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COMMENTARY

Energy and Environmental Ramifications of the Trump Election

Significant changes to U.S. energy and environmental policies are likely to occur in the presidential administration of Donald J. Trump. President-elect Trump's plan for his first 100 days in office identifies several matters of importance for the energy industry that his administration plans to tackle. This *Commentary* explores whether and to what extent the Trump administration may be able to accomplish his goals and associated implications for the energy sector.

Standards Applicable to Most Executive Branch Decision-Making

It is a perfectly normal exercise for new political leadership at executive branch agencies to revise or repeal positions taken by previous administrations. Some such agency actions are subject to the Administrative Procedure Act ("APA"), depending on the nature of the action taken.[1] Where applicable, the APA imposes both procedural and substantive requirements in connection with revisions and repeal, including the notice-and-comment process. Courts reviewing an agency action may set it aside if the court determines that the change is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law."[2]

The U.S. Supreme Court has held that a change in agency position is subject to the same standard as any other action to which the APA applies.[3] It is sufficient for an agency changing position to show that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better."[4]

However, the Court has also specified that an agency may not "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." The Court may also require "a more detailed justification" if the new policy "rests upon factual findings that contradict those which underlay its prior policy" or "has engendered serious reliance interests." In such cases, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[5]

Many efforts by new Trump leadership to eliminate or weaken rules adopted in the current administration may be subject to APA procedures and therefore could be challenged in court. With this general framework in mind, we turn to some of the key aspects of Mr. Trump's energy platform.

Key Trump Energy and Environmental Proposals

Make America Energy-Independent. In many respects, this goal is consistent with current trends. For example, according to the U.S. Energy Information Administration, "in 2015, U.S. net imports (imports minus exports) of petroleum from foreign countries were equal to about 24% of U.S. petroleum consumption, the lowest level since 1970." EIA's Annual Energy Outlook 2016 also predicts that U.S. net energy imports will trend downward through 2040, due to increased domestic oil and natural gas production and decreased consumption. These projections in part reflect the fact that reducing America's dependence on foreign energy sources has also been a priority of the Obama administration. However, current models incorporate assumptions about the implementation of existing regulations, such as the Clean Power Plan. If the Trump administration is able to limit or abolish such policies (explored in more detail below), it may be possible to outperform current projections. This aspect of Mr. Trump's platform is relatively uncontroversial and is not likely to face challenges independently.

Open Offshore Leasing on Federal Lands. The Bureau of Ocean Energy Management ("BOEM"), a division of the U.S. Department of Interior, is responsible for managing energy resources in the outer continental shelf. In 2012, BOEM issued a plan that outlines where and when oil and gas leasing would be allowed for the period 2012 to 2017. The plan generally limits offshore leasing to areas that have already been developed. The current plan is set to expire on August 26, 2017. BOEM has started the process of preparing a new plan for the period 2017 to 2022. The 2017–2022 plan essentially offers the same areas for leasing as the current program. BOEM currently expects to complete its environmental review and issue the final proposal in late 2016. At least 60 days after that, the plan will be eligible for approval by the Secretary of the Interior. It therefore seems likely the 2017–2022 leasing plan will not be finalized during the Obama administration, and it could be subject to revision after President-elect Trump takes office in January of 2017.

One potential obstacle the Trump administration might face is that, as part of its final environmental review document, BOEM is likely to identify its current proposal as the "preferred" action based on various factual findings. As explained above, an agency's departure from previous factual findings can sometimes require more significant justification. However, there are other options available if the Trump administration wishes to expand the availability of offshore leasing opportunities. For example, the Trump administration could target the Gulf of Mexico Energy Security Act,[6] which declared that certain portions of the outer-continental shelf would be off-limits to oil and gas leasing through June 2022. Depending on whether he has support in Congress (note that both the House and the Senate will continue to be controlled by the Republican Party in the 115th Congress), he may be able to facilitate an amendment of that provision.

