UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

**PRESENTED AT**

39th Annual Corporate Counsel Institute
May 11 – 12, 2017
Houston, TX

# The Opportunity to Trump Obama's Environmental & Energy Agenda

**Kelly A. Johnson**

Kelly A. Johnson
Holland & Hart LLP
Washington, DC

kajohnson@hollandhart.com
202.393.6500

As a candidate for President, Republican nominee Donald Trump committed to limit the authority of the U.S. Environmental Protection Agency ("EPA") and dismantle existing environmental programs including many initiatives pursued by his predecessor, President Barack Obama. The first 100 days of the Trump Administration[1] make clear that these were not idle promises and, in fact, President Trump and his EPA Administrator Scott Pruitt have embarked on a wide-ranging disassembling of a number of federal environmental regulations and policies. What is unclear is whether the other two branches of government – Congress and the judiciary –will facilitate or block these efforts.

**REGULATORY REFORM**

A number of mechanisms exist for President Trump to repeal, revise or substantially delay rules, guidance documents and other policy initiatives undertaken by the Obama Administration.[2] Immediately upon taking office, White House Chief of Staff Reince Preibus issued a memorandum to federal agency heads that placed a "regulatory freeze" on pending or recently promulgated regulations ("Preibus Memorandum").[3] President Trump also has used his executive power to direct agencies to take certain actions, including ordering agencies to review specific regulations. Two Executive Orders have particular relevance to the oil and gas industry: federal activities related to energy independence and climate change and the rule defining "waters of the United States."

**Regulatory Freeze**

The Preibus Memorandum directs agencies to limit the new regulations sent to the Office of the Federal Register ("OFR"); immediately withdraw for review any regulation sent to the OFR but not yet published; and, for regulations that have been published in the OFR but have not yet taken effect, delay the effective date for 60 days with the potential for additional delay consistent with the requirements of the Administrative Procedure Act ("APA"), that is, March 21, 2017. This last directive is intended to combat so-called "Midnight Regulations" issued by the Obama Administration and allow the Trump Administration to decide whether or not they agree with the policy set forth in the regulation.

The EPA, pursuant to the Priebus Memorandum, identified 30 regulations that were sent to the OFR and scheduled to go into effect before March 21, 2017.[4] The delay has allowed the Trump Administration and Administrator Pruitt to review the regulations and decide whether to keep

---

[1] Day 100 of the Trump Presidency was April 29, 2017.

[2] This paper does not examine the use of the Congressional Review Act, 5 U.S.C. § 801 *et seq*., by Congress to overturn final rules issued by a federal agency in the last days of an outgoing Administration. The Senate Republican Policy Committee says that final rules issued between June 13, 2016 and January 4, 2017 were eligible to be disapproved under the expedited provisions of the Congressional Review Act until May 9, 2017. https://www.rpc.senate.gov/policy-papers/restoring-the-peoples-voice-in-regulations.

[3] Reince Priebus, *Memorandum for the Heads of Executive Departments and Agencies regarding Regulatory Freeze Pending Review* (Jan. 20, 2017) found at https://www.whitehouse.gov/the-press-office/2017/01/20/ memorandum-heads-executive-departments-and-agencies.

[4] 4 U.S. Environmental Protection Agency, *Delay of Effective Date for 30 Final Regulations Published by the Environmental Protection Agency Between October 28, 2016 and January 17, 2017*, 82 Fed. Reg. 8499 (Jan. 26, 2017).

them, revise them or rescind them. While the delay of final rules usually requires notice and comment rulemaking, EPA relies on the "good cause" exception of the APA to support the delay which does not require public comment.[5] Included among the delayed rules are a number of State program approvals and the Risk Management Program rules issued under Section 112(r) of the Clean Air Act.[6]

**Executive Orders**

President Trump can issue Executive Orders to change federal policy but this ability is limited to the authorities granted to the President by the Constitution or Congress.[7] Executive Orders can be used to rescind prior Executive Orders without the need to follow any procedural or legal requirements. Similarly, Executive Orders can be used to direct policy changes pursuant to international agreements, Presidential memoranda, certain decisions made by federal agency heads and guidance documents.[8] However, a President cannot use an Executive Order to directly repeal or rescind a final agency regulation that is specifically authorized by statute. Rather, a President can only direct a federal agency to revisit regulations currently in effect. If an agency decides to repeal or revise any existing regulation, they would need to comply with the requirements of the Administrative Procedure Act.

**Presidential Memoranda**

While Executive Orders often address more general federal policies, a President can issue Presidential Memorandum which tells an agency to take a specific action.[9] For example, President Trump issued two Presidential Memoranda within days of taking office concerning controversial pipelines whose permitting was delayed by President Obama.

In the case of the Keystone Pipeline which would transport oil from oil sands in the Alberta Province of Canada to the United States, President Trump encouraged the owner of the Keystone Pipeline, TransCanada Keystone Pipeline, L.P., to "promptly re-submit" its application for a Presidential Permit (which had previously been denied) and for the Secretary of State to expeditiously review the application and issue the Presidential Permit.[10] The Secretary of State issued the Presidential Permit required for the Keystone Pipeline on March 23, 2017.[11] Similarly, with respect to the Dakota Access Pipeline, whose permitting by the U.S. Army Corps of Engineers

---

[5] 5 U.S.C. §§ 553(b) and 553(d)(3).

[6] 82 Fed. Reg. at 8500 — 8501.

[7] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (Presidential authority to issue executive orders "must stem either from an act of Congress or from the Constitution itself.").

[8] As discussed below, this articulation of a change in policy is what President Trump did with respect to a number of memoranda issued by President Trump to address climate change.

[9] Executive Orders and Presidential Memoranda are very similar with the only difference being, perhaps, that Executive Orders are considered more prestigious.

[10] *Memorandum on Construction of the Keystone XL Pipeline* (Jan. 24, 2017) *reprinted in* 82 Fed. Reg. 8663 (Jan. 30, 2017).

[11] U.S. Dep't of State, *Notice of Issuance of a Presidential Permit to TransCanada Pipeline, L.P.* (Mar. 2017) *reprinted in* 82 Fed. Reg. 16467 (Apr. 4, 2017).

UT LAW CLE THE UNIVERSITY OF TEXAS TEXASLAW

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the UT Law CLE eLibrary (utcle.org/elibrary)

# Title search: Practical Considerations for Protecting Trade Secrets in Texas

Also available as part of the eCourse
Hot Topics for Corporate Counsel: M&A Trends, Contracts, and Energy

First appeared as part of the conference materials for the
39th Annual Corporate Counsel Institute session
"The Opportunity to Trump Obama's Environmental & Energy Agenda"