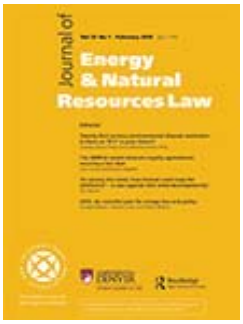

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The America First energy policy of the Trump Administration

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At the time of writing, the Trump Administration is nascent, in existence for less than ten weeks. During that short time, however, the President has made it abundantly clear that he intends to occupy his new office in the same way he ran his presidential campaign – loudly, caustically and with a single-minded vision bent on turning government and United States policy upside down, ostensibly to benefit American citizens, American workers and American business. Although many commentators have said that this broad-brushed approach to governance overemphasises bold results over thoughtful process and idealism over nuance, thereby ignoring or otherwise casting aside important details, no one should be the least bit surprised that it's happening.

1. Trump and energy

1.1. *Trump's overarching America First energy policy*

On 26 May 2016, then-presidential candidate Donald Trump gave a speech to the North Dakota Petroleum Council setting forth his energy policy. North Dakota Congressman Kevin Cramer had prepared two white papers on energy policy for candidate Trump prior to the Bismarck speech,[1] and the speech reflected fairly standard Republican tenets on energy issues, taking account of the Trump campaign's focus on promoting jobs for American workers.[2] The speech and the much shorter America First energy

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1 Evan Lehmann, 'Meet Trump's New Energy Advisor' (*E&E News*, 13 May 2016) www.eenews.net/stories/1060037208 accessed 7 May 2017.

2 The full text of the speech can be found at Press Release, 'An America First Energy Plan' (*Trump for President*, 26 May 2016) www.donaldjtrump.com/press-releases/an-america-first-energy-plan. ('Bismarck speech').

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policy published on the White House website[3] following Mr Trump's inauguration provide some clear policy statements and specific actions.

In the vision set forth by candidate Trump, his administration will remove 'bureaucratic and political barriers' to energy development.[4] In the Bismarck speech, candidate Trump stated that '[a]ny future regulation will go through a simple test: is this regulation good for the American worker? If it doesn't pass this test, the rule will not be approved.'[5] According to the President, doing this will promote the energy independence of the United States, freeing it from reliance on oil imports from 'the OPEC cartel or any nations hostile to our interests'.[6] And all sources of energy, including renewables and nuclear, will benefit from the relaxed regulatory environment, but governmental policy will not favour one source of energy over another.[7] That said, Trump does intend to take measures to bring back jobs in the coal industry, seemingly regardless of whether present markets will welcome an influx of new coal.[8] Candidate Trump also promised to clear the way for more infrastructure, including oil pipelines like the Keystone XL and the Dakota Access Pipeline (DAPL). On the foreign policy front, the Trump Administration intends to 'work with our Gulf allies to develop a positive energy relationship as part of our anti-terrorism strategy'.[9]

1.2. *Trump executive actions and congressional initiatives to promote the US energy industry*

Without question, the Trump Administration and the Republican-controlled Congress are reshaping US energy policy. A centrepiece of the new policy is a renewed focus on encouraging domestic energy production and development, including on federal lands, driven in part by a desire to promote US job growth and manufacturing. A key related initiative is a renewed emphasis on regulatory reform, including efforts to streamline the federal permitting and licensing of new energy projects.

The President and Congress have promised to remove what they see as regulatory impediments that stand in the way of US production and export of fossil fuels and other domestic energy resources. Initial efforts are being led by the Trump Administration's use of executive actions and Congress's use of the Congressional Review Act (CRA)[10] to eliminate the 'midnight' regulations of the Obama Administration. Because comprehensive legislative actions will likely be delayed until 2018 or thereafter, efforts to improve regulatory efficiency may come from within the Trump Administration executive agencies themselves acting under new leadership and under new mandates issued by the Administration.

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3 See www.whitehouse.gov/america-first-energy.
4 Bismarck speech (n 2).
5 *Ibid.*
6 *Ibid.*
7 *Ibid.*
8 *Ibid.* The development of natural gas from US shale has driven down the price of natural gas, and inexpensive natural gas has displaced some coal-fired electricity generation. A policy that promotes more shale development may exacerbate the market pressures on coal.
9 *Ibid.*
10 5 USC ss 801–08.

1.2.1. Executive orders/memoranda

As of the writing of this paper, the President has issued multiple executive actions,[11] the thrust of each of which is to reduce the overall number of regulations issued or managed by executive agencies, and, in certain cases, to remove what the President sees as regulatory impediments to energy projects. These executive actions, which are discussed in more detail later in this paper, include:

- requiring that for every regulation promulgated, two must be eliminated;
- requiring agencies to establish regulatory reform task forces;
- freezing the issuance of all regulations for a set period so they can be re-reviewed by the new Administration;
- directing the Secretary of Commerce to establish a broader regulatory reform plan after considering public input; and
- directing various agencies to 'suspend, revise or rescind' several rules thought to potentially burden the development of domestic energy resources.

The overall goal of these efforts seems to be to increase energy production and to make the heavily regulated energy sector more competitive, both globally and at home.

The President also has issued targeted, energy-specific executive actions, focused primarily on pipelines. He has promulgated two presidential memoranda aimed at restarting the permitting processes for the Keystone XL and DAPLs,[12] both of which were unable to attain (or had had revoked) required permits during the tenure of the Obama Administration. However, these actions came with a proviso: the same day, the President also issued a 'Buy American' presidential memorandum asking the Secretary of Commerce to develop a plan under which all new and retrofitted pipelines shall 'use materials and equipment', in particular iron or steel products, 'produced in the United States'.[13] The Administration clearly views energy policy as a means to promote jobs and domestic manufacturing.

The Trump Administration also issued a more generic executive order, 'Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects' ('Infrastructure Executive Order').[14] This order creates a process by which the CEQ

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11 Presidential Executive Order on Enforcing the Regulatory Reform Agenda (24 February 2017) www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda (unpublished copy); Executive Order 13771, Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs, 82 Fed Reg 9339 (3 February 2017) (issued 30 January 2017); Presidential Memorandum Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing (24 January 2017) www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-streamlining-permitting-and-reducing-regulatory; Presidential Memorandum Initiating Regulatory Freeze Pending Review (20 January 2017) www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies.

12 Presidential Memorandum Regarding Construction of the Keystone XL Pipeline (24 January 2017) www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-keystone-xl-pipeline; Presidential Memorandum Regarding Construction of the Dakota Access Pipeline (24 January 2017) www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-dakota-access-pipeline.

13 Presidential Memorandum Regarding Construction of American Pipelines (24 January 2017) www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-american-pipelines. Note that a new regulatory programme will likely be necessary to implement this 'Buy American' regime for pipelines.

14 Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, 82 Fed Reg 8657 (30 January 2017) (issued 24 January 2017). The Keystone XL pipeline is exempt from

will work with administrative agencies to 'streamline and expedite…environmental reviews and approvals for' 'projects designated as "High Priority Infrastructure Project[s]." The decision whether a project is a "High Priority Infrastructure Project" is made by the CEQ Chairman, and he can consider such broad factors as a project's "importance to the general welfare" "or other factors he" deems relevant.' CEQ's guidance on how to expedite … environmental reviews will likely carry weight with federal agencies and the courts, given its responsibility to oversee implementation of the National Environmental Policy Act[15] (NEPA).[16] The Administration plainly believes that reform of the environmental review process is key to streamlining federal permitting of infrastructure projects, but much of that process is dictated by statutes that Congress would have to amend.

Another open issue presented by these executive actions is their reach to 'independent' agencies, or those regulatory agencies that exist outside the federal executive departments and the Office of the President. These agencies are typically led by five-member commissions, the members of which cannot be removed at will by the President, with no more than three commissioners from the same political party. These agencies, including the Federal Energy Regulatory Commission (FERC) and the Nuclear Regulatory Commission (NRC), oversee many of the nation's large infrastructure projects and have some of the longest and most difficult environmental review and permitting timelines.[17] Both the FERC and the NRC have traditionally followed the policies of presidential executive orders, and this seems likely to remain their practice.

1.2.2. Congressional Review Act

The current congressional Republican majority is focused on rolling back regulations that the Obama Administration adopted near the end of Obama's presidency. The primary mechanism for this is the CRA, which grants Congress, with presidential approval, the ability to 'disapprove' a new rulemaking before it takes effect through an expedited procedural process. Congress typically has 60 'days of continuous session' 'after a rule has been submitted to Congress or published in the Federal Register' in which to act.[18]

Before the current administration took office, the CRA was seldom used – just once in its roughly 20-year history. However, in February 2017, that streak was broken, with multiple rules being disapproved by Congress and the President, at least two of which have implications for the energy industry. The first was a rule requiring the disclosure of financial transactions with foreign governments by oil, gas and mining companies,[19]

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this requirement because it is under construction and its steel has already been purchased. See Aric Jenkins, 'Keystone XL Pipeline Won't Use American Steel Despite President Trump's Promise' *Fortune Magazine* (4 March 2017) http://fortune.com/2017/03/04/keystone-xl-pipeline-american-steel-trump accessed 7 May 2017.

15 National Environmental Policy Act of 1969, as amended, 42 USC ss 4321–47, available at www.nepa.gov.

16 Hogan Lovells, 'First Steps: A Look at Trump Administration Executive Actions Regarding Energy Projects' (25 January 2017) http://ehoganlovells.com/cv/9ffc908bc80c98b96c844de4a90f0b8be47f669c.

