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WilmerHale ENsights

Welcome to the inaugural issue of WilmerHale ENsights. In this and future editions, we will share weekly energy policy analysis on President-elect Donald Trump's transition and the priorities of the new Congress. Our experienced lawyers from our [Energy, Environment and Natural Resources Practice](#) will highlight the need-to-know information that will assess your exposure and unlock new potential.

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Obama Legacy, Trump Team Takes Shape

Nearly a month into the presidential transition, many questions about President-elect Trump's policies and cabinet remain unanswered, but one thing is clear: the federal oversight of energy, environment, and natural resources will be profoundly different under the Trump Administration. Early cabinet choices in financial services, the economy and international affairs suggest Trump is tracking to the center from his campaign positions. But not so for the energy sector. Likely appointments at the Departments of Interior, Energy, EPA and Agriculture have fundamentally different philosophies than do their Obama administration predecessors on virtually every issue, from energy development to environmental controls to climate change. Key appointments, policy announcements, and congressional hearings over the coming months will shape the new regulatory landscape for energy and natural resource developers.

The Obama Administration Finalizes Legacy Rules

A flurry of rulemaking activity occurred in the days after the presidential election, an apparent final push to codify key policies of the Obama administration. Among these policies were three

Department of the Interior rules that consider a landscape-level approach to land use and natural resource management—the Bureau of Land Management’s (BLM) new land use planning rule, Planning 2.0; a new BLM rule that establishes a framework for competitive renewable energy leasing on public lands; and an update to the Fish and Wildlife Service mitigation policy. All three policies aim to institutionalize an approach that considers resources across jurisdictional boundaries on a landscape basis to identify the areas best suited for development and those where conservation measures would have the greatest value.

- **BLM Planning 2.0.** On Dec. 1, the BLM issued a final rule known as Planning 2.0, the much anticipated update to its land use planning regulations. The [rule](#) updates for the first time in 30 years the agency’s procedures for developing and amending BLM’s resource management plans—the documents that guide BLM’s management of public lands in terms of natural resource development, recreation and conservation. It also incorporates the Obama administration’s signature landscape-level approach to resource management into BLM’s formal planning process.
- **Renewable Energy Leasing Rule.** On Sept. 30, BLM issued a final [rule](#) establishing a competitive leasing process for solar and wind development on public lands. This rule also codifies a landscape-level approach to project planning, directing developers to designated leasing areas (DLAs) with minimal conflicts and the best energy generation potential. Project developers who site projects within DLAs stand to enjoy a variety of incentives, including financial benefits and a streamlined leasing process. The rule complements and institutionalizes the Obama administration’s landmark planning efforts for “smart from the start” renewable energy development on public lands, including the [Western Solar Plan](#), the [Desert Renewable Energy Conservation Plan](#) in California and the [Restoration Design Energy Project](#) in Arizona.
- **FWS Mitigation Policy.** On Nov. 21, the Fish and Wildlife Service (FWS) published an update to its [mitigation policy](#), adopting a landscape-level approach to mitigation of project impacts on fish, wildlife, plants and habitats, and establishing a “net gain... or at a minimum, no net loss” goal. The policy update is consistent with a 2015 [Presidential Memorandum](#) calling on agencies to set a “net benefit” goal for mitigation, as well as a 2013 [Secretarial Order](#) and subsequent DOI Manual update, establishing a department-wide mitigation strategy to move away from project-by-project or single-resource mitigation and toward a landscape-level approach.

Will the Trump Administration Roll Back Key Reforms?

President-elect Trump’s campaign has promised to roll back federal regulations so it is unclear whether recently completed rules will remain in force after January 20. Once he takes office, Mr. Trump will have several mechanisms at his disposal to do away with Obama-era regulations, but each has important limitations that make wholesale regulatory repeal unlikely. Faced with competing interests, the Trump administration is expected to prioritize and focus its efforts on overturning a handful of regulations, such as the EPA’s and Army Corps’ Waters of the US rule, EPA’s rule on methane emissions from new and modified oil and gas facilities, or BLM’s venting and flaring rule.