Eliminate Moratorium on Coal Leasing. On January 15, 2016, the U.S. Department of the Interior, Bureau of Land Management ("BLM") announced that it would suspend almost all decisions with regard to leases under the federal coal program until an environmental review of the program was completed. The quantity of potential coal mining opportunities at issue is significant.

According to the order: "as of Fiscal Year 2014, the BLM administered 310 Federal coal leases, encompassing 475,692 acres in 10 states, with an estimated 7.75 billion tons of recoverable Federal coal reserves. Over the last decade, the BLM has held 39 coal lease sales and managed leases that produced approximately 4.4 billion tons of coal and $10.3 billion in revenue. The recoverable reserves of Federal coal currently under lease are estimated to be sufficient to continue production from federal leases at current levels for 20 years…"

BLM's order is effective until "amended, superseded, or revoked, whichever occurs first." The environmental review initiated by BLM is discretionary, as there was no regulatory action proposed in conjunction with the order. It therefore seems likely that the Trump administration will be able to rescind the current moratorium on coal leasing. Given that the current order was not subject to the APA, revoking the order is also likely to be free of such procedures. The comment period for the environmental review ended earlier this year, but no documents or decisions have yet been issued that would be subject to judicial review as final agency action. The environmental review effort may therefore be halted in the new administration.

Allow Energy Infrastructure Projects, such as the Keystone Pipeline, to Move Forward. Pursuant to various executive orders, the Secretary of State has the authority to evaluate permit applications for the construction, connection, operation, or maintenance of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels at the borders of the United States. In 2012, the State Department determined that the Keystone XL project, which would have transported crude oil between Canada, Montana, and North Dakota, was not in the national interest, and it therefore denied the permit. Assuming the project applicant, or another entity, is willing to repropose a similar project, it would be within the new Secretary of State's powers to consider and approve such an application.

Given that the Keystone project was relatively high profile, it is likely that any future approval would be challenged. The agency may therefore seek to provide an explanation for why it disagrees with or is otherwise departing from the facts and circumstances that led to the original decision to deny the permit. In general, however, this aspect of the Trump platform indicates an openness to considering and approving transnational energy infrastructure projects.

It should be noted that the Dakota Access Pipeline, another high-profile energy infrastructure project, is distinguishable from the Keystone project in that it does not cross international borders, and therefore it is not subject to the approval of the Secretary of State or the President.

Eliminate the Waters of the U.S. Rule and Scrap the Clean Power Plan. The Clean Water Rule (also known as the WOTUS Rule) and the Clean Power Plan ("CPP") are two of the most significant, recent U.S. Environmental Protection Agency ("EPA") rulemakings. The WOTUS Rule redefines (and, many argue, unnecessarily expands) the term "waters of the United States" for purposes of regulatory requirements under the Clean Water Act. The CPP, a Clean Air Act rule, regulates greenhouse gas emissions from existing power plants. Both rules are being challenged in litigation and are currently stayed. The status of these rules could affect the options available for repeal.

For example, EPA has on occasion moved for "voluntary vacatur and remand" of a regulation in the midst of litigation.[7] If such a motion were granted in the WOTUS or CPP matters, it would effectively invalidate the rules. A motion for voluntary vacatur seems more likely to succeed in the WOTUS Rule litigation for a few reasons.

First, the WOTUS Rule is equally unpopular with states, environmental groups, and industry; it therefore seems unlikely that there would be significant opposition to a motion for voluntary vacatur. Most motions for voluntary vacatur are unopposed and are typically facilitated by a settlement between the parties.

Second, the WOTUS Rule litigation has thus far primarily focused on jurisdictional issues and has not yet proceeded to the merits. Therefore, a vacatur would be consistent with an efficient use of judicial resources.