17 *Ibid.*

18 'Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress' at 2 (Congressional Research Service, 3 September 2008) https://fas.org/sgp/crs/misc/RL34633.pdf

19 HJ Res 41, Providing for Congressional Disapproval under Chapter 8 of Title 5, United States Code, of a Rule Submitted by the Securities and Exchange Commission Relating to 'Disclosure of Payments by

known as the 'publish what you pay' rule. The second rule was known as the 'Stream Protection Rule', a rule concerning the disposal of coal mining wastes in manners that may cause the wastes to enter into streams or other waterways.[20] Moreover, it is possible that the CRA will be used to strike down more Obama-era rules going forward, such as regulations of the Department of Energy (DOE) imposing efficiency standards.

Still, the limited timeframe available for review, Congress's busy schedule and opposition from congressional Democrats may result in fewer rules being overturned than initially planned. Because many regulations merely implement existing federal law, the rollback of such regulations is also likely to be more complicated and take longer than some have predicted.

1.2.3. Other regulatory reform efforts

Many legislative initiatives have been proposed by the new administration to promote investment in the energy industry and reduce regulatory burdens. One of the President's signature plans is to 'spur $1 trillion in infrastructure investment' over the course of a decade.[21] The President has said that the plan will be revenue-neutral and designed to leverage public–private partnerships and private investments through tax incentives. So far, there have been few details released on this new initiative, and some in Congress have voiced concern that the plan may lead to 'crony capitalism'.[22] It also appears likely that this and related initiatives will be pushed off in favour of other legislation until 2018.[23] One potential exception, however, is a bill to promote the development of next-generation nuclear power reactors, which has already been proposed in both houses of Congress with bipartisan support.[24]

Over the next year, it may be agencies themselves leading the way on regulatory reform. The President has the opportunity to nominate three new commissioners for the FERC, thus giving him the ability to reset the agency's policy goals. The President also will have the ability to nominate two commissioners to the NRC. The President already has acted quickly to designate current Commissioner Kristine L Svinicki as the NRC Chairman. She is well regarded within the NRC and by the industry, and views regulatory reform as a priority.

Resource Extraction Issuers' (14 February 2017) www.congress.gov/bill/115th-congress/house-joint-resolution/41/text.

20 HJ Res 38, Disapproving the Rule Submitted by the Department of the Interior Known as the Stream Protection Rule (16 February 2017) www.congress.gov/bill/115th-congress/house-joint-resolution/38/text.

21 'Trump's Plan for $1 Trillion in Infrastructure Investments' (*Politico*, 9 November 2016) www.politico.com/tipsheets/morning-transportation/2016/11/trumps-plan-for-1-trillion-in-infrastructure-investments-217315.

22 'How Donald Trump's Infrastructure Plan Fails America' (*Center for American Progress*, 1 December 2016) www.americanprogress.org/issues/economy/reports/2016/12/01/293948/how-donald-trumps-infrastructure-plan-fails-america

23 'Trump, Congress May Punt on Infrastructure Until 2018: Report' (*The Hill*, 23 February 2017) http://thehill.com/policy/transportation/320886-report-trump-congress-may-punt-on-infrastructure-until-2018.

24 'January Advancements for Small Modular and Advanced Nuclear Reactors' (*HL New Nuclear*, 20 January 2017) www.hlnewnuclear.com/2017/01/january-advancements-for-small-modular-and-advanced-nuclear-reactors.

In addition, on 24 February 2017, President Trump issued an executive order on 'Enforcing the Regulatory Reform Agenda'.[25] Under this executive order, administrative agencies are to appoint a regulatory reform officer and create a regulatory reform task force. The task force is to identify regulations that:

(i) eliminate jobs, or inhibit job creation;

(ii) are outdated, unnecessary, or ineffective;

(iii) impose costs that exceed benefits;

(iv) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;

(v) are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act…or the guidance issued pursuant to that provision, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or

(vi) derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.[26]

Such regulations will be scrutinised and perhaps targeted for elimination.[27]

Leadership changes, when coordinated with executive action, could lead to significant changes in how agencies decide how to implement their regulatory missions. The CEQ could set an example. Before the President took office, the agency issued guidance pushing for *expanded regulatory reviews*, in particular of greenhouse gas emissions from energy projects. However, under the President's Infrastructure Executive Order, the CEQ now is tasked with helping *reduce regulatory reviews* for high-priority and other infrastructure projects. This seems sure to provoke more court challenges from citizen groups to final regulatory actions, which could undermine the desire for overly accelerated change.

Efforts to streamline the regulatory process may get assistance from the nomination of Judge Neil Gorsuch for a seat on the US Supreme Court. Judge Gorsuch has strongly advocated taking a fresh look the *Chevron*[28] doctrine, which requires courts to defer strongly to administrative agencies on questions of statutory interpretation and implementation.[29] Administrative agencies have often used this deference to expand the scope of their reviews or increase regulatory oversight. Because courts defer to agency interpretations, agencies can expand their remit under the operative statutes with a broad reading of their statutory authority. Judge Gorsuch, if confirmed, would join a court that is increasingly interested in taking on this issue.[30]

25 Presidential Executive Order on Enforcing the Regulatory Reform Agenda, EO 13777 (24 February 2017).
26 *Ibid.*
27 *Ibid.*
28 *Chevron USA, Inc v Natural Res Defense Council, Inc*, 467 US 837 (1984).
29 'A Jeffersonian for the Supreme Court' (*The Atlantic*, 1 February 2017) www.theatlantic.com/politics/archive/2017/02/a-jeffersonian-on-the-supreme-court/515319.
30 'Supreme Court Chipping Away at Agency Deference' (*Bloomberg BNA*, 22 October 2015) www.bna.com/supreme-court-chipping-n57982062598.

2. Environmental regulation

2.1. *Clean Air Act*

The US Environmental Protection Agency (EPA) administers the Clean Air Act (CAA). As an agency of the executive branch of the federal government, the EPA reports to the President of the United States, and works closely with the President to pursue and implement a specific policy agenda. On 17 February 2017, the US Senate confirmed Scott Pruitt, former Attorney General of Oklahoma, as the new EPA Administrator. Prior to his appointment, Mr Pruitt vocally disagreed with significant federal regulations recently promulgated by the Obama Administration – particularly in the energy sector. In fact, in his first speech at the EPA headquarters in Washington, DC, Mr Pruitt clarified his pragmatic view on regulations, stating that

> [r]egulations ought to make things regular. Regulators exist to give certainty to those that they regulate. Those that we regulate ought to know what's expected of them so that they can plan and allocate resources to comply. That's really the job of a regulator.[31]

These views are likely to pervade the EPA's agenda, including with respect to regulation of and enforcement under the CAA.

2.1.1. New Source Performance Standards subpart OOOOa

Section 111 of the CAA authorises the EPA to develop technology-based standards that apply to specific categories of stationary sources, referred to as New Source Performance Standards (NSPS).[32] Specifically, section 111(b) of the CAA requires the EPA to establish emission standards for any category of new and modified stationary sources that the EPA Administrator, in their judgement, finds 'causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare'.[33] Once an endangerment finding for a source category has been established, the EPA must then establish 'standards of performance' that apply to sources within that category that are constructed, modified or reconstructed *after* the EPA *proposes* the NSPS for that particular source category. While the EPA has significant discretion to define the source categories, determine the pollutants for which standards should be developed, identify the facilities within each source category to be covered and set the level of the standards, such discretion is not unfettered.

Under President Obama's Climate Action Plan: Strategy to Reduce Methane Emissions, on 18 September 2015, the EPA proposed technical amendments to the NSPS at subpart OOOO '(establishing emission standards and compliance schedules for the control of volatile organic compounds (VOCS)) for the crude oil and natural gas production, transmission and distribution sectors and also proposed new standards at subpart OOOOa (establishing emission standards and compliance schedules for the control of pollutant greenhouse gases (GHGs) for the crude oil and natural gas industry).[34]

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31 Juan Carlos Rodriguez, 'New EPA Chief Pledges to Change Regulatory, Legal Practices' (*Law360*, 21 February 2017) www.law360.com/articles/893816/new-epa-chief-pledges-to-change-regulatory-legal-practices.

32 See generally, 40 CFR Part 60.

33 42 USC s 7411.

34 See 80 Fed Reg 56,593 (18 September 2015).

With respect to NSPS OOOOa (the most significant of the proposed regulations), the EPA's primary goal was to impose upon the oil and gas industry new requirements to reduce emissions of GHGs and to require that additional equipment and activities comply with new source standards. Specifically, NSPS OOOOa established emissions limitations for methane, which the Obama Administration observed as the 'principal [GHG] emitted by equipment and processes in the oil and gas sector'.[35] The EPA confidently declared that operators will be able to meet these standards utilising cost-effective and readily available technologies. The EPA further stated that:

> [t]he methane reductions from the final New Source Performance Standards (NSPS) will build on the agency's 2012 rules to curb VOC emissions from new, reconstructed and modified sources in the oil and gas industry…Reducing methane emissions is an essential part of an overall strategy to address climate change. Climate change impacts affect all Americans' lives, from stronger storms and longer droughts to increased insurance premiums, food prices and allergy seasons.[36]

Typically, in a rulemaking of this nature (ie, one that is highly technical, subject to a high level of scrutiny and controversy, and involves more than a dozen categories of emissions sources) the EPA would take not less than a year and a half to evaluate and address all stakeholder comments, resolve issues where feasible and publish a final rule. Here, however, only nine months after publication of the proposed rule, the EPA (under the Obama Administration) published its final rule on these NSPS proposals. Specifically, on 3 June 2016, the EPA issued the final rule revising NSPS OOOO and establishing NSPS OOOOa.[37]

Immediately upon publication of the final NSPS OOOOa rule on 15 July 2016, the State of North Dakota filed a Petition for Review in the Court of Appeals for the District of Columbia of the rule. Subsequently, eight more parties challenged the OOOOa regulations: the State of Texas; the American Petroleum Institute (API); the Western Energy Alliance (WEA); the Texas Oil and Gas Association; the State of West Virginia; the Independent Petroleum Association; the Interstate Natural Gas Association; and the GPA Midstream Association (collectively, 'Petitioners'). The cases have been consolidated under the lead case, *State of North Dakota, et al v EPA*, No 16-1242 (DC Cir 2016). Additionally, beginning on 15 August 2016, a number of states and environmental groups intervened ('Intervenors') in support of the EPA. The Intervenors include, among others: the State of California, the State of New York, the State of New Mexico, the City of Chicago, the Natural Resources Defense Council, the Sierra Club, the Clean Air Council and the Environmental Defense Fund.

