Energy & Resources Notes

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Christina Sheehan and Stuart Butzier, co-editors

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President Trump's Executive Orders Take Aim at Environmental Issues of Importance to Energy and Infrastructure Projects

In his first 100 days, President Trump issued numerous (28 to date) executive orders addressing key issues ranging from immigration to health care. In this issue, we address three executive orders that signal major policy shifts on environmental issues that affect energy and infrastructure projects. We will continue to update you on these and other developments on these important issues.

Executive Order Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects

On his second day in office, President Trump issued several executive orders and memoranda intended to overhaul the environmental review and approval process for pipeline and other infrastructure projects. Among them was EO 13755, intended to expedite environmental reviews and approvals for high priority infrastructure projects.[1] The EO articulates that the Trump administration's policy is to "streamline and expedite, in a manner consistent with the law, environmental reviews and approvals for all infrastructure projects, especially projects that are a high priority for the Nation, such as improving the U.S. electric grid and telecommunications systems and repairing and upgrading critical port facilities, airports, pipelines, bridges, and highways."

The EO requires the Chairman of the Council on Environmental Quality ("CEQ") to determine, within 30 days of a request, whether an infrastructure project qualifies as "high priority," after consideration of the project's importance to the general welfare, value to the Nation, environmental benefits, and such other factors as the Chairman deems relevant. Once a project is designated as high priority, the CEQ Chairman is required to coordinate with the relevant decision-making agency to establish, in a manner consistent with law, the procedures and deadlines for completion of environmental reviews and approvals. All agencies are to give highest priority to completing such reviews and approvals by the established deadlines. If such deadlines are not met, the agency head must provide a written explanation to the CEQ Chairman explaining the causes for the delay and providing what concrete actions the agency has taken to complete the review and approval as expeditiously as possible.

As stated, the EO provides its implementation will be "in a manner consistent with law." This means that qualifying projects must comply with existing environmental laws such as the National Environmental Policy Act,[2] the Endangered Species Act,[3] the Clean Water Act,[4] cultural resource laws such as the National Historic Preservation Act,[5] and other related laws and regulations. Compliance with these laws and implementing regulations generally can be time consuming, particularly for complex or controversial projects, which is often the case with infrastructure projects such as pipelines and transmission lines.

Although likely the administration's focus, implementation of the EO for pipeline projects such as Keystone XL and Dakota Access will likely face legal challenges. Opponents may assert that the expedited reviews did not sufficiently comply with the requirements of the environmental laws noted above. Further, the EO's emphasis on expedited "approval" rather than "decision-making" offers an obvious target for opponents to assert pre-decisional bias

and arbitrary and capricious decision-making under the Administrative Procedure Act.[6]

The EO is similar in its objectives to President Obama's FAST Act, enacted in December of 2015 but not yet substantively implemented or tested.[7] However, the FAST Act, while identifying similar infrastructure projects for expedited reviews, establishes a more complex process, emphasizes compliance with applicable laws, and imposes limitations on judicial review of FAST Act project decisions. The new EO and White House press release on the EO fail to mention the FAST Act or why the new EO was necessary in light of the existing law that already contemplates expedited review for the same types of projects. The new EO will likely be tested in the courts.

We will monitor the implementation of the EO and resulting litigation, and will update as developments occur.

For more information please contact Joan E. Drake.

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[1] *See* THE WHITE HOUSE, EXECUTIVE ORDER EXPEDITING ENVIRONMENTAL REVIEWS AND APPROVALS FOR HIGH PRIORITY INFRASTRUCTURE PROJECTS (2017), *available* here.

[2] 42 U.S.C. § 4321 *et seq*.

[3] 16 U.S.C. § 1531 *et seq*.

[4] 33 U.S.C. § 1251 *et seq*.

[5] 54 U.S.C. § 300101 *et seq*.

[6] 5 U.S.C. § 500 *et seq*.

[7] *See* Joan Drake, *The Fast Act Seeks to Expedite Multi-Agency NEPA Compliance for Large Infrastructure Projects*, ENERGY & RESOURCES NOTES, Spring 2016, at 2, *available* here.