By contrast, multiple parties have intervened in the CPP litigation in support of the rule, and they may be unwilling to agree to a voluntary vacatur proposed by the new administration. It is unclear whether a court would be inclined to grant a voluntary vacatur motion over such objections. In addition, the CPP case was already briefed on the merits and presented before the *en banc* United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). The arguments for judicial efficiency may therefore be limited. Nevertheless, voluntary vacatur is an option, and in the past, EPA has moved for such an order when the agency becomes persuaded that its previous position was inconsistent with the law. The Trump EPA may be able to strengthen its case for voluntary vacatur of the CPP by granting the pending petitions for reconsideration of the rule, which could weigh in favor of pausing the litigation until reconsideration is complete, and ultimately vacating the rule if EPA finds that it agrees with the petitioners.

It is also possible that the D.C. Circuit will issue its ruling on the merits in the CPP matter before a motion can be filed or a ruling on the petitions for reconsideration issued. If so, there are a few potential outcomes: the D.C. Circuit could vacate the rule, vacate and remand the rule, or uphold the rule (in whole or in part). Parties that have intervened on behalf of EPA would likely appeal any vacatur to the U.S. Supreme Court, but it seems unlikely that a Trump EPA would defend the CPP. The intervening parties could obtain permission to stand in the shoes of EPA but may nevertheless face reduced

chances of having the rule upheld. If the rule is remanded, and depending on any direction from the court and whether the court retains jurisdiction, the Trump administration will have an opportunity to either halt the rule altogether or to propose a substantially revised version. Finally, if the rule is upheld by the D.C. Circuit, challengers would likely appeal to the U.S. Supreme Court. If EPA does not defend the rule, the petitioners may have an increased likelihood of having the rule overturned.

If Mr. Trump's EPA leadership is provided the opportunity to repeal the WOTUS Rule or the CPP, it could, under the APA standard, justify such action based on a change in legal interpretation. For instance, most of the issues in the CPP litigation turn on EPA's understanding of its legal authority under the Clean Air Act, including: whether Section 111(d) of the Clean Air Act authorizes EPA to regulate beyond the fence-line of existing sources; whether regulation of existing power plants under Section 111 is precluded by Section 112; and whether the CPP improperly intrudes on state power. It is within EPA's authority to reconsider and revise its legal interpretations of these issues if the change is properly explained.

Because the CPP has been stayed pending judicial review, there may be limited reliance concerns triggering more significant justification. Under the WOTUS Rule, the current EPA has made factual determinations about what constitutes water of the United States, including how and whether certain waters are interconnected. A departure from these factual determinations may therefore require more substantial explanation under the APA. A formal decision not to regulate is subject to judicial review, and any new rule adopting a change in position with regard to the CPP or the WOTUS Rule will likely be challenged. However, the energy sector can reasonably assume that neither the WOTUS Rule or the CPP are likely to be implemented in their current form in the near future.

Withdraw from International Climate Change Efforts. During his campaign, Mr. Trump expressed criticism of the Paris Agreement, an international accord under which various countries pledged to reduce greenhouse gas emissions. There are several options available to the Trump administration for withdrawing from the Paris Agreement. First, the emissions reduction targets are voluntary, which means other participating countries would have little recourse if the United States remains a member of the agreement but does not adhere to its pledges. Second, the Obama administration has maintained that the Paris Agreement is not a treaty requiring Senate approval. The Trump administration, therefore, could arguably move forward with withdrawing from the Paris Agreement through executive action alone.

Alternatively, Mr. Trump may take the position that the Paris Agreement does require the advice and consent of the Senate. If such approval is sought, it seems unlikely that the Republican-controlled Senate would endorse the agreement, thereby obligating the executive branch to commence the withdrawal process.

In any event, it is unclear how quickly a withdrawal could be effected. Under Article 28 of the Paris Agreement, a party may withdraw by providing notice "at any time after three years from the date on which this Agreement has entered into force," and "any such withdrawal shall take effect upon expiry of one year" from the notice. Alternatively, a party may withdraw from the Paris Agreement by withdrawing from the United Nations Framework Convention on Climate Change. The latter option is a possibility, given that Mr. Trump has pledged to "cancel billions in payments to U.N. climate change programs." Because the Paris Agreement does not regulate U.S. industry directly, the timing and manner of withdrawal is not likely to be of significant consequence for the energy sector at this time.