The Petitioners alleged multiple claims challenging NSPS OOOOa, including but not limited to whether the rule improperly and unlawfully expands the oil and natural gas source category, and together with NSPS OOOO and related amendments, constitutes an abuse of due process; unlawfully regulates existing oil and natural gas sources; and violates the US Constitution and the foundational cooperative federalism

35 EPA's Air Rules for the Oil & Gas Industry, 'EPA's Actions to Reduce Methane Emissions from the Oil and Natural Gas Industry: Final Rules and Draft Information Collection Request' (May 2016) 2 www.epa.gov/sites/production/files/2016-09/documents/nsps-overview-fs.pdf.

36 *Ibid* at 1–2.

37 81 Fed Reg 35824 (3 June 2016).

structure of the CAA by failing to provide a meaningful mechanism for recognising existing state-delegated programmes, among other claims.

On 4 January 2017, the US Court of Appeals for the DC Circuit ordered that the challenges to NSPS OOOOa be further consolidated with pending challenges to two additional EPA final rules that have been under review for some time: Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, 77 Fed Reg 49,490 (16 August 2012) (2012 NSPS OOOO Rule); and Oil and Natural Gas Sector: Reconsideration of Certain Provisions of New Source Performance Standards, 79 Fed Reg 79,018 (31 December 2014) (2014 NSPS OOOO Amendment).[38] Proposals for a briefing schedule and format are currently due on 19 May 2017.[39] The rule remains in effect pending the litigation.

Compounding the judicial challenges to NSPS OOOOa, it is expected that the policy initiatives and messages promoted by the Trump Administration EPA will differ significantly from those driven by the Obama Administration EPA. As stated above, the US Senate confirmed Scott Pruitt as the new EPA Administrator. In his former role as the Attorney General of Oklahoma, Mr Pruitt was strongly opposed to the EPA's promulgation of NSPS OOOOa. And in fact, until recently, Oklahoma, under the direction of Mr Pruitt, was a party to the lawsuit challenging NSPS OOOOa. With Mr Pruitt at its helm, and pushing a federalism agenda, we can expect the EPA to steer clear of, and in fact seek to actively revise or rescind, any action the Administrator believes would exceed the EPA's statutory authority or unduly regulate industry and the business community.[40] In addition to the industry petitioners, the fact that such a large number of states have chosen to challenge NSPS OOOOa provides the EPA with a strong argument that the rule has significant deficiencies that need to be addressed in light of the CAA's cooperative-federalism structure, by which the federal government delegates to and entrusts states to regulate under and enforce federal law. In short, while the future of NSPS OOOOa remains uncertain, it is most certainly a regulation to monitor – particularly for those operating in the oil and gas industry, and it is expected that changes will be proposed in the near future.

2.1.2. Clean Power Plan

Also under the Obama Administration's Climate Action Plan, the EPA promulgated the Clean Power Plan (CPP), published on 3 August 2015.[41] From the Obama Administration's perspective, the goal of the CPP was to reduce carbon pollution from power plants by imposing the first-ever national standards that address carbon pollution from existing power plants. Again, the Obama Administration EPA touted the rule as necessary to fight climate change, 'one of the greatest

38 See Per Curiam Order, *State of North Dakota, et al v EPA*, No 16-1242 (DC Cir 4 January 2017).
39 See Clerk's Order, *State of North Dakota, et al v EPA*, No 16-1242 (DC Cir 27 January 2017).
40 Under this direction, policy-makers have already investigated whether the CRA (discussed in section 1, above) could be used as a tool to dismantle NSPS OOOOa. The CRA, however, is not applicable to NSPS OOOOa because it applies only to rules promulgated after 13 June 2016. Thus, the Trump Administration cannot rely on the CRA to repeal the new regulations.
41 80 Fed Reg 64,662 (23 October 2015).

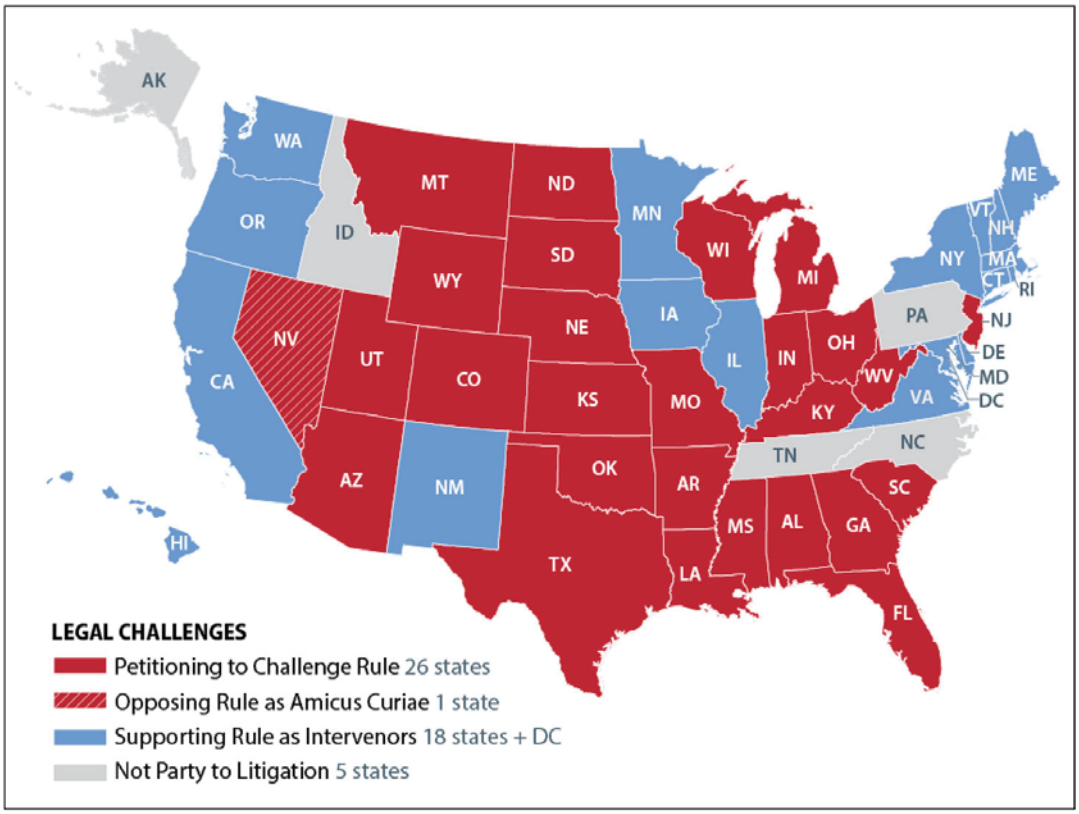

Figure 1. States participating in Clean Power Plan litigation. Source: prepared by CRS from litigation filings in *West Virginia v EPA*.

environmental and public health challenges we face'.[42] The EPA stated that the CPP 'also shows the world that the United States is committed to leading global efforts to address climate change'.[43]

The CPP has been referred to as 'one of the more singularly controversial environmental regulations ever promulgated by the EPA'.[44] Paralleling the DC Circuit litigation involving NSPS OOOOa, the numerous challenges to the CPP have also been consolidated in the US Court of Appeals for the DC Circuit in *West Virginia v EPA et al*, DC Circuit No 15-1363. In fact, as shown in Figure 1,[45] 27 states filed petitions challenging the CPP, including Oklahoma, North Dakota, Mississippi, West Virginia and Texas as the key lead states. Other petitioners challenging the CPP include labour unions, rural electric cooperatives and an association representing them, industry and trade groups, non-profit public policy organisations, and fossil-fuel-related

42 EPA, 'Overview of the Clean Power Plan: Cutting Carbon Pollution from Power Plants' (August 2016) 2 www.epa.gov/sites/production/files/2015-08/documents/fs-cpp-overview.pdf.
43 *Ibid* at 1.
44 Congressional Review Service Report, 'Clean Power Plan: Legal Background and Pending Litigation in *West Virginia v. EPA*' (10 January 2017) https://fas.org/sgp/crs/misc/R44480.pdf.
45 Congressional Review Service Report, 'Clean Power Plan: Legal Background and Pending Litigation in *West Virginia v. EPA*' at 2 (10 January 2017) https://fas.org/sgp/crs/misc/R44480.pdf.

companies and local electric utilities. In total, more than 100 parties filed petitions challenging the CPP.

In this litigation, and again, parallel to the challenges to NSPS OOOOa, petitioners have attacked the EPA's underlying authority to promulgate the CPP. The key arguments on the merits include but are not limited to whether the EPA has exceeded its authority under section 111 of the CAA; involve constitutional arguments relating to federalism and separation of powers; and include record-based challenges to the achievability and reasonableness of the rule.