Executive Order on the Clean Water Rule

The Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the Unites States" (WOTUS) Rule issued on February 28, 2017[1] articulated the Trump administration's policy on navigable waters, and attempted to roll back the Clean Water Rule issued by the Obama administration to define the term "waters of the United States" for permitting purposes under Section 404 of the Clean Water Act The key elements of the Executive Order are as follows:

- The Executive Order articulates the Trump administration's policy to "ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution."
- The Executive Order instructs the Environmental Protection Agency ("EPA") and the Assistant Secretary of the Army for Civil Works (which oversees the Army Corps of Engineers ("Corps"), tasked with implementation of the Section 404 permitting program) to "review" the Rule for consistency with the new administration's policy and to publish a proposed rule rescinding or revising the Rule consistent with the policy articulated in the Executive Order.
- The Executive Order directs the agencies to "consider" interpreting the term "navigable waters" consistent with the opinion of Justice Scalia rather than the broader interpretation applied by Justice Kennedy in *Rapanos v. United States.*[2]
- The Executive Order orders the Attorney General be informed of the pending review so that he may inform any court in litigation related to the Clean Water Rule and "take such measures as he deems appropriate" pending completion of the administrative proceedings related to the Rule.

Each of these has implications for how the Section 404 permit program will be implemented by the EPA and Corps and interpreted by the federal courts.[3]

The Clean Water Rule: In the Federal Register preamble to the Obama administration's Clean Water Rule, EPA and the Corps ("Agencies") stated that the Rule was promulgated to define the scope of waters protected under the Clean Water Act in light of the Act, science, several United States Supreme Court decisions, including *Rapanos v. United States*, and the Agencies' experience and technical expertise.[4] The Agencies asserted the Rule would simplify and speed up the permit process through clearer definitions and increased use of bright-line boundaries to establish features that are "jurisdictional by rule" and therefore do not require case-specific analyses of a significant nexus to a downstream water of the United States to establish jurisdiction. The Rule was enjoined before it went into effect.

New Policy: The administration's new policy emphasizes pollution control and economic growth, but is silent with respect to which of these considerations takes precedence or how they are to be balanced when they are in conflict, as is often the case in permitting situations. The policy is also silent with respect to the Clean Water Act's often-quoted objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[5] which arguably encompasses not only direct pollution but also destruction and degradation as well as restoration of waters and the biological resources they support. It remains to be seen how the Corps and EPA will interpret the administration's new policy and reconcile it with the statute and judicial precedent.

New Rulemaking: The Corps and EPA are ordered to issue a rulemaking that rescinds or revises the current Clean Water Rule consistent with the Trump administration's policy. It is unclear when that may occur or what the rulemaking may propose in place of the Clean Water Rule. The EPA recently announced that it intends to use two separate rulemakings to formally repeal the Rule and then replace it, in a likely attempt to have the Rule repealed before a court is granted jurisdiction to hear the case.[6] In the meantime, the Agencies are continuing to evaluate permit applications under the rules in effect prior to the Clean Water Rule since the Rule is currently stayed.

Scope of "Waters of the United States": The Executive Order directs the permitting agencies to consider Justice Scalia's more narrow interpretation of the scope of "Waters of the United States" in the fractured *Rapanos* decision. Scalia's interpretation would essentially limit the extent of permitting jurisdiction to "relatively permanent, standing or continuously flowing bodies of water" connected to traditionally navigable waters, and to "wetlands with a continuous surface connection to" such waters. Justice Kennedy, in his concurring opinion, presented a broader interpretation of the term, identifying regulated waters to include those with a "significant nexus" to downstream traditional navigable waters. At this point, the Corps and the EPA apply either interpretation, but emphasize Kennedy's "significant nexus" test, particularly for upstream tributaries. The Clean Water Rule relied heavily on Justice Kennedy's significant nexus test to establish features that are "jurisdictional by rule" and therefore do not require case-specific analyses to demonstrate a significant nexus to a downstream water of the United States to establish jurisdiction.

The EPA recently met with state and local officials to review plans to roll back and revise the rule. Using a slide show, the EPA outlined alternative approaches to defining Justice Scalia's "relatively permanent waters" and wetlands "with a continuous surface connection."[7]

The three alternative approaches to "relatively permanent waters" are:

- Perennial streams only (i.e., streams that carry flow throughout the year except in extreme drought).
- Perennial streams plus streams with "seasonal" flow (current practice is to define seasonal flow as about three months, but this can vary regionally).
- Perennial streams plus streams with another measure of flow, using metrics such as frequency of flow and intersecting water table.