Renegotiate Existing International Trade Agreements. During his campaign, Mr. Trump expressed the intention to renegotiate international trade agreements that had been entered into previously by the United States. Should the Trump administration proceed to withdraw from or cancel free trade agreements that provide for national treatment (i.e., provide for no regulatory distinction between domestic production or imports) for trade in natural gas, one issue that may need to be addressed is the possibility that, in the near term, there could be an increased regulatory burden on U.S. exporters of liquefied natural gas ("LNG"). Under the Natural Gas Act,[8] any person who wishes to export LNG from the United States must first obtain export authorization from the U.S. Department of Energy ("DOE"). If the intended importing country is a signatory to a free trade agreement requiring national treatment for trade in natural gas, as is the case with the North American

Free Trade Agreement and a number of other existing U.S. trade agreements, DOE is required to approve the LNG export authorization request without modification or delay. However, if the importing country is not a signatory to such an agreement, requests for authorization to export LNG to the country are subject to review under the National Environmental Policy Act, and they are approved only upon a finding by DOE that the proposed export will be consistent with the public interest, following an opportunity for submission of comments, protests, and motions to intervene. Accordingly, to the extent that Mr. Trump's administration withdraws from or renegotiates free trade agreements covering trade in natural gas, absent other corrective measures, LNG exporters may face additional regulatory hurdles, at least initially.

In the longer term, the impact of Mr. Trump's commitment to renegotiate existing free trade agreements on LNG exporters is less clear but is likely to yield to a favorable climate for energy exports. Mr. Trump campaigned on a platform of encouraging domestic oil and natural gas production and eliminating regulations that impede market activity, and he frequently raised concerns with the United States' trade deficit. Given Mr. Trump's stance on these issues, the new administration not only will likely seek to avoid creating new regulatory hurdles for LNG exporters but also will likely seek to ensure that such exports are expanded.

Begin the Process of Selecting a Replacement for Justice Scalia. Given that the Senate has not yet acted on President Obama's nominee, Judge Merrick B. Garland of the U.S. Court of Appeals for the D.C. Circuit, it now seems likely that the Trump administration will fill the vacancy. The Senate will remain Republican-controlled in 2017 and thus, despite the lack of a filibuster-proof 60-vote majority, will be more likely to approve a Trump nominee than would be the case had Senate control passed to the Democrats. This is significant because in recent years, the U.S. Supreme Court has increasingly been the arbiter of important environmental law cases, including *EPA v. EME Homer City Generation, L.P.* (2014) (upholding the Cross-State Air Pollution Rule) and *Michigan v. EPA* (2015) (holding that EPA must consider costs when deciding whether to regulate hazardous air pollutants from power plants).[9] Furthermore, the current stay of the CPP was issued by the Supreme Court and, as noted above, appeal from the D.C. Circuit opinion is a possibility.

Other Proposals that Could Affect the Energy Sector

As part of his platform, Mr. Trump has also proposed a number of measures aimed at reducing regulatory burdens on industry more broadly, including:

- Ask all Department heads to submit a list of every wasteful and unnecessary regulation that kills jobs, and that does not improve public safety, and eliminate them.
- Issue a temporary moratorium on new agency regulations that are not compelled by Congress or public safety.
- Implement a hiring freeze on all federal employees.
- Require that for every new federal regulation, two existing regulations must be eliminated.

These priorities are an indication that the energy sector may be subject to less regulation and enforcement at the federal level under the Trump administration. Mr. Trump's positions will also be welcomed by industry members who have already been arguing that EPA and other agencies must consider impacts such as job loss when enacting new regulations.