The CPP litigation has a unique and interesting procedural history. In late 2015, petitioners filed a motion requesting that the court stay the CPP for the duration of the litigation. In January 2016, the DC Circuit denied the petitioners' motion, stating that '[p]etitioners have not satisfied the stringent requirements for a stay pending court review'.[46] Following this order, and in a rare procedural step, petitioners applied to the US Supreme Court for a stay of the CPP. On 9 February 2016, in an unexpected 5–4 decision (and contrary to the DC Circuit's order), the Supreme Court granted the petitioners' applications to stay the CPP, without any explanation.[47] Thus, the CPP is currently stayed (eg, has no legal effect and cannot be enforced by the EPA) during the pendency of the litigation.

Oral arguments were held in the DC Circuit litigation on 27 September 2016. Following the DC Circuit Court's judgment, either party may seek review by the Supreme Court (and is in fact expected to do so). Notably, the Supreme Court's decision to stay the CPP was one of Justice Scalia's last votes prior to his passing on 13 February 2016. Without a doubt, the vacancy left by Scalia's departure will affect the course and outcome of the CPP litigation.

In addition to the continuing CPP litigation, President Trump has made his position clear on the CPP – dimming the outlook for its continuance: 'We will eliminate the highly invasive "Waters of the U.S." rule, and scrap the $5 trillion dollar Obama-Clinton Climate Action Plan and the Clean Power Plan.'[48] As discussed above, Mr Scott Pruitt has been named the new EPA Administrator, which carries with it a status of Cabinet rank. As with NSPS OOOOa, Mr Pruitt has been at the forefront of lawsuits challenging the CPP.

On 28 March 2017, the President issued his 'Executive Order on Promoting Energy Independence and Economic Growth'.[49] The executive order rescinds several Obama Administration presidential actions related to climate change. It also requires the EPA to review all rules related to the CPP, including: (i) the final rule entitled 'Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units', 80 Fed Reg 64661 (23 October 2015) (Clean Power Plan); (ii) the final rule entitled 'Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units', 80 Fed Reg 64509 (23 October 2015); and (iii) the proposed rule entitled 'Federal Plan

46 Order at 2, *West Virginia v EPA*, No 15-1363 (DC Cir 21 January 2016).

47 Order in Pending Case, *West Virginia v EPA*, No 15A773 (S Ct 9 February 2016).

48 Missouri Public Utility Alliance, 'Survival of Clean Power Plan under a Trump Administration Looms as a Question' (19 January 2017) http://mpua.org/news/327018/Survival-of-Clean-Power-Plan-under-a-Trump-administration-looms-as-a-question.htm accessed 7 May 2017.

49 Executive Order 13783, Executive Order on Promoting Energy Independence and Economic Growth (28 March 2017).

Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before 8 January 2014; Model Trading Rules; Amendments to Framework Regulations; Proposed Rule', 80 Fed Reg 64966 (23 October 2015).[50]

While this executive order requires a hard look at the CPP and related regulations, it also requires that such actions be 'appropriate and consistent with law'. The new administration appears intent on unravelling the CPP, and has several options following the executive order.[51] First, the EPA could initiate a formal rulemaking process to eliminate the CPP. Unlike a proposed rule, a final rule such as the CPP must go through the same notice-and-comment rulemaking process to undo it as it went through to promulgate it in the first place. This would take time and significant legal resources. Second, the administration could let the litigation play out in the DC Circuit Court. If the DC Circuit Court judgment is not favourable, parties would appeal to the Supreme Court, new Justice Gorsuch. And, third, to the extent the CPP remains, the EPA could use its enforcement discretion and refuse to enforce the requirements of the CPP, a path that Mr Pruitt would likely welcome. Simultaneously, President Trump could instruct the Department of Justice to also refuse to defend or enforce the CPP. And even if the agency did not defend or enforce the CPP, the CPP would still remain in full force and effect, exposing the EPA to lawsuits from environmentalists alleging that the EPA has failed to act on climate and other issues, and also exposing companies to citizen suits under section 304(a) of the CAA.

As discussed in further detail below, whatever happens to both NSPS OOOOa and the CPP, environmental groups and states are expected to fight any attempt by the new administration (or other parties) to limit or eliminate the EPA and its rules such that any efforts to undo existing regulations will face significant hurdles both in Congress and in the courts.

2.1.3. The role of states

The EPA does not have sole authority over protection of the environment and public health. Indeed, many of the federal statutes (for example, Clean Air Act, Clean Water Act, Safe Drinking Water Act and the Resource Conservation and Recovery Act) contain provisions authorising states to petition for delegation of primary enforcement and regulatory authority as part of a cooperative federalism regime between the state and the EPA, explained above.[52] In addition, most states have laws that are analogues of the major federal environmental statutes, which authorise the states to adopt regulations and requirements that apply to sources within the state.[53]

With respect to adoption of regulations, and as a general rule, under the federal delegation programmes (which vary based upon the specific statute at issue), states are required only to be *at least* as restrictive as federal standards; however, the

50 *Ibid* at sec 4.

51 Thomas A Lorenzen and Sherrie A Armstrong, 'Change in Administrations, Change in Course? What the Next President Could Do to Vacate or Reform Obama's Clean Power Plan (Part 2 of 2)' (2016) 48 (2) *Trends* www.americanbar.org/publications/trends/2016-2017/november-december-2016/change_in_administrations.html accessed 7 May 2017.

52 See, eg, 42 USC s 7411(c)(1) ('Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.').

53 See, eg, Colo Rev Stat Ann ss 25-8-101 et al (Colorado Water Quality Control Act).

federal statutes generally do not limit the state's ability to adopt more restrictive standards.[54] Thus, absent of state prohibitions on the adoption of standards more stringent than federal requirements, states have significant authority to adopt both regulations that may be enforced under the federal regimes, as well as state-only requirements.

Given this broad authority, we expect several states to react with their own regulations to fill the gap that the Trump Administration may leave in its wake as it proceeds to unwind or revise federal regulations adopted during the Obama Administration. Such states may include: Colorado, California, Pennsylvania and New Mexico (among others). We think this is particularly true in the context of the CAA and with respect to oil and gas development. In fact, several more progressive states have indicated their intent to increase and improve their state regulatory regimes related to oil and gas emissions, despite the expectation that the Trump Administration will severely pull back or limit the scope of rules related to emissions from oil and gas sources. For example, in February 2017, the Pennsylvania Department of Environmental Protection (PA DEP) published, for a 45-day public comment period, proposed permitting requirements for new and modified sources at unconventional natural gas well sites and remote pigging stations.[55] The proposed permit requirements contain strict methane-reduction requirements that track those contained in NSPS OOOOa, including a leak-detection-and-repair (LDAR) programme requirement. Additionally, PA DEP recently asserted its continued commitment to drafting methane regulations for existing sources within the state, but did not announce a proposed timeline for the promulgation of those regulations. Similarly, Colorado has previously adopted methane regulations related to the oil and natural gas industry, including existing sources,[56] and has recently announced a stakeholder process that could further enhance regulations related to oil and gas emissions sources in Colorado. In both of these cases, these regulations would adopt the very requirements that the Trump Administration seeks to overturn (eg, NSPS OOOO/OOOOa described herein) as state requirements, and apply them to sources (eg, existing sources) that the EPA may have neither the authority nor the resources to regulate at this time.

In addition to increased regulatory development, we expect that certain states may increase their enforcement efforts in response to public, environmental and other concerns that a Trump EPA will not appropriately or comprehensively enforce against the regulated industries. Because states have enforcement authority under both their federally delegated programmes and their state-only requirements, companies may find themselves in a regulatory environment that is as challenging, if not more challenging, than what existed before the Trump Administration took office.

2.2. *'Waters of the United States'*

On 29 June 2015, the EPA and the US Army Corps of Engineers (Corps) published a final rule further defining the scope of 'waters of the United States' under the Clean

54 See *Union Elec Co v EPA*, 427 US 246, 265 (1976) (holding that under the CAA, states may submit state implementation plans 'more stringent than federal law requires and…the Administrator must approve such plans if they meet the minimum requirements' of the CAA).

55 See General Plan Approval and/or General Operating Permit BAQ-GPA/GP-5a: Unconventional Natural Gas Well Site Operations and Remote Pigging Stations www.elibrary.dep.state.pa.us/dsweb/Get/Document-116054/2700-PM-BAQ0268_GP-5A.pdf.

56 See 5 Colo Code Regs s 1001-9:XVII.

Water Act (CWA).[57] Under the CWA, the Corps and the EPA can only assert jurisdiction over navigable waters, defined under the statute only as 'waters of the United States'.[58] In other words, only those waters the EPA or the Corps deem as waters of the United States are subject to regulation under CWA programmes such as section 402 (National Pollutant Discharge Elimination System - NPDES) or section 404 (Permits for Dredged or Fill Material). As noted by the Supreme Court, in 2006, the average applicant for an individual section 404 permit spent '788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spen[t] 313 days and $28,915 – not counting costs of mitigation or design changes'.[59] Thus, the regulated community has always paid significant attention to the regulatory and judicial interpretation of the term 'waters of the United States' as that definition has significant consequences for the regulated community.

