced biofuels, biomass based diesel, and cellulosic biofuels. Each fuel category includes certain minimum thresholds for lifecycle greenhouse gas emissions. As the mandated volumes increase from 2008 to 2022, the advanced biofuels contribution to the overall mandate reaches 21 billion gallons with conventional corn ethanol capped at 15 billion gallons beginning in 2015.

A decade after its initial enactment, the RFS continues to create controversy and consternation for those involved in the program. With a mandate that 36 billion gallons of renewable fuel be blended



in transportation fuel by 2022, of which 16 billion gallons is to be cellulosic biofuel, the goals of the RFS appear to be unachievable. For example, in 2017, the RFS mandates 5.5 billion gallons of cellulosic biofuels, while EPA's final rule for 2017 requires just 311 million gallons of cellulosic biofuels. Since 2010, the continued failure of cellulosic biofuels to produce the necessary volumes to meet the RFS mandates forced EPA to waive the requirements year after year. The failure of cellulosic biofuel production to come to fruition combined with lower demand for gasoline versus 2007's projection for increased gasoline demand, thereby limiting the amount of renewable fuel that may be safely blended into the transportation fuel pool, sets the stage for a failed program those obligated to abide by consider unworkable and unfair.

In an effort to make an unworkable program workable, EPA, as well as stakeholders, suggest temporary fixes. These include shifting responsibility for RFS compliance to additional stakeholders, recently proposed to be denied by EPA as an option; creating RFS compliance pathways for renewable electricity when used to power electric vehicles; and federal funding for installation of renewable fuel infrastructure such as blender pumps and electric vehicle charging stations.

With EPA's prior inability to implement the program in a timely manner and stakeholders on all sides expressing concerns with the future of the program, the 115th Congress may be the key to resolving the situation. While a new administration looks to reset the program, a new Congress may prefer to take action versus permitting the program to continue beyond 2022 when it reverts to EPA's full control.

A new administration can review and reconsider any regulation issued by a predecessor administration under the requirements of the Administrative Procedure Act, but is there anything Congress can do to review and possibly alter the implementation of final regulations issued by a previous administration?



KAREN: The ability of a new administration to alter or even completely reverse course on draft or final regulations under the Administrative Procedure Act (APA) in a timely manner

depends where those regulations are in the approval process. Amending final rules, for example, can require a reopening of a lengthy rulemaking. However, there are a variety of legislative tools available that a like-minded Congress can use to disapprove or reopen regulations. One of the most frequently discussed is the Congressional Review Act (CRA). The CRA provides an expedited process for the disapproval of major regulations by a majority vote of both Houses of Congress. The resolution of disapproval must be signed by the president to be effective in vetoing the regulation, which is why most efforts to use the CRA are ultimately unsuccessful when used during the course of an administration.

However, the CRA provides an extension of the time for review in the instance of a change in administration, which is designed to allow the new

QUESTION & ANSWER

Congress and president to review regulations issued by the former president on the way out the door.

The “look back” period is based on the number of Congressional days of session in the previous Congress, and may extend as far back as six or seven months. There is a deadline for the use of the CRA, so it is a popular mechanism for the period that it is available at the beginning of a new Congress. However, even after the CRA deadline expires, the Congress is not without tools to influence the implementation and enforcement of regulations. The most direct, but perhaps most difficult, route is to pass a law that explicitly repeals or contradicts the regulation. Passing such a law generally requires the support of 60 members of the Senate to obtain “cloture” on the motion to proceed to such a bill, which means that the law must have significant bi-partisan support.

The need for 60 votes is eliminated, however, when the law would result in significant budgetary savings or revenue and is included as an assumption in the budget resolution, which would make the measure eligible for consideration under the “budget reconciliation” process, which requires a simple majority (51 votes in the Senate) to pass. Another approach to block the application of a regulation is to include language in an appropriations bill that states that “no funds” may be used for the implementation of the rule. Appropriations bills require 60 votes to pass the Senate, but the inclusion of such language in a larger appropriations bill is often balanced by other considerations that make the threshold easier to cross.



Many existing U.S. nuclear power plants are under increasing economic pressure from a combination of factors, including abundant and inexpensive natural gas, technological advances, and state and federal policies that have increased market share for solar and wind generation, and unfavorable market structures in many states and regions. What is the future of the nuclear industry in this country?

KAREN: The situation is complex and varies dramatically depending on the location of the plant. While there are federal policy measures that can be taken to improve the economics of nuclear plants, varying state and regional market structures mean that there is not a “one size fits all” federal policy solution. The future of nuclear power will depend on a combination of federal, regional and state policies.



With regard to future nuclear plants, large amounts of private capital and government funding is being invested in multiple advanced nuclear technologies. These new technologies are designed to deliver clean nuclear power with passive safety features, and most are smaller than traditional nuclear plants,



allowing them to be assembled off-site and added to the grid on a “modular” basis. Unfortunately, the existing Nuclear Regulatory Commission (NRC) process was designed for large central station plants and is not a good fit for these advanced reactors, in particular the small modular reactors. Changes to the NRC permitting process are needed, and legislation is likely to be required. The nuclear industry is optimistic that development of these technologies and an appropriate NRC permitting process can result in the production of emission-free nuclear power at a competitive cost.

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”



President-elect Trump has promised to increase access to federal lands and waters for energy and mineral production. What regions of the country could see increased activity?

KAREN: In general, most new oil production faces economic headwinds from low oil prices; however, the new administration will be unlikely to support a continued ban on drilling off the Atlantic and Arctic coasts, and lessen obstacles to drilling on federal lands on shore. At a minimum, administration support could lead to previously prohibited seismic geologic analysis that could clarify the potential for oil and gas production in these areas. The greatest immediate opportunity is for development on federal and tribal lands adjacent to areas with oil production on private lands, as once federal regulatory barriers are removed, the most important factors will be the economics associated with the development of the formation and the ability to use existing infrastructure.



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WASHINGTON, D.C. OFFICE

601 Pennsylvania Avenue, N.W.
Suite 825 South
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