- **Regulation Repeals.** President-elect Trump could issue executive orders directing agencies to repeal or revise previously promulgated rules but this would require formal notice and comment for each rule, and the final decision would have to withstand judicial scrutiny in near-certain litigation. For complex regulatory issues, such as the regulation of greenhouse gas emissions, the repeal process could take several years.

- **DOJ Position in Pending Litigations.** A Trump-led Department of Justice may be directed not to defend the numerous pending lawsuits against the most controversial Obama-era regulations, such as the Clean Power Plan, the BLM's and EPA's methane rules, and the Army Corps' Waters of the US rule. Even without an active DOJ defense, however, third-party intervenors will almost certainly step in to continue defending such rules.
- **Congressional Overhaul.** A third option applies to rules finalized within the last 60 session days before Congress adjourns, which has been estimated to fall at the end of May. For any rule finalized after this date, the Congressional Review Act (CRA) allows Congress to pass, and the President to sign into law, a joint resolution disapproving the rules.

Congressional Republicans, including Paul Ryan, have repeatedly attempted to use the CRA to overturn some of the Obama administration's rules, but these attempts were largely symbolic because they either failed to generate the necessary two-thirds majority in both houses or were vetoed by President Obama.

But now, with two Republican-controlled houses and a Republican president intent on stripping away burdensome regulations, the CRA is a viable—though by no means automatic—path to overturning regulations without the typical procedural requirements.

The CRA does not permit filibusters in the Senate, but House Democrats will be able to filibuster each measure—and while the CRA places limitations on the debate time on the House floor, repealing each target rule through a separate joint resolution is likely to be very time consuming.

In part to address this issue, both the Senate and the House have introduced bills, [S.3483](#) and [H.R. 5982](#), respectively that would allow Congress to bundle “midnight regulations” and overturn them as part of a single joint resolution. These bills are unlikely to overcome significant Democratic opposition in the current Congress, and President Obama has indicated he would veto them if passed, but they stand a better chance in next year's Republican-controlled legislature.

Significantly, these administrative hurdles apply only to formal rulemakings. President-elect Trump can abolish executive orders, interpretive rules, policy statements and guidance documents, such as the Council on Environmental Quality's guidance for evaluating greenhouse gas emissions as part of NEPA review.

The Future of Energy, Environmental and Natural Resource Policy

The Trump transition team is expected to announce the heads of the Departments of Interior, Energy, and EPA during the week. A number of potential candidates have been floated for the top post at each agency, ranging from governors, to state regulators, to Congressional members, to oil and gas executives, and even two Democratic Senators.

- **Interior.** The shortlist for the Interior includes Oklahoma Governor Mary Fallin, Wyoming Representative Cynthia Lummis, Washington Representative Cathy McMorris Rodgers, Former Oklahoma House Speaker T.W. Shannon, former Arizona Governor Jan Brewer, and former Alaska Lieutenant Governor Mead Treadwell. The list of potential Interior nominees also includes a number of top oil and gas executives.

- **EPA.** Top EPA candidates include former Oklahoma Attorney General Scott Pruitt, former Texas environmental regulator Kathleen Hartnett White, West Virginia Attorney General Patrick Morrisey, Arkansas Attorney General Leslie Rutledge, and former Bush EPA official Jeff Holmstead.
- **Energy.** Former Texas Governor Rick Perry, Wyoming Representative Cynthia Lummis and two Democratic Senators—West Virginia Senator Joe Manchin and North Dakota Senator Heidi Heitkamp—are rumored to be at the top of the list for the next Secretary of Energy. That list also includes senior oil and gas executives like Larry Nichols, former head of Devon Energy Corp.

The Republican-controlled Senate is expected to confirm all Trump appointments, especially in light of a recent rule change requiring only a simple majority vote to confirm cabinet appointments but many of the nominees announced so far will likely face very difficult confirmation hearings. Senate Democrats have already said they would oppose nominees who question the existence of climate change or favor wholesale regulatory reform for the benefit of fossil fuel interests. On Dec. 1, 10 Senators penned [a letter](#) criticizing President-elect Trump for selecting cabinet and transition team members with “extensive ties to the fossil fuel industry.” The letter also urged Mr. Trump to reevaluate his picks for the EPA, Energy and Interior.

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