The Clean Water Rule (also known as the 'Waters of the United States Rule') followed three US Supreme Court cases addressing the jurisdictional scope of the CWA.[60] In the most recent of these decisions, *Rapanos*, Justice Scalia, in a plurality opinion, held that the term 'waters of the United States' refers only to 'relatively permanent, standing or continuously flowing bodies of water' that can be used in interstate commerce (but not necessarily navigable in the traditional sense), and '*only* those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right…are "adjacent to" such waters and covered by the [CWA]'.[61] Justice Kennedy, on the other hand, held that wetlands with a significant hydrological, chemical, physical or biological nexus to waters of the United States were themselves waters of the United States.[62] Importantly, Justice Kennedy also held that the 'significant nexus' test could be met by looking at the wetlands at issue, 'either alone or in combination with similarly situated lands in the region…'.[63] Accordingly, Justice Kennedy and Justice Scalia offered two very different, and equally controlling, interpretations of the jurisdictional reach of the CWA, and *Rapanos* ultimately infused increased uncertainty into already murky waters.

Through the Clean Water Rule, the Corps and the EPA's stated purpose was to increase regulatory certainty 'through clearer definitions and increased use of bright-line boundaries'.[64] The Corps and EPA, however, wholly adopted the significant nexus standard as defined by Justice Kennedy in *Rapanos*.[65] The Corps and the

57 See 80 Fed Reg 37,054 (29 June 2015) ('Clean Water Rule').

58 See, eg, 33 USC s 1362(12) ('The term 'discharge of a pollutant'…means [ ] any addition of any pollutant to navigable waters from any point source…'); *ibid* s 1362(7) ('The term "navigable waters" means the waters of the United States, including the territorial seas.').

59 *Rapanos v United States*, 547 US 715, 721 (2006).

60 See *United States v Riverside Bayview Homes, Inc*, 474 US 121 (1985); *Solid Waste Agency of Northern Cook Cty v Army Corps of Engineers*, 531 US 159 (2001) (SWANCC); *Rapanos v United States*, 547 US 715 (2006).

61 547 US at 739, 742.

62 See *ibid* at 780; see also SWANCC (n 60), 531 US at 167 ('It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA…').

63 *Ibid.*

64 80 Fed Reg at 37055.

65 See *ibid* at 37060 ('The key to the agencies' interpretation of the CWA is the significant nexus standard…Waters are "waters of the United States" if they, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.').

EPA also promulgated more specific regulatory definitions for the ambiguous terms necessary to apply the standard. Thus, in the Clean Water Rule, the EPA and the Corps adopted a definition of 'waters of the United States' that many saw as pushing the outermost limits of the CWA. Accordingly, the Clean Water Rule proved extremely controversial and was heavily opposed by both states and the regulated community.

Ultimately, over 100 parties, consisting of states, industry and trade associations, filed a total of 22 petitions for judicial review of the Clean Water Rule.[66] The petitions for review were ultimately consolidated in the US Court of Appeals for the Sixth Circuit and, on 9 October 2015, the US Court of Appeals for the Sixth Circuit issued a nationwide stay of the Clean Water Rule.[67] After the stay was issued, a contentious and complicated battle over jurisdiction began, with industry and state petitioners asserting that jurisdiction properly lay in the district courts, with the Sixth Circuit eventually holding that jurisdiction was proper in the Sixth Circuit, as the Clean Water Rule was subject to direct circuit court review.[68] On 13 January 2017, the US Supreme Court granted *certiorari* to review the jurisdictional question.[69]

The grant of *certiorari* on the jurisdictional issue was generally seen as a gift to the incoming Trump Administration. In the final weeks of the Obama Administration, and on the same day the Supreme Court granted *certiorari*, EPA, filed its opening brief defending the rule in the merits stage of the litigation in the Sixth Circuit.[70] Thus, the Court's decision to review the jurisdictional question provided the Trump Administration with an automatic stay of the litigation that it clearly had no intent to continue to defend – time the Administration could use to decide its next move in regard to the Clean Water Rule.

That next move came on 28 February 2017, when the Trump Administration signed an executive order directing the EPA to rescind the Clean Water Rule. The executive order, entitled: 'Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule.', directs EPA to review the Clean Water Rule and to publish a proposed rule either rescinding or revising the rule.[71] Notably, the executive order expressly instructs EPA to 'consider interpreting the term "navigable waters," as defined in 33 USC 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v United States*, 547 US 715 (2006)'. The executive order also directs the Attorney General to take the steps he deems necessary concerning the current litigation over the rule.

The end result of the executive order, and the ultimate fate of the Clean Water Rule, is still not clear. Revision or rescission of the Clean Water Rule will require that EPA engage in formal rulemaking procedures pursuant to the Administrative Procedure Act

66 See Petition for Writ of Certiorari, *National Ass'n of Mfrs v US Dept of Defense*, No 16-299, 2016 WL 4698748, at *i (US 2 September 2016).

67 *In re EPA*, 803 F3d 804, 808 (6th Cir 2015).

68 *In re US Dep't of Def, US EPA Final Rule: Clean Water Rule: Definition of Waters of US*, 817 F3d 261, 270 (6th Cir 2016) (33 USC s 1369(b)(1)(E)).

69 *Nat'l Ass'n of Mfrs v Dep't of Def*, No 16-299, 2017 WL 125667 (US 13 January 2017).

70 See Brief for Respondents, *Murray Energy Corp v EPA*, No 15-3751 (6th Cir 13 January 2017).

71 Executive Order 13778, Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule, 82 Fed Reg 12497 (3 March 2017) (issued 28 February 2017).

(APA), which could take years.[72] And EPA's revised rule will be subject to additional judicial review pursuant to the APA's arbitrary and capricious standard, which will require EPA to adequately explain its basis for the change in course.[73] Thus, it is not outside the realm of possibility that the rulemaking process, and subsequent judicial review, could stretch beyond the Trump Administration's first term, which would potentially subject EPA's revised Clean Water Rule to the same fate met by the current rule.

2.3. *NEPA and NEPA reforms*

The NEPA requires that federal agencies fully examine the environmental effects and possible alternatives of all major federal actions.[74] Specifically, federal agencies must prepare an environmental impact statement (EIS) for all '[f]ederal actions significantly affecting the quality of the human environment'.[75] If an agency is unsure whether an action is likely to have 'significant' environmental effects, the agency may prepare a more concise environmental assessment (EA) to determine whether to prepare an EIS.[76] Importantly, the term 'major federal action' implicates a large swathe of federal permitting and approval decisions relevant to both infrastructure projects and energy development on federal lands, two stated priorities of the Trump Administration.[77]

NEPA does not require that an agency actually select the alternative with the least environmental impact, or impose substantive environmental requirements that agency decisions must adhere to. Rather, the Supreme Court has made it clear that NEPA imposes only procedural requirements.[78] Under NEPA, federal agencies must take a 'hard look' at the environmental effects of all proposed actions, but as long as 'the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs'.[79] That is not to say, however, that NEPA lacks teeth. NEPA's procedural requirements are extensive. For example, when preparing an EIS, federal agencies must consider the direct, indirect and cumulative impacts of the proposed action; reasonable means to mitigate those impacts; and the reasonable alternatives to the proposed action and the environmental effects of those alternatives.[80] Complying with these requirements can cost millions of dollars and can stretch project development timelines by years. NEPA's procedural requirements also provide prospective litigants with a hook to challenge and vacate agency decisions, further delaying project development.

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72 See 5 USC s 551(5); *Perez v Mortg Bankers Ass'n*, 135 S Ct 1199, 1206 (2015).
73 See *FCC v Fox Television Stations, Inc.*, 556 US 502, 515 (2009); *Motor Vehicle Mfrs Ass'n of US, Inc v State Farm Mut Auto Ins Co*, 463 US 29, 41–43 (1983).
74 *Robertson v Methow Valley Citizens Council*, 490 US 332, 348 (1989); 42 USC s 4332; 40 CFR s 1502.1.
75 42 USC s 4332(c).
76 40 CFR s 1508.9.
77 See 40 CFR s 1508.18(b).
78 *Kleppe v Sierra Club*, 427 US 390, 410 n21 (1976); *Robertson* (n 74) 490 US at 350.
79 *Robertson* (n 74) 490 US at 350.
80 See 40 CFR ss 1502.14, 1502.16.

President Trump ran on a platform focused on removing what he and his advisers view as unnecessary administrative hurdles to infrastructure and energy development. Thus, because of the central role that NEPA plays in these areas, we expect to see the Trump Administration pursue some form of NEPA reform during his tenure in the White House (either legislative or regulatory). Already, on 24 January 2017, the White House issued an executive order entitled: 'Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects'.[81] Under the executive order, the governor of a state or the head of a federal agency may request that the CEQ (as explained above, the agency tasked with promulgating NEPA's implementing regulations) determine that a particular infrastructure project qualifies as a 'high-priority' project. In determining whether a project qualifies as 'high priority', the CEQ is directed to consider 'the project's importance to the general welfare, value to the Nation, environmental benefits, and such other factors [the CEQ] deems relevant'. If the CEQ deems a project 'high priority', the CEQ must then 'coordinate with the head of the relevant agency to establish, in a manner consistent with law, expedited procedures and deadlines for completion of environmental reviews and approvals for such projects'.

At this early stage, it is unclear what the effect of Trump's recent executive order will be, and what the contemplated 'expedited review' may entail. Ultimately, the executive order seems more focused on ensuring that agency resources are diverted to reviewing high-priority projects than on fostering substantive NEPA reform. Furthermore, the language, 'in a manner consistent with law', is telling and highlights the primary issue the Trump Administration will face in fostering substantial NEPA reform. Any significant changes to the CEQ's implementing regulations, or to agency-specific NEPA procedures, must still ensure that the final review complies with the requirements of the statute and the vast body of case law interpreting it. Thus, any meaningful NEPA reform will likely require legislative action. That said, there are a few areas where the CEQ and other federal agencies broadened the scope of NEPA under the Obama Administration and those areas may be subject to easy repeal or revision by the Trump Administration to the extent not required by law (as expressed and identified through judicial decisions).