The three alternative approaches to "wetlands with a continuous surface connection" are:

- Wetlands must directly touch jurisdictional waters.
- Wetlands with a surface connection to a jurisdictional water even if separated by a non-jurisdictional feature.
- Wetlands with some degree of connectivity to a jurisdictional water, using an appropriate metric such as distance.

EPA is seeking comments and suggestions from state and local officials by June 19, 2017.

The Clean Water Rule is Currently Stayed: The Executive Order, and even the potential repeal of the Rule by the EPA, would have little practical effect on current regulatory decisions since the Rule was already enjoined by the Sixth Circuit and the Federal District Court for the District of North Dakota—although a repeal would cause the effects of this stay to be permanent. The stay is in effect because the courts were troubled by the broad "ripple effects" of the Rule's bright-line approach to jurisdictional boundaries, particularly the inclusion of remote and intermittent waters as jurisdictional tributaries, and the use of geographic distance as a jurisdictional determinant without sufficient notice or scientific support. However, the Trump administration's direction, diametrically opposed to the Obama administration's approach in the Clean Water Rule, will likely eventually result in a new rulemaking that takes a far more limited view of the scope of the Clean Water Act's jurisdiction.

Ongoing Litigation: The Executive Order directs the Attorney General to take whatever action he deems appropriate in the pending litigation on the Clean Water Rule. Cases are pending in federal district courts; and the Sixth Circuit found that it has jurisdiction to hear challenges.[8] The U.S Supreme Court took up the matter in January, 2017. The Justice Department moved to halt the litigation in light of the Executive Order, but the U.S. Supreme Court rejected the motion. However, with EPA's announcement of its plan to repeal the Rule, there may be a race to move forward with repeal before the Court determines which court has jurisdiction to hear the challenges. If the Rule is already repealed before the Supreme Court is set to hear the issue, the EPA may be able to have the case dismissed and establish a "clean slate" on which to issue a new rulemaking based on Justice Scalia's more narrow interpretation.

What Now?: The Clean Water Rule remains stayed and may soon be repealed. The Corps' and EPA's evaluations of permit applications continues as it has for many years under their pre-existing rules which require case-specific determinations of whether a "significant nexus" exists for tributaries and upstream features. The U.S. Supreme Court may rule on which court has jurisdiction to hear legal challenges of the Rule, or the Rule may be repealed and the case may be dismissed.

Environmental groups will no doubt bring challenges to any new rulemaking that attempts to sideline Justice Kennedy's significant nexus test and limit the scope of

regulated waters to Justice Scalia's "traditionally navigable waters" in light of the Clean Water Act's language and objectives. The eventual outcome is not clear. What is clear for the regulated public is that, while the Agencies continue to regulate under the status quo for the time being, the scope of future regulation under the Clean Water Act remains entirely unclear.

We will continue to monitor the litigation and any rulemaking or guidance the Agencies may issue, and will update you as this matter evolves.

For more information please contact Joan E. Drake.

[1] The White House, Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule (2017), *available* here.
[2] 547 U.S. 715 (2006).
[3] For background information on the Section 404 permit program and the Clean Water Rule, *see* Deana M. Bennett & Joan E. Drake, *The Clean Water Rule: Troubled Waters Ahead for the EPA and Corps*, *available* here.
[4] *See* 80 Fed. Reg. 37054 (June 29, 2015), available here.
[5] 33 U.S.C. § 1251(a).
[6] *See* Ariel Wittenbert, *Clean Water Rule: EPA to use 2 rulemakings to repeal and replace WOTUS*, Greenwire, April 12, 2017, *available* here.
[7] Available here.
[8] *See Murray Energy Corp. v. United States DOD (In re United States DOD)*, 817 F.3d 261, 274 (6th Cir. 2016).

Executive Order on Review of Designations under the Antiquities Act

President Trump signed an Executive Order ("EO") on April 26, 2017, directing the Secretary of the Interior to conduct a review of all Presidential designations or expansions of designations of national monuments under the Antiquities Act.[1] The review mandated by the EO applies to designations or expansions made since January 1, 1996 of greater than 100,000 acres, or where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders. In each of these situations the Secretary is to determine whether the designation or expansion conforms to the policy set forth in the newly issued EO.

