
Congressional Investigations: What the Energy Sector Should Do to Prepare

JANUARY 31, 2019

This is the inaugural issue of WilmerHale's 10-in-10 Hot Topics in Energy Series. Over the next 10 weeks, our attorneys will share insights on current and emerging issues affecting the US energy sector. Attorneys from across various practice groups at the firm will offer their take on issues ranging from congressional investigations, to the impact of key regulatory reforms, to emerging trends in domestic litigation and international arbitration. [Read our other recent publications.](#)

With the House of Representatives now under Democratic control and Republicans maintaining the majority in the Senate, the 116th Congress will likely continue to be defined by partisanship and legislative gridlock. For the energy industry, the most significant impact of the shift in power within Congress will be House Democrats' newfound oversight power. Speaker of the House Nancy Pelosi and House committee leaders have already indicated their intent to place the Trump Administration under scrutiny—and the energy sector will be at the center of much of the upcoming oversight activity.

In this alert, we offer our take on the committees to watch in 2019, the initial set of issues likely to be the focus of congressional oversight, and steps companies can take to prepare for potential oversight activity that impacts them and their interests, either directly or indirectly.

I. What Are the Congressional Committees to Watch?

In the immediate aftermath of the November elections, Speaker Pelosi and the Democratic leaders of the committees with authority over US energy development have been busy developing a new agenda focused on oversight and scrutiny of the Trump Administration's policies on climate change, fossil fuels and deregulation. Here are the key congressional committees likely to engage in oversight activities affecting the energy industry.

- *House Committee on Energy and Commerce.* Chairman Frank Pallone (D-NJ) has emerged as one of the centers of gravity for the new Congress's oversight activities. He has identified his top priority as "hold[ing] the Trump administration accountable" for "dangerous policies," singling out climate change as a leading issue.
- *House Natural Resources Committee.* Chairman Raul Grijalva (D-AZ) will also play a lead

role in future oversight of energy and natural resources issues and has promised aggressive oversight of the Department of the Interior and its agencies. Earlier this week, Rep. Grijalva announced that the House Natural Resources committee is planning to hold a series of hearings on climate change—beginning with a full committee hearing on February 6 and continuing throughout the month of February with subcommittee hearings. Rep. Grijalva has been a staunch critic of Secretary Zinke and is expected to hold hearings on “wasted resources” at the Department of the Interior.

- *Select Committee on the Climate Crisis.* The revival of a select committee on climate change has received a lot of attention and will place another spotlight on the Trump Administration’s policies on fossil fuels and environmental deregulation. Chairman Kathy Castor (D-FL) has said she wants to hold hearings to “raise the profile” of climate change. The committee does not have the power to consider legislation or subpoena records, but it will make recommendations to the other committees, primarily the Energy and Commerce Committee.
- *House Committee on Oversight and Reform.* Chairman Elijah Cummings (D-MD) and Chairman of the Subcommittee on the Environment Harley Rouda (D-CA) have promised aggressive oversight of the Trump Administration and the private sector. Among other issues, they will focus on “global climate change, environmental protection, public lands, endangered species, air and water quality, oceans, public health, ... [and] energy policy.” Earlier this week, Chairman Cummings announced that the committee has agreed to policy changes that would limit unilateral subpoenas and would give House Republicans 48 hours to object and request a vote on subpoenas before the committee issues them. This will be a departure from the past eight years, during which time the former committee leadership issued over 100 unilateral subpoenas.
- *House Committee on Science, Space, and Technology.* Chairman Eddie Bernice Johnson (D-TX) said she would like her chairmanship to focus on the science underlying issues, most importantly climate change. While she criticized previous Chairman Lamar Smith’s aggressive oversight efforts, it is likely that her own investigators will also take an active role.