For example, what is likely at the top of the climate-change-sceptical President's NEPA list is the CEQ's guidance on the consideration of climate change under NEPA. On 5 August 2016, the CEQ under the Obama Administration published final, non-regulatory guidance on the consideration of climate change under NEPA. See CEQ, 'Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews' (5 August 2016) ('Final Guidance'). The guidance was over six years in the making.[82] Because the guidance is non-regulatory and did not undergo notice and comment rulemaking, the CEQ under the Trump Administration could simply revoke

81 Executive Order 13766, Presidential Executive Order on Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, 82 Fed Reg 8657 (30 January 2017) (issued 24 January 2017).

82 See CEQ, 'Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions' (18 February 2010); CEQ, 'Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews' (24 December 2014).

the guidance without having to follow APA rulemaking procedures.[83] Federal courts, however, have made it clear that climate change 'falls squarely within NEPA's focus' and must be evaluated under NEPA.[84] And while the Final Guidance would not be considered 'an authoritative interpretation of NEPA's requirements entitled to deference', courts will look to agency guidance when interpreting statutory requirements.[85] Thus, simply withdrawing the guidance could result in piecemeal litigation over how climate change is evaluated as individual GHG-emitting projects are challenged, further delaying project approval and development. As discussed above, it is still expected that the infrastructure development championed by President Trump, and all energy-related decisions on public lands, will be subject to NEPA, including an evaluation of climate change. Accordingly, rather than rescinding the Final Guidance entirely, the Trump Administration may issue revised guidance seeking to limit the scope of how, when and to what extent climate change should be considered under NEPA.

Other potential vehicles for enacting NEPA reform, and an area we will be watching closely, are the agency-specific manuals, handbooks and memoranda that guide the NEPA process. From a practical standpoint, these internal documents are what guide the Agency and the project proponent through the NEPA process, and they often establish important procedural presumptions such as whether an EA or EIS is required, presumptive timelines, and when the Agency should conduct supplemental NEPA analyses.[86] Internal policy manuals and handbooks, much like the CEQ climate-change guidance discussed above, could be revised without the Agency having to follow formal APA rulemaking procedures, and without being subject to judicial challenge. Thus, these internal policy documents could provide the Trump Administration with an avenue through which to create efficiencies and improvements in the NEPA process and the timing thereof. As discussed above, however, even if federal agencies under the Trump Administration were to revise their internal NEPA policies and procedures, the NEPA processes the Agency ultimately employs must still conform to the requirements of the statute. Thus, federal agencies under the Trump Administration will still be required to prepare an EIS when necessary and take a 'hard look' at the environmental effects of their actions.

3. Public lands

3.1. *Sale/privatisation of public lands*

The US federal government owns and manages about one-third of the land in the US.[87] Much of this public land is located in the western half of the US. Federal lands are also rich in minerals and, therefore, host robust mineral-development efforts. In the fiscal year 2014, for example, the federal lands produced 651 million barrels of oil, 3,551 BCF of natural gas and 402 million tonnes of coal.[88] The Republican Party has been

83 See *Perez v Mortg Bankers Ass'n*, 135 S Ct 1199, 1206 (2015).
84 See *Ctr for Biological Diversity v Nat'l Highway Traffic Safety Admin*, 538 F3d 1172, 1217 (9th Cir 2008).
85 See *WildEarth Guardians v Jewell*, 738 F3d 298, 309 n5 (DC Cir 2013).
86 See, eg, BLM H-1790-1 (January 2008) (BLM NEPA Handbook).
87 See Public Land Law Review Commission, *One-Third of the Nation's Land* (1970).
88 US Energy Information Agency, 'Sales of Fossil Fuels Produced from Federal and Indian Lands' (July 2015) at 2 (Table 1).

historically resistant to the management of lands by the federal government, preferring that such lands be either transferred to the states or sold to private parties. As stated in the Republican Party platform:

> The federal government owns or controls over 640 million acres of land in the United States, most of which is in the West…Federal ownership or management of land also places an economic burden on counties and local communities in terms of lost revenue to pay for things such as schools, police, and emergency services. It is absurd to think that all that acreage must remain under the absentee ownership or management of official Washington. Congress shall immediately pass universal legislation providing for a timely and orderly mechanism requiring the federal government to convey certain federally controlled public lands to states. We call upon all national and state leaders and representatives to exert their utmost power and influence to urge the transfer of those lands, identified in the review process, to all willing states for the benefit of the states and the nation as a whole. The residents of state and local communities know best how to protect the land where they work and live. They practice boots-on-the-ground conservation in their states.[89]

President Trump does not appear to accept his party's impulse toward returning the federal public lands (or some major portion of them) to the states. In an interview with *Field and Stream* magazine, President Trump was asked about transferring federal lands to the states. He replied:

> I don't like the idea because I want to keep the lands great, and you don't know what the state is going to do. I mean, are they going to sell if they get into a little bit of trouble? And I don't think it's something that should be sold. We have to be great stewards of this land. This is magnificent land. And we have to be great stewards of this land.[90]

Trump's opposition to the federal divestment of the public lands was reinforced by his appointment of Ryan Zinke (R-Mont) to be the Secretary of the Interior. Secretary Zinke opposes the sale of federal lands.[91] He has said publicly, 'I will not tolerate selling our public lands' and, as a US Congressman, voted against a bill to transfer national forest lands to the states.[92] In his confirmation testimony before the US Senate, Secretary Zinke was again asked about the sale of federal lands: 'I am absolutely against transfer and sale of public lands. I can't be more clear.'[93] While Secretary Zinke's position is clear, some Republicans are pushing to have Utah Congressman Michael E Noel appointed to Head the Bureau of Land Management (BLM), the agency responsible within the Department of the Interior for the largest area of federal lands.[94] Noel advocates the transfer of federal lands, and is an advocate for a proposal that would transfer 31 million acres of federal lands to his home state of Utah.[95]

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89 Republican Party Platform 2016 at 21. https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf accessed 7 May 2017.
90 'Q&A: Donald Trump on Guns, Hunting and Conservation' *Field and Stream* (22 January 2016).
91 See *Public Land News* (16 December 2016) at 1.
92 *Ibid.*
93 'Nominee for Interior Vows to Preserve, and Develop, Public Lands' *New York Times* (17 January 2017).
94 42 *Public Lands News* (17 February 2017) 5.
95 *Ibid.*

It appears that there will be ongoing tension on this issue. That tension may arise between the Trump Administration and the Republican Congress, or within the Trump Administration itself. While President Trump has expressed his desire to preserve federal ownership of the public lands, it is not clear that he would veto a bill passed by the Republican Congress authorising a transfer of federal lands to a state or states.

3.2. *Mineral development on federal lands*

While President Trump and Secretary Zinke may diverge from Republican Party orthodoxy on the continued federal ownership of public lands, both the President and the Secretary accept the goal of promoting mineral development of the federal lands. The short statement of the Trump Administration's energy policy, posted on the White House website, makes this clear: 'We must take advantage of the estimated $50 trillion in untapped shale, oil, and natural gas reserves, especially those on federal lands that the American people own.'[96] Secretary Zinke has also been a constant supporter of mineral development on federal public lands.[97] His testimony before Congress as the President's nominee for the role of Secretary of the Interior was entirely consistent with this view.[98]

3.3. *Indian lands*

During his campaign for the presidency, Donald Trump formed a 'Native American Coalition', chaired by Congressman Mark Wayne Mullin of Oklahoma. The press release announcing the formation of the Coalition focused on removing regulatory barriers to the economic development of Indian tribes.[99] After the election, some members of the Coalition floated the idea of privatising Indian lands as a way of avoiding federal regulation of Indian mineral development.[100] According to Chairman Mullin, 'We should take tribal land away from public treatment…As long as we can do it without unintended consequences, I think we will have broad support around Indian Country.'[101] The Coalition is not advocating the wholesale divestiture of tribal lands to non-Indian ownership, but rather taking land out of federal hands and putting it into private ownership. The Coalition recognises the need to protect tribal sovereignty. Ross Swimmer, a member of the Coalition, suggests, for example, that the approach to privatisation could include some limit on the sale of lands to non-tribal interests.[102]

Mullin later objected to the characterisation of his statement as advocating privatisation of Indian lands. Mullin said the recent article misquoted him. He doesn't want to privatise Indian lands, he says. He just wants to make it easier for tribes to do business

96 See www.whitehouse.gov/america-first-energy (emphasis added); accord Republican Party Platform 2016 (n 89) at 20.
97 See *Public Land News* (16 December 2016) 2.
98 'Nominee for Interior Vows to Preserve, and Develop, Public Lands' *New York Times* (17 January 2017).
99 Trump-Pence Press Release, 'Donald J. Trump Announces Native American Coalition' (30 October 2016).
100 See Valerie Volcovici, 'Trump Advisors Aim to Privatize Oil-Rich Indian Reservations' (*Reuters*, 5 December 2016). www.reuters.com/article/us-usa-trump-tribes-insight-idUSKBN13U1B1 accessed 7 May 2017.
101 *Ibid.*
102 *Ibid.*

without the approval of the federal government – to 'cut through the red tape of bureaucracy'. He added, 'It's tribal land given to sovereign nations, but it's treated like public land. They can't develop their resources. We want them to be treated like private landowners.'[103]

Secretary Zinke, in responses to questions related to Senate hearings on his nomination, distanced himself from the talk of privatisation:

> Question 33: Reuters has reported that the incoming administration aims to privatize oil rich and coal-rich Indian reservations. Can you comment on your understanding of such conversations, and what is your opinion on whether we should privatize tribal lands for the purpose of extracting energy resources?
>
> Response: I have not personally reviewed the referenced Reuters' report. I am unaware of any effort by anyone to privatize tribal lands.[104]

In his testimony and in his response to questions from the Senate, Secretary Zinke was quick to note his commitment to tribal sovereignty, and recognising the ongoing efficacy of the trust relationship between the federal government and Indian tribes.[105]

Secretary Zinke is likely to accept the goal of the Trump Administration to decrease the bureaucracy and regulations applicable to development of resources in Indian Country. The Secretary does not, however, seem inclined to adopt a radical revision of the twin concepts of the trust relationship and tribal self-determination. There is always a tension between the trust relationship and self-determination.[106] The Republican Party Platform, while acknowledging the trust relationship, clearly leans toward enhancing tribal self-determination: 'Our approach is to empower American Indians, through tribal self-determination and self-governance policies, to develop their greatest assets, human resources and the rich natural resources on their lands, without undue federal interference.'[107] While, as noted elsewhere, the Trump Administration seems willing to diverge from the party's platform, in the area of Indian lands, it seems likely that the approach articulated in the Platform will be consistent with Indian policy in the Trump Administration.