The Antiquities Act:

The Antiquities Act[2] was enacted in 1906, and provides the following expansive authority:

> The President of the United States is authorized in his discretion to declare by public proclamation historic landmarks, historic and pre-historic structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments. The President may reserve as part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

The Act does not set forth any more specific requirements that a proposed national monument must meet. Consequently, the Antiquities Act gives the president substantial discretion in designating national monuments. Some national monument designations identify particular objects needing protection, while others refer generally to scenic, scientific, or educational features or interests. Presidents have designated monuments for conservation, recreation, scenic protection, or protection of living organisms. Similarly, some monument proclamations have pointed generally to the need for the protection provided by the designation, due to threats to natural and cultural resources.[3]

The scope of reservations of land varies considerably, and monuments vary widely in size.[4] This range in sizes and characteristics of individual national monuments makes it impossible to implement uniform government-wide management standards. Rather, management is

delegated on a case-by-case basis to individual responsible agencies.

The New Policy:

Section 1 of the EO acknowledges that monument designations are "a means of stewarding America's natural resources, protecting America's natural beauty, and preserving America's historic places." However, the EO criticizes designations that "result from a lack of public outreach and proper coordination with State, tribal, and local officials and other relevant stakeholders," noting that such designations create barriers to achieving energy independence, restrict public access to Federal lands, and otherwise curtail economic growth. The EO instructs that designations should be made in accordance with the "requirements and original objectives" of the Antiquities Act, and should "appropriately balance" the protection of landmarks, structures, and objects against the "appropriate use" of Federal lands and effects on surrounding communities.

The Reviews:

Section 2 of the EO directs the Secretary to consider the following in conducting reviews:

(1) the requirements and original objectives of the Act, including the Act's requirement that reservations of land not exceed "the smallest area compatible with the proper care and management of the objects to be protected";

(2) whether designated lands are appropriately classified under the Act as "historic landmarks, historic and prehistoric structures, [or] other objects of historic or scientific interest";

(3) the effects of a designation on the available uses of designated Federal lands, including consideration of the multiple-use policy of section 102(a)(7) of the Federal Land Policy and Management Act (43 U.S.C. 1701(a)(7)), as well as the effects on the available uses of Federal lands beyond the monument boundaries;

(4) the effects of a designation on the use and enjoyment of non-Federal lands within or beyond monument boundaries;

(5) concerns of State, tribal, and local governments affected by a designation, including the economic development and fiscal condition of affected States, tribes, and localities;

(6) the availability of Federal resources to properly manage designated areas; and

(7) such other factors as the Secretary deems appropriate.

The EO also directs the Secretary, as part of the review process, to consult and coordinate with other departments, governors of states affected by monument designations, or other relevant officials of affected state, tribal, and local governments. A final report on the review is due within 120 days. The recently designated Bears Ears National Monument is a particular target. The EO requires an interim report on that designation summarizing the findings under the above factors to be submitted within 45 days.

Legal Challenges:

Environmental groups have voiced concerns about potential reductions and eliminations of national monuments created under the broad presidential discretion provided by the Antiquities Act and may be preparing lawsuits to challenge actions taken following the reviews. It remains to be seen whether the administration will unilaterally take such action or use the reports and findings to push for congressional action. In either event, eliminating or reducing a presidentially proclaimed designation made under a congressionally authorized power may be difficult. Courts have upheld presidential designations under the Antiquities Act and

have given great deference to the vested authority granted to presidents. Courts have held that they have only a limited review of a monument proclamation, provided that the proclamation states the natural or historic interest preserved and identifies an area that is the minimum amount needed to protect the stated interest or interests.[5]

Based on the above listed factors articulated in the EO, the administration may focus its rationale for reduction or elimination of designations on whether the presidential proclamation creating the monument exceeded the discretion provided by the Antiquities Act by exceeding the limits of the factors enumerated in the Act itself, such as type of feature and size of area protected. However, the EO fails to note that the Act includes items of "scientific interest" as well as historic interest (which could be expansive), and appears to leave to the discretion of the designating president the area compatible with "proper care and management" of the "objects to be protected."