II. What Issues Are Likely to Come Up?

The Democratic oversight staff is likely to conduct investigations in a focused and thoughtful way, rather than haphazardly issuing subpoenas and calling hearings as has been suggested by some in the media. The US Environmental Protection Agency (EPA) and Department of the Interior will be the key focal points for congressional oversight in the energy space, as Democrats in the House focus on some of the hallmark policies of the Trump Administration and on agencies’ decision-making processes for both policy- and project-specific decisions. We can also expect subpoenas of company officials or investigations directly into private companies’ activities. The statements and past requests of top Democrats suggest several initial areas of focus:

- *Climate Change.* Democrats will seek to shine a spotlight on a variety of policies related to climate, ranging from the Trump Administration’s support of the fossil fuel industry to investigations of public statements by corporations regarding climate change and funding

of so-called climate denial science. Other topics in the investigative crosshairs are the Trump Administration's regulatory proposals involving mercury and air toxicity standards, freight truck and automobile emissions, the role of science in setting National Ambient Air Quality Standards under the Clean Air Act, methane, and the Clean Power Plan. Rep. Pallone, Rep. Diana DeGette (D-CO) and Rep. Paul Tonko (D-NY) have sent several [letters](#)—including one [this week](#)—to EPA Acting Administrator Andrew Wheeler requesting documents and information about the agency's decision to roll back these policies. Rep. Grijalva has also said he would push for more renewable energy production on federal lands and for climate change to be incorporated into federal decisions on natural resources.

- *Oil and Gas Drilling.* House Republicans have criticized policies perceived as favoring the oil and gas industry. The decision to open up more areas for offshore drilling, the lifting of safety protections for development in the Arctic, the review of the Integrated Activity Plan for the National Petroleum Reserve in Alaska, and the repeal of regulations that “potentially burden” oil and gas development are all likely to come under scrutiny. We can also expect Congress to look into the genesis, implementation and effects of certain key Trump Administration policies, such as the Energy Independence Executive Order (EO 13783; March 28, 2017), the Offshore Energy Executive Order (EO 13795; April 28, 2017), the Secretarial Order on Energy Independence (SO 3349; March 29, 2017) and the Secretarial Order on Offshore Energy (SO 3350; May 1, 2017). Congress will also likely look into the Department of the Interior's relationship with the fossil fuel companies it regulates. For example, in November 2018, Rep. Grijalva sent a letter to Joe Balash, the Department of the Interior assistant secretary for land and minerals management, requesting all calls to and from the personal cell phone number of Scott Angelle, Director of the Bureau of Safety and Environmental Enforcement.
- *Streamlined Permitting.* In an April 24, 2018, [letter](#) to the Government Accountability Office (GAO), Rep. Pallone expressed a concern “that President Trump's and Administrator Pruitt's policies to ‘streamline’ permitting processes, reduce regulatory ‘burdens’ for industry, and defer to states on enforcement will lead to more environmental law violations due to lax enforcement at both the state and federal level.” This same letter requested a review of the December 7, 2017, EPA New Source Review [memorandum](#) to regional offices stating that the EPA would no longer enforce certain preconstruction requirements for facilities under the Clean Air Act. We can expect to see additional scrutiny of agency processes that appear to take shortcuts or cut procedural corners for the sake of “streamlining.”
- *National Environmental Policy Act (NEPA).* House Democrats have also been critical of what they have referred to as attacks on the cornerstone environmental statute, NEPA. Oversight of this issue could include a review of the Department of the Interior's new page- and time-limits on NEPA documents, the ongoing reform of the Council on Environmental Quality's NEPA regulations, and the repeal of certain key guidance documents, such as the guidance on analyzing the impacts of greenhouse gas emissions in NEPA documents. In addition, Rep. Grijalva has criticized the Trump Administration's efforts to limit public input in federal land management and may scrutinize the NEPA process for specific land

management or project decisions.