3.4. *Solicitor's opinions from the Obama Administration*

The Solicitor for the Department of the Interior issued several opinions late in the Obama Administration, including eight after the election of President Trump in November 2016.[108] The formal opinions of the Solicitor, called 'M-Opinions', are binding on

103 Allison Herrera, 'Reports of Privatizing Oil-Rich Native Lands Are Overblown, But Big Changes Are Still in Store under Trump' (PRI 19 December 2016) www.pri.org/stories/2016-12-19/reports-privatizing-oil-rich-native-lands-are-overblown-big-changes-are-still accessed 7 May 2017.

104 US Senate Committee on Energy and Natural Resources, 17 January 2017 Hearing: Nomination of the Hon Ryan Zinke, to be the Secretary of the Interior, Questions for the Record from Chairman Lisa Murkowski.

105 *Ibid.*

106 Scot Anderson, 'Regulating Commerce: Federal Oversight of the Development of Oil, Gas, and Coal Resources on Indian Lands' (Special Institute: Energy & Mineral Development in Indian Country, Rocky Mt Min L Fdn, November 2014).

107 Republican Party Platform 2016 (n 89) at 29.

108 See US Dep't of the Interior, 'Solicitor's Opinions' https://www.doi.gov/solicitor/opinions accessed 7 May 2017.

the agency, including its administrative law judges.[109] While the M-Opinions are technically directed to the agency, the opinions can affect private parties.[110]

The Acting Secretary of the Interior, K Jack Haugrud, suspended four of these opinions because they were 'written in part to support regulations, decisions, or nationwide guidance or policies that are currently under review by the new administration'.[111] The four suspended opinions are:

- M-37038: Tribal Treaty and Environmental Statutory Implications of the Dakota Access Pipeline (4 December 2016)
  In this opinion, the Solicitor found that:
  (i) Lake Oahe did not diminish Cheyenne River or Standing Rock Sioux Reservations;
  (ii) Portions of the land with Lake Oahe are within the boundary of both reservations;
  (iii) Congress recognised Sioux hunting and fishing rights; and
  (iv) Tribe also has water rights that may be relevant.
  The opinion states that the US Army Corps of Engineers ('Corps') has sufficient justification to deny permits for the Dakota Access Pipeline. The opinion also finds that, before the Corps issues the permit, the Corps will need more consultation, more NEPA analysis and further assessment of socio-economic impacts.
- M-37039: The Bureau of Land Management's Authority to Address Impacts of its Land Use Authorizations through Mitigation (21 December 2016)
  In this opinion, the Solicitor found that BLM has authority to require mitigation when authorising the use of public lands. The Department of the Interior has added a section to the Departmental Manual creating a landscape-scale mitigation policy. Based on an analysis of the Federal Land Policy and Management Act (FLPMA) policy of multi-use/sustained yield and prevention of unnecessary or undue degradation, the Solicitor believes that the Secretary of the Interior has authority to require compensatory mitigation for the use of federal public lands.
- M-37041: Incidental Take Prohibited Under the Migratory Bird Treaty Act (10 January 2017)
  Some courts have limited the prohibition on taking migratory birds to incidental taking. In this opinion, the Solicitor found that the Migratory Bird Treaty Act prohibits incidental takes.
- M-37042: Authority of US Fish and Wildlife Service to Manage Non-Federal Oil and Gas Activities Underlying National Wildlife Refuges (12 January 2017)
  The United States Fish and Wildlife Service (USFWS) publishes regulations governing the exercise of non-federal oil and gas rights within National Wildlife Refuge System Lands (ie, non-federal oil and gas under Refuge System Lands). In this opinion, the Solicitor found that USFWS can require a permit for development of these oil and gas rights.

109 Michael Malmquist and Elizabeth Schulte, 'Deference to Administrative Agencies: Substantive Review of Agency Decisions' (Special Institute: Challenging and Defending Federal Natural Resource Agency Decisions, Rocky Mt Min L Fdn, September 2016).

110 See Scot Anderson and Charlie Breer, 'Regulation Without Rulemaking: The Force and Authority of Informal Agency Action' (2001) 47 Rocky Mt Min L Inst Ch 5.

111 Memorandum to Acting Solicitor from K Jack Haugrud Concerning Temporary Suspension of Certain Solicitor M-Opinions Pending Review (6 February 2017).

4. Enforcement and litigation

4.1. *Enforcement trends from Obama to Trump*

As discussed above, President Obama's executive agencies generally aggressively and broadly expanded their regulatory missions. They did this not only by issuing a variety of new regulations over the President's eight years in office, but also by enforcing regulations new and old with a vigour and attention to compliance that was, in many ways, foreign to the previous George W Bush Administration. The Obama Administration focused on proactively using agency enforcement, along with regulatory guidance and rulemaking procedures (and, some commenters emphasise, 'sue-and-settle' collusion lawsuits with environmental groups)[112] to force industry compliance. The Administration largely focused on the environment (examples are the Clean Power Plan, the Stream Protection Rule, rules on greenhouse gases as they affect climate change, and the scope of the Clean Water Act), workers and safety, along with anti-trust and other efforts to ensure businesses acted fairly. And President Obama was not shy about promulgating regulations. From 2009 to 2016, for example, EPA promulgated 3,900 new rules.[113] And numerous news outlets in December 2016 emphasised that the Federal Register, the US Government's official compendium of regulations issues by administrative agencies, was over 19,000 pages long last year, the longest ever.[114]

But those data are not nearly as illuminating as the ones that demonstrate the Obama Administration's ambitious agenda for actually enforcing many of those regulations (and ones that have been on the books for years). For example, President Obama targeted energy extraction at upstream and midstream oil and gas operations during an era of incredible domestic energy production led by the unconventional production of natural gas. Among other effects on industry, this resulted in an unprecedented air-pollution settlement with Noble Energy Inc, which paid $73m for alleged violations related to faulty vapour-control systems on controlled condensate storage tanks that caused illegal emissions of toxic chemicals from some of the company's Colorado facilities.[115] In keeping with the Obama EPA's broad initiative to combat methane emissions and hazardous air pollutants, Noble also had to install infrared cameras and pressure monitors on its facilities.[116] The former administration also focused on Clean Air Act regional-haze, and New Source Review/Prevention of Significant Deterioration enforcement. Aside from its Clean Air Act efforts, the Obama EPA prioritised other industrial discharges as well, especially under the Clean Water Act (including coal ash from power plants, and a bevy of additional focus areas, including but not

112 'Sue and Settle: Regulating Behind Closed Doors' (*U.S. Chamber of Commerce*, 10 April 2017) www.uschamber.com/report/sue-and-settle-regulating-behind-closed-doors.

113 'A Review of EPA's Regulatory Activity During the Obama Administration: Energy and Industrial Sectors' (*U.S. House of Representatives*, 30 June 2016) http://docs.house.gov/meetings/IF/IF03/20160706/105153/HHRG-114-IF03-20160706-SD002.pdf.

114 Clyde Wayne Crews Jr., 'Obama's Legacy:2016 Ends With A Record-Shattering Regulatory Rulebook' (*Forbes*, 30 December 2016) www.forbes.com/sites/waynecrews/2016/12/30/obamas-legacy-2016-ends-with-a-record-shattering-regulatory-rulebook/#17c859761398. Obviously, however, a mere page count does not necessarily reflect either agencies' actual rulemaking records, or the quality or impact of the regulations promulgated.

115 Juan Carlos Rodriguez, 'Noble Reaches $73M Settlement for EPA Clean Air Act Claims' (*Law360*, 22 April 2015) www.law360.com/articles/646396/noble-reaches-73m-settlement-for-epa-clean-air-act-claims.

116 *Ibid.*

limited to environmental justice, marine debris, municipal wastewater infrastructure, hazardous waste, pesticides at day-care facilities, surface impoundments, wetlands and worker protection standards). All of this put industry on edge – waiting for the next shoe to drop.

