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ENERGY AND ENVIRONMENTAL LAW

Energy-Dominance Agenda and Regulatory Challenges

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Special to the Legal

On March 28, President Donald Trump signed the presidential executive order on Promoting Energy Independence and Economic Growth. This executive order hopes to be the catalyst to “unleash America’s \$50 trillion in untapped shale, oil and natural gas reserves, plus hundreds of years in clean coal reserves.” And by doing so, it aims to make the United States the global leader in fossil-fuel production and achieve not just “energy independence,” but “energy dominance”—a phrase that was front and center during the Trump administration’s (June 26–30, 2017), “Energy Week.” Although the coal industry has dominated the energy and environmental news, the Trump administration’s “energy dominance” agenda will shape the



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future of the natural gas industry as well. With the administration’s desire to emphasize domestic energy production, the regulatory environment for the natural gas industry will, no doubt, look different than it did a year ago.

EXPLORATION RESTRICTIONS WILL EASE

The Trump administration has already made proposals to reverse or eliminate the hydraulic fracturing (fracking) rule, which tightened standards on gas well construction, governed the disposal of fracking waste and

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required disclosure on the fracking chemicals used. The Department of Interior’s Bureau of Land Management (BLM) is acting under pressure from the U.S. Court of Appeals for the Tenth Circuit, where DOI has requested that the legal challenge to the current fracking rule be stayed pending the drafting and promulgation of a new rule (*Wyoming v. Zinke*, 10th Cir., No. 16-8068). Indeed, on June 17,

the BLM sent a notice of proposed rulemaking regarding fracking on federal lands to the Office of Management and Budget for its review. Should this result in a relaxing of the BLM's regulations on fracking on federal lands, an increase in the exploration of both natural gas and crude oil is expected. These regulatory changes will increase the supply of natural gas over the medium-term.

In addition, on May 26, the Environmental Protection Agency (EPA) announced it was suspending and reconsidering for 90 days a 2016 EPA regulation that limits methane emissions from the oil and gas industry. The EPA stated that it wants to give the oil and gas industry a second chance to comment on the rule. Following up on that announcement, on June 16, the EPA announced that it was taking steps to ensure that those regulations remain stayed while the agency works through the reconsideration process. In order to reconsider the regulations properly, the EPA announced that it was staying the regulations for two years.

Finally, the Trump administration is seeking permission to use seismic air guns to find oil and gas formations underneath the Atlantic Ocean floor. This request reverses the Obama administra-

tion's policy, which found that the seismic air guns disturb and injure oceanic life in general and whales in particular.

EXPORT RESTRICTIONS WILL BE LIFTED

New exploration and fewer regulations will add fresh supply of natural gas to an already oversupplied market. Increasing exports, many feel, will take care of the glut of natural gas. However, exports of natural gas—in the form of liquefied natural gas (LNG)—have also been hampered by regulatory oversight. The Federal Energy Regulatory Commission (FERC) currently has more than dozen LNG export companies waiting for it to complete its environmental and safety review, which can take up to a year. Once FERC's approval is obtained, the Department of Energy (DOE) must also review the project before it can move forward. More than two dozen LNG export firms are waiting for the Department of Energy to sign off on their projects. The Trump administration wants to break-up this regulatory logjam.

To address this situation, most industry observers believe that the DOE will soon propose an export fast-track rule. In addition, DOE Secretary Rick Perry is expected to reverse a 2014 policy, under which the DOE has to wait for the FERC to complete its review before DOE

can approve the project. This would allow the approvals to move on parallel tracks through FERC and the DOE.

Rulemaking may not be necessary, though. Although Congress has not yet proposed a new bill, in the past Congress, the House proposed a bill that would have given the DOE a 60-day time limit to make a decision after receiving a final application from FERC. The Senate had also proposed a bill that would have allowed the DOE 45 days to make a decision. Whether either house of Congress will propose a new bill will depend on whether the Trump administration take the action the Congress feels is necessary to get LNG exports moving.

REWRITING CLEAN POWER PLAN

Section 4 of the executive order on promoting energy independence and economic growth instructs the EPA to rewrite the 2015 regulation dubbed the "Clean Power Plan" that limits greenhouse gas emissions from existing electric utilities. Interestingly, the Clean Power Plan (CPP), one of the cornerstones of the Obama administration's environmental policy, would actually have been advantageous for natural gas producers by forcing energy companies to retire coal-fired power plants. However, other broader

EPA air pollution regulatory initiatives, which will be more difficult for the Trump Administration to eliminate, will still encourage energy companies to retire their old coal-fired plants and replace them with gas-fired facilities.

TAP THE BRAKES ON FURTHER REGULATION

In December 2016, after the election, but before the inauguration, the EPA issued its report *Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States*. Although the report was not the blanket condemnation of “fracking” that environmentalists had hoped, it did not give fracking a clean bill of health either. The EPA concluded that activities throughout the hydraulic fracturing water cycle “can impact drinking water resources under some circumstances.” But, the agency concluded that it could not quantify the frequency of such impacts on a national level.

The report, which was seven years in the making, probably will not get any further consideration by now-EPA Administrator Scott Pruitt. Even though the level of contamination from fracking was shown to be relatively modest, the report contravenes industry’s insistence that there were no known

cases of drinking water contamination stemming from fracking. In just about any other administration, the EPA would have used the report to support additional rule-making to protect drinking water resources from fracking. That outcome seems unlikely now.

MORE EMPHASIS ON STATE REGULATION AND ENFORCEMENT

More than ever, with President Trump in control of the executive branch, regulation and enforcement of environmental activities will fall to state and local authorities. Indeed, the White House recently stated its goal was for the federal “Government to get out of the way to allow state and local governments to succeed at meeting their unique challenges.” For now, though, with oil and gas prices at or near historic lows, states may not be in any hurry to issue new regulations or take aggressive enforcement action.

However, many analysts predict a rise in citizen suits, both at the federal and the state level. For example, in case of *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania*, issued on June 20, 2017, the Supreme Court of Pennsylvania found that “because state parks and forests, including the oil and gas minerals therein, are part of the corpus of Pennsylvania’s environmental public trust, we hold

that the commonwealth, as trustee, must manage them according to the plain language of Section 27 [of the Pennsylvania Constitution], which imposes fiduciary duties consistent with Pennsylvania trust law.” Thus, the Pennsylvania Supreme Court made it clear that it is the commonwealth’s duty as the trustee of the state property, to “conserve and maintain them for the benefit of all the people” including the generations yet to come.

However, that decision has to be balanced with Gov. Tom Wolf’s efforts to pass a permit system designed to reduce emissions from gas wells, compressors and other installations. Eighteen months after being announced, the permit system has been delayed and most likely will not move forward until after the election in 2018.

CONCLUSION

The Trump administration intends to support the growth of all fossil fuel industries by pushing for greater exports and lightening the regulatory burden. Whether these actions will have an impact on the natural gas industry remains to be seen. At the same time, there most likely will be an increase in state regulations and enforcement activity. •