We will monitor and keep you informed of developments on the administration's reviews and actions that may be taken.

For further information, please contact Joan E. Drake or Christina C. Sheehan.

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[1] See THE WHITE HOUSE, PRESIDENTIAL EXECUTIVE ORDER ON THE REVIEW OF DESIGNATIONS UNDER THE ANTIQUITIES ACT (2017), available here.
[2] 54 U.S.C. § 320301.
[3] See, e.g., Establishment of the Grand Staircase-Escalante National Monument, 3 C.F.R. § 6920 (1997), available here.
[4] About half of the monuments designed by presidential proclamation involve less than 5,000 acres, but monument sizes vary widely. For example, the African Burial Ground National Monument is 0.345 acres, while the Papahanaumokuakea National Marine Monument is 89 million acres.
[5] See, e.g., Tulare Cty. v. Bush, 185 F. Supp. 2d 18, 26 (D.D.C. 2001), aff'd, 306 F.3d 1138 (D.C. Cir. 2002); Mt. States Legal Found. v. Bush, 306 F.3d 1132, 1138 (D.C. Cir. 2002) (holding that the Antiquities Act may protect natural wonders and wilderness values).

ONRR's Federal Oil & Gas and Federal & Indian Coal Valuation Reform: A Call for Comments, Industry Here's Your Shot

As noted in a previous update,[1] on January 6, 2015 the U.S. Department of the Interior's Office of Natural Resource Revenue (ONRR) announced a proposed rulemaking amending its regulations governing valuation, for royalty purposes, of oil and gas produced from Federal onshore and offshore leases and coal produced from Federal and Indian leases.[2] This Rule, known as the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, was finalized on July 1, 2016 and technically went into effect on January 1, 2017; however, on February 27, 2017 ONRR issued a stay of the rule, just one day before Federal and Indian lessees were required to report and pay royalties under the new Rule.[3] Then, on April 4, 2017 ONRR issued two advance notices of proposed rulemakings. The first notice is a notice of intent to repeal the recently issued rule (RIN 1012-AA20).[4] The second notice is a notice requesting comments from industry members and interested parties concerning whether updated royalty valuation regulations are necessary (RIN 1012-AA21).[5]

More specifically, ONRR seeks comments on the following questions:

- In the event the January 1, 2017 rule is repealed, ONRR would like to know whether a new rulemaking would be beneficial.

- In the event the January 1, 2017 is not repealed, ONRR would like to know:

    1. Whether ONRR should have one rule addressing Federal oil and gas and Federal and Indian coal valuation, or two separate rulemakings?

2. How should ONRR value non-arm's length coal sales, and sales between affiliates?

3. Should ONRR update the valuation regulations for arm's-length sales of Federal gas? If the answer is yes, how so?

4. Should ONRR address the marketable condition rule, and unbundling issues? If the answer is yes, how so?

5. Finally, should ONRR have a default valuation provision that gives the Secretary discretion to establish values for production when there is misconduct, a breach of the duty to market, or in situations when a value cannot otherwise be verified?

These notices clearly indicate that the new administration is looking to make changes to the 2017 regulations. Industry involvement in the comment process will likely be given considerable weight, making this a good opportunity for industry to lobby for meaningful changes to the ever-problematic marketable condition rule and Unbundling Cost Allocations (UCAs set by ONRR).

As previously noted, one of the most notable changes issued by ONRR in the 2017 Obama-era rule was the creation of a "default provision" that would allow ONRR to "exercise considerable discretion" to establish a royalty valuation when "(1) a contract does not reflect total consideration, (2) the gross proceeds accruing to you or your affiliate under a contract do not reflect reasonable consideration due to misconduct or breach of the duty to market for the mutual benefit of the lessee and the lessor, or (3) it cannot ascertain the correct value of production because of a variety of factors, including but not limited to, a lessee's failure to provide documents."[6] In sum, the Rule "changes how lessees value their production for royalty purposes and revises revenue-reporting requirements."[7] While the stated purposes of the rule were to "offer greater simplicity, certainty, clarity, and consistency in product valuation for mineral lessees and mineral revenue recipients[,] . . . ensure that Indian mineral lessors receive the maximum revenues from coal resources on their land, . . . decrease industry's cost of compliance and ONRR's cost to ensure industry compliance[,] and . . . [ensure] that companies have paid every dollar due,"[8] many have questioned whether the new rule can achieve these goals.