The Trump administration is likely to act swiftly to fill the currently vacant slots in the leadership of the Federal Energy Regulatory Commission ("FERC")—the five-member independent agency that oversees wholesale electricity and natural gas markets, electric transmission services, hydropower licensing, and oil and gas pipeline services and siting. The FERC currently has only three Commissioners—all Democrats appointed by President Obama. By law, there may be no more than three Commissioners associated with a single political party, and the President designates the Commissioner that serves as FERC Chairman—a role that effectively establishes the agency's entire agenda and priorities. Thus, Mr. Trump is likely to appoint a Republican to serve as Chairman, an act that would have the effect of relegating to ordinary Commissioner status the current Chairman, Norman C. Bay, a former U.S. attorney seen as an unabashed enforcer of energy market regulation.

In addition, Mr. Trump would be likely not only to fill the other open Commissioner slot with a Republican but also to act at the earliest opportunity to replace, with a Republican, the first Democrat to reach the end of an appointed term. In this case,

that would be Commissioner Colette D. Honorable, a former state regulator from Arkansas, whose term ends in June 2017.

Although the FERC, compared to other organs of the federal government, generally is not seen as overtly political, these leadership changes are likely to move federal energy policy at least incrementally in a direction more in line with the deregulatory and other, issue-specific views expressed by the President-elect. For example, the FERC, despite the Supreme Court's stay of the CPP, has continued to meet with stakeholder groups and to consider potential adjustments to FERC policy in anticipation of eventual CPP implementation. Under a Trump-appointed FERC Chairman, such actions are likely to come to an immediate halt.

It is important to recognize that a possible reaction to these anticipated policy shifts at federal agencies could be increased regulation from states, and more citizen suits aimed at filling any perceived gaps in enforcement. Some environmental regulatory agendas, such as the control of methane emissions from oil and gas sources, may be abandoned by U.S. EPA but taken up by the states. Similarly, existing state-only environmental regulation, such as California's Global Warming Solutions Act, are unaffected by administration changes at the federal level.

More importantly, the revision or repeal of existing federal laws will take time. While they remain in effect, compliance must continue to be a priority, especially in the face of potential state and citizen suit enforcement. Further, although reduced budgets and staff for environmental agencies may lead to fewer rulemakings and enforcement actions, it could also increase the timeline for obtaining federal approval or consideration of permits and other applications. Because many state agencies are also facing reduced budgets, the energy industry may face extended timelines when commencing new projects.

Similarly, while the federal policies that require deployment of renewables may be reduced or eliminated in a Trump administration, state programs and other incentives for them will continue to exist. As a result, the pace of renewable energy adoption may not be affected much by federal changes, and continued deployment of renewables could continue to reduce America's greenhouse gas emissions regardless of any action the new administration takes to prevent implementation of the Paris Climate Accord's voluntary standards.

The biggest federal impact in the renewable energy sector has been in the military, which may decide to stay the course if it concludes it furthers the strategic military imperative of energy independence for military advanced operations. Also, several federally funded programs, like SunShot, among others, enjoy bipartisan support for the R&D and commercialization of hard science energy solutions, many of which are focused on renewable energy.

Additional information about Mr. Trump's energy policies is available here and here.

Jones Day is currently representing certain parties challenging the Clean Power Plan in West Virginia v. EPA, *D.C. Cir. Case No. 15-1363.*

Endnotes

1 5 U.S.C. § 500 *et seq.*

2 5 U.S.C. § 706(2)(A).

3 *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 513–516 (2009).

4 *Id.* at 515.

5 *Id.* at 515–516.

6 Pub. Law 109-432.

7 *See, e.g.*, Respondent EPA's Unopposed Motion for Voluntary Vacatur and Remand, D.C. Cir. Case No. 09-1256 (Aug. 10, 2012). The motion was granted on September 19, 2012. 2012 U.S. App. LEXIS 19691.

8 15 U.S.C. § 15B *et seq.*

9 *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014); *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

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