- *National Monuments.* Rep. Grijalva and House Democrats have decried the reversal of the Obama Administration's National Monument designations, and this issue will likely continue to be a focus. Rep. Grijalva has raised questions about how agency policies have been shaped, including what went into recommending a reduction in Utah's Bears Ears National Monument and the use—or neglect—of science in various policy decisions. The Trump Administration's decisions, and the role natural resource companies played in them, are likely to come under scrutiny.
- *Reclamation and Bonding.* In May 2018, then-ranking member Rep. Grijalva called for reform of the Bureau of Land Management's (BLM) reclamation and self-bonding rules following the release of a GAO report finding that BLM could not accurately account for taxpayer cleanup risks at abandoned onshore oil and gas wells. Rep. Grijalva called for more stringent industry regulation, including an end to self-bonding, and better BLM tracking methods. He has also criticized the Bureau of Ocean Energy Management's delay in requiring companies to meet supplemental bonding requirements that were originally published in 2016 and rescinding orders to companies that hold "sole liability" properties, which are considered the highest risk to the taxpayers.
- *Project-Specific Inquiries.* Finally, we may also see congressional inquiries or investigations into specific controversial projects. For example, in February 2018, Rep. Pallone and Rep. Maria Cantwell (D-WA) sent a [letter](#) to Federal Energy Regulatory Commission Chairman Kevin J. McIntyre requesting an update on environmental safety concerns related to construction of the Rover Pipeline. We may see similar requests for other significant energy projects that are undergoing or have recently completed reviews under the Trump Administration.

III. What Can My Company Do to Plan?

Congressional oversight that directly or indirectly implicates company interests will require the senior legal, government affairs and executive teams to mobilize quickly and engage productively with Congress, while minimizing disruption to the business. Companies should be aware that any investigation can begin long before the first letter or subpoena is sent. However, hearings can be announced on very short notice, just days in advance of the hearing date. There are four steps that companies can take now to prepare.

1. Conduct an internal diagnostic.

Companies should consider gathering and reviewing existing internal materials, as well as recent past activity, to establish a baseline understanding of the documentary evidence. This should include materials that have been provided to Congress in the past, records of communications with federal agencies and related internal analyses and discussions, and information from press releases and financial disclosures and from readily accessible corporate strategy documents. In this process, the company should focus on identifying both strengths and weaknesses in its existing policies and activity; it should then analyze possible internal or external policy changes or other actions to proactively remedy any deficiencies.

2. Research and anticipate congressional requests.

The company should gather data about relevant past oversight actions from Congress from the current and past administrations. This would include not only formal requests for information but also briefing requests, phone calls, memoranda, requests for Inspector General or GAO investigations, and any other notes regarding contacts with members of Congress or congressional staff.

3. Proactively engage with Congress.

One of the most effective ways to minimize the risks of oversight activity directed at the company is to anticipate and proactively engage with key committees and member offices. The first step in this process is to identify the specific members and committee staff likely to cover the issue in future oversight efforts, then engage directly to explain why your company is not a proper target. This is primarily done by providing these individuals with information that tells the company's story, including past and planned actions to proactively address the issue.

4. Defensively prepare for a hearing.

If a congressional investigation is announced, or appears highly likely, the company should begin to prepare for a potential congressional hearing. A hearing appearance requires significant preparation, as the questions are often not limited to the topic at hand. If a committee demands the appearance of the chief executive officer, preparation becomes more important and more logistically challenging. Any witness will need to understand the nature of documents or information provided to Congress, as well as the potentially difficult questions that could lead to further congressional review of the company and possible collateral inquiries. Beginning this preparation as early as possible is key.

IV. Conclusion

With House Democrats promising robust oversight, companies and their counsel would be well advised to take stock of their activities and the potential for future oversight. While there is no one solution for every oversight request, experienced counsel can help companies comply with congressional inquiries in a professional and efficient way, while minimizing the risk to the business.

Authors



Alyssa DaCunha

PARTNER

Co-Chair, Congressional
Investigations Practice

✉ alyssa.dacunha@wilmerhale.com

☎ +1 202 663 6454



Sean Hayes

COUNSEL

✉ sean.hayes@wilmerhale.com

☎ +1 202 663 6175