Three separate Petitions were filed in the United States District Court for the District of Wyoming,[9] challenging the Rule as arbitrary, capricious, and contrary to the law by exceeding ONRR's authority under applicable statutes and lease terms. As the American Petroleum Institute states in its Petition for Review of Final Agency Action, filed December 29, 2016, "the Final Rule upends a longstanding valuation system and replaces it with widespread uncertainty and unconstrained agency 'discretion,' thereby placing both offshore and onshore federal oil and gas lessees in an untenable position going forward with respect to their royalty reporting and payment obligations."[10] The Petition goes on to state that the Rule's net effect is "an attempt to inflate royalty demands beyond what is fairly, and legally, due from federal lessees based on the value of the oil or gas production at or near the lease."[11]

On February 17, 2017, the Petitioners in these cases requested that ONRR postpone the implementation of the Rule, pending the outcome of the lawsuits, due to their assertion that the "lessees affected by the Rule

face significant hardship and uncertainty in the face of reporting under the rule for the first time on February 28, 2017."[12] The Petitioners also asserted that, not only are the payment requirements difficult, or impossible, to comply with by the royalty reporting deadline, but that "non-compliant lessees may be exposed to significant civil penalties."[13]

Based on the pending lawsuits and request for postponement, on February 27, 2017, one day before Federal and Indian Lessees would have been required to report and pay royalties under the new Rule, ONRR announced its decision to postpone the effectiveness of the Rule, pursuant to 5 U.S.C. 705 of the Administrative Procedure Act, pending judicial review. ONRR stated that this was necessary due to the potential consequences of the pending litigation. Specifically, 5 U.S.C. 705 of the Administrative Procedure Act states: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." ONRR determined that justice required the postponement in this situation in order to "preserve the regulatory status quo while the litigation is pending," recognizing the Petitioners' concerns with regard to "the expansion of the 'default provision' and the use of the sales price of electricity for certain coal-royalty valuations."[14] ONRR stated that postponing the rule will save both the regulated community and ONRR time and money that it will take to correct and verify revenue reports and payments; time and money that will be wasted if the Rule is invalidated. ONRR went on to state that they have received "numerous legitimate questions from lessees on how to apply the 2017 Valuation Rule, some of which will require additional consideration and time before ONRR can definitively answer them; thus increasing the likelihood that lessees will initially report incorrectly and later need to adjust their reports. In addition, the Court may resolve some of these issues differently than ONRR, again increasing the likelihood that lessees will need to submit corrected reports."[15]

While it is not yet known what will come of the newly issued advance notices of proposed rulemakings, it is clear that the new administration is aware of industry's concerns related to the 2017 Rule. Notably, based on statements made in issuing the stay, ONRR has already acknowledged some apparent problems with the Rule. Industry should focus on some of these issues in their comment letters to the agency, along with other historic problems that have created significant reporting and royalty calculation challenges for payors. Comments to both advance notices of proposed rulemakings are due May 4, 2017.

In the meantime, lessees that have already converted to the new 2017 reporting requirements have been instructed to convert back to the prior reporting rules by February 29th if possible, but if not, as soon as possible thereafter.

If you have any questions concerning the advance notices of proposed rulemakings or ONRR's current stay, please contact Jennifer L. Bradfute or Robin E. James.

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[1] *See* Jennifer Bradfute, *Kick'em When They're Down: ONRR Releases Proposed Federal Oil & Gas and Federal & Indian Coal Valuation Reform*, *available* here.
[2] *See* Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 81 Fed. Reg. 43,337 (July 1, 2016) (to be codified at 30 C.R.F. pts. 1202 and 1206), *available* here.
[3] *See* Postponement of Effectiveness of the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform 2017 Valuation Rule, 82 Fed. Reg. 11823 (Feb. 27, 2017), *available* here.
[4] *See* Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 82 Fed. Reg. 16323 (April 4, 2017), *available* here.
[5] *See* Federal Oil and Gas and Federal and Indian Coal Valuation, 82 Fed. Reg. 16325 (April 4, 2017), *available* here.
[6] Bradfute, *supra* note 1 (emphasis in original omitted) (citing 80 Fed. Reg. 609-610).
[7] Postponement of Effectiveness of the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform 2017 Valuation Rule, *supra* note 3.
[8] *See* Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, *supra* note 2.

[9] *See* Postponement of Effectiveness of the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform 2017 Valuation Rule, *supra* note 3 (*Cloud Peak Energy, Inc. v. United States Dep't of the Interior*, Case No. 16CV315-F (D. Wyo.); *American Petroleum Inst. v. United States Dep't of the Interior*, Case No. 16CV316-F (D. Wyo.); *Tri-State Generation and Transmission Ass'n, Inc., Basin Electric Power Cooperative, and Western Fuels-Wyoming, Inc., v. United States Dep't of the Interior*, Case No. 16CV319-F (D. Wyo.)).

[10] Petition for Review of Final Agency Action at 2, *America Petroleum Institute v. United States Department of the Interior et al.,* No. 16-CV316-F (D. Wyo. Dec. 29, 2016).
[11] *Id.*
[12] Postponement of Effectiveness of the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform 2017 Valuation Rule, *supra* note 3.
[13] *Id.*
[14] *Id.*
[15] *Id.*

New Mexico's Renewable Energy Outlook Following 2017 Legislative Session

April 7, 2017 was the last day for the Governor to sign, veto, or pocket veto any bills passed by the New Mexico legislature during the 2017 legislative session. What passed and what did not is significant for New Mexico's renewable energy industry.

New Mexico's Distributed Generation companies will face new consumer protection laws after the 2017 Legislative Session. The Governor signed into law the House Judiciary substitute for House Bill 199—the Distributed Generation Disclosure Act ("DGDA"). The DGDA requires that certain disclosures be included on any agreement governing the financing, sale or lease of a distributed energy generation system, or an agreement governing the sale of power to a power purchaser. The nineteen new disclosures sellers or lessors are required to make pursuant to the DGDA include:

- Whether the warranty or maintenance obligations related to the system may be sold or transferred to a third party;
- Whether, per the agreement, the buyer or lessee is restricted from modifying or transferring ownership of the distributed generation system, including whether any modification or transfer is subject to review or approval by a third party;
- All options available to the buyer or lessee in connection with continuation, termination, or transfer of the agreement in the event that the real property to which the system is affixed is transferred;
- All assumptions used for any savings estimates that were provided to the buyer or lessee; and
- All requirements established by the Public Regulation Commission that affect the buyer or lessee's system.

In addition to the disclosure requirements, the DGDA provides new requirements for the promotion of distributed generation systems. If a promotional or sales document states that a distributed generation system will result in certain financial savings for the buyer or lessee, under the DGDA that document shall provide assumptions and calculations used to derive those savings. The same requirement exists for those promotion or sales documents that state the system will result in energy savings. Importantly, the DGDA does not apply to an individual or company that negotiates an agreement for the sale, financing, or lease of an existing system that is affixed to a piece of real property being sold or transferred.

The House and Senate passed a Joint Memorial, Senate Joint Memorial 21, which encourages New Mexico state agencies to support the development of an Energy Road Map for New Mexico, building on the 2015 energy plan developed by the Energy Minerals and Natural Resources Department. Moreover, both the House and Senate passed Memorials (House Memorial 95 and Senate

Memorial 127) directing the representatives of the State of New Mexico interim committee dealing with water and natural resources to study the impact of electric power rates on the energy sector and economic development opportunities in the state. These Memorials were especially concerned with the impact electricity rates have on oil and gas production in the state. The committee tasked with this study must report its findings before December 1, 2017.

Bills that did not pass potentially would have had a large impact on New Mexico's renewable energy industry. Significantly, House Bill 61, which would have extended the Solar Market Development Tax Credit to 2025 and increased the annual cap on solar market development tax credits to $5,000,000, lost a vote in the Senate after passing the House. The largest criticism of the bill was that it only provided tax credit to parties that could afford installing solar panels. A related bill, House Bill 193, which would have made the solar market development tax credit permanent, died in committee.

Finally, Governor Martinez vetoed Senate Bill 227, which would have required New Mexico's General Services Department to adopt rules and issue Requests for Proposals to implement energy efficient and renewable energy improvements to state facilities.

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