Under President Trump, the regulatory focus has already changed dramatically. Throughout his electoral campaign, President Trump emphasised his view that the US has become an 'administrative state',[117] a federal government bloated by regulations that are 'unnecessary' and do nothing more than burden industry. So far, less than two months into his presidency, the Trump Administration has lived up to the promises of its leaders. Steve Bannon, Senior Advisor to the President (and widely believed to have powerful influence over Mr Trump), in rare public comments, proclaimed in February at conservative loyalists' Conservative Political Action Conference that the new administration and Trump's Cabinet picks would rip up the Obama regulatory agenda, and are focused on 'deconstruction of the administrative state', and will weaken regulatory agencies and other bureaucratic entities by emphasising what's good for business and the economy. 'The way the progressive left runs, is if they can't get it passed, they're just going to put in some sort of regulation in an agency'. Bannon continued: 'That's all going to be deconstructed and I think that's why this regulatory thing is so important.'[118] Such statements are remarkably radical, even for a conservative presidential administration.

It's easy to deduce from Mr Trump's focus on deregulation that statutory and regulatory enforcement efforts also will change under President Trump – resulting in fewer actions brought against industry, and more freedom from regulations for industry to operate. Judging from the President's first moves on enforcement, this likely will prove true. The most startling news so far is that the President is considering closing EPA's enforcement office, the Office of Enforcement and Compliance Assurance (OECA), the EPA arm whose 3,000 employees handle civil and criminal enforcement of the country's federal environmental laws while promoting environmental justice and other programmes designed to keep the public safe.[119]

And President Trump's picks to head the EPA and the Department of Justice (DOJ), which brings environmental cases that the EPA investigates and prepares, bolster the conclusion that enforcement will change dramatically. EPA Administrator Scott Pruitt and Attorney General Jeff Sessions are known for their pro-industry, anti-regulatory policy positions. Pruitt, as Attorney General of Oklahoma, was well known for his laissez-faire approach to regulatory enforcement, having shuttered that state's environmental enforcement unit in his office in 2011, and he's been a vocal critic of the agency he's been tasked to run – focusing on alleged 'overreach' by EPA in its enforcement efforts. He described himself on his Oklahoma AG website as 'a leading advocate against the EPA's activist agenda' who 'established Oklahoma's first federalism unit to combat unwarranted regulation and overreach by the federal

117 'Trump Wants to End the 'Administrative State'' (CNN, 26 February 2017) http://www.cnn.com/videos/tv/2017/02/26/ip-c-block.cnn accessed 7 May 2017.

118 David Z Morris, 'Steve Bannon Say's Trump's Cabinet Picks Are Intended to 'Deconstruct' Regulation and Agencies' (Fortune, 25 February 2017) http://fortune.com/2017/02/25/bannon-trump-cabinet-cpac.

119 Kate Sheppard and Nick Visser, 'Trump Administration Considering Shutting EPA's Enforcement Office: Report' (*Huffington Post*, 9 February 2017) www.huffingtonpost.com/entry/epa-enforcement-office_us_589b9593e4b0c1284f2a7ab3.

government'.[120] He's also a climate-change sceptic, and a well-known friend of the energy industry. However, in what many consider an encouraging nod to reason, Administrator Pruitt told the *Wall Street Journal* on 18 February 2016, that:

> [t]he greatest threat we've had to economic growth has been that those in industry don't know what is expected of them. Rules come that are outside of statutes. Rules get changed midway. It creates vast uncertainty and paralysis, and re-establishing a vigorous commitment to rule of law is going to help a lot.[121]

Many are hopeful that Mr Pruitt follows what some see as a basic commitment to the law, to clean air and clean water, and to allowing states to regulate in lieu of EPA intrusion. Importantly, however, as discussed above, if Mr Pruitt aligns with President Trump in rolling back significant regulation, and also promotes federalism, we may well see certain progressive states, like California or New York, taking more aggressive regulatory action against industry operators to 'gap fill' where Mr Pruitt and President Trump fail to regulate. Sessions, for his part, is known as a small-government conservative hawk who's also a climate sceptic. But the most important of Trump's picks with regard to enforcement would be the head of the OECA. That position hasn't been filled, of course, because the OECA itself may be on the chopping block.

But none of this means that federal enforcement of environmental laws will simply end. In fact, Administrator Pruitt told the *Wall Street Journal* that:

> [t]here is no reason why EPA's role should ebb or flow based on a particular administration, or a particular administrator.…Agencies exist to administer the law. Congress passes statutes, and those statutes are very clear on the job EPA has to do. We're going to do that job.[122]

There are other considerations as well. As four former EPA and DOJ officials, including Hogan Lovells' own former DOJ environmental enforcement lawyer, Justin Savage, explained immediately after the election,[123] the intricacies and mechanics of the regulatory enforcement world do not rise and fall on a president's agenda alone. For example, EPA's budget – even during the Obama Administration – has declined significantly in the past few years, so Trump's agenda to decrease it further comes as no surprise. This is likely to affect some enforcement initiatives, which could be scrapped or pared back in favour of other priorities.

But if the Trump Administration were to eviscerate enforcement initiatives and resources that could help solve big problems – for example, a clean-water crisis, a mass-pollution event or a large-scale scandal – the American public, along with its

120 Scott Detrow, 'Scott Pruitt Confirmed to Lead Environmental Protection Agency' (*NPR*, 17 February 2017) www.npr.org/2017/02/17/515802629/scott-pruitt-confirmed-to-lead-environmental-protection-agency.

121 Kimberley A Strassel, 'Scott Pruitt's Back-to-Basics Agenda for the EPA' (*Global Warming Policy Forum*, 18 February 2017) www.thegwpf.com/scott-pruitts-back-to-basics-agenda-for-the-epa.

122 'EPA Chief Scott Pruitt: 'Agencies Exist to Administer the Law'' (*Tulsa World*, 20 February 2017) www.tulsaworld.com/business/energy/epa-chief-scott-pruitt-agencies-exist-to-administer-the-law/article_00867060-d5c0-56b0-8575-8e9487244e23.html.

123 See Amanda Reilly, 'Enforcement Strategy Likely to Change under Trump' (*E&E News*, 16 November 2016) www.eenews.net/stories/1060045875.

representatives on both sides of the aisle, would rise up in protest. The Obama Administration entered into a $20bn settlement with British Petroleum (BP) in an enforcement effort targeting BP for the explosion of the deadly and environmentally devastating Deepwater Horizon rig in the Gulf of Mexico in 2010. And it secured a nearly $15bn settlement with Volkswagen for the manufacturer's alleged installation of so-called defeat devices to evade diesel emission limits. These are the types of large-scale issues that the Trump Administration simply could not ignore. 'Do I think Donald Trump will simply fire all the hundreds of enforcement attorneys? No,' Savage said: 'Would a Trump Administration still have enforced over the Macondo spill, the VW issues or the West Virginia water spill? Absolutely. Those cases that are serious and require enforcement will continue to get them.'[124] Moreover, former officials doubt President Trump will stop his agencies from working on the numerous pending cases on DOJ staffer's desks, especially because many of the staffers are career employees whose allegiances run to the agencies and the law – not to one administration or another.

There are a few other considerations related to enforcement. (1) The Trump Administration, in its bid to allow states more freedom to manage their own affairs, likely will spend less time and energy monitoring states whose agencies are tasked through EPA delegation with enforcement of federal environmental programmes (eg, Clean Air Act State Implementation Plans and Clean Water Act NPDES permits). But that could be a positive thing as well, as states take on the mantle of various environmental issues that are important to citizens but not to the new administration. (2) The Trump Administration seems to have little regard for science, data or the accuracy of information. This could play a significant role in whether enforcement efforts commence, even when all objective facts demonstrate they should, and could dramatically influence policies, regulations and the role of administrative agencies that are supposed to harbour the federal government's technical expertise. (3) Numerous polls demonstrate that the current White House is massively out of step with the priorities of mainstream America when it comes to environmental issues. Although the President has claimed he is for clean air and clean water,[125] actions speak louder than words, and his focus on dismantling the Clean Power Plan and undermining climate-change science and policy, all to promote his 'America First' economic policies, is already creating opportunities for states and citizen groups to take advantage of the new administration's retreat from regulation and enforcement. For example, as discussed above, on 28 February 2017, the Trump Administration signed an executive order directing the EPA to review and rescind the Clean Water Rule promulgated by EPA in 2015.[126] This move will likely empower some states to regulate waters based on the current jurisdictional framework while EPA takes a back seat during review of the rule.

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124 *Ibid.*

125 Joe Scarborough et al., 'Trump: We Need Clear Air, Clean Water" (*MSNBC*, 30 November 2015) www.msnbc.com/msnbc-news/watch/trump–we-need-clean-air–clean-water-576202307582.

126 See 80 Fed Reg 37,054 (29 June 2015) ('Clean Water Rule'); Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic.

4.2. *Challenges in the courts*

4.2.1. NGO FUNDING

Non-governmental organisations (NGOs) and states are expected to fill the enforcement void created by federal agencies' retreat from Obama-era policies, and to attack the Trump Administration's emphasis on business over environment. And the Supreme Court likely will weigh in on a number of issues important to energy and environmental interests.

Environmental NGOs are expected to file a greater number of lawsuits than they have in a decade. Many of those actions will take the form of citizen suits, in which, through various federal statutes, citizens 'stand in the shoes' of agencies that are perceived by NGOs as failing to properly enforce those laws. When the Trump Administration pushes forward on infrastructure projects, as it says it will, NGOs likely will file citizen suits in an effort to block those projects for failure to abide by the National Environmental Policy Act and other laws. And NGOs are sure to take up the air, water, land-use and climate-change issues the Obama Administration pushed on to the conventional and renewable-energy and other industries.

NGOs have made their stances obvious and unmistakable: over a bold red background, the Sierra Club website proclaims: 'Join the Fight. Protect Our Planet from Trump. Donate Now'.[127] Indeed, since the first minutes after President Trump was elected, it has never been easier for environmental NGOs to raise money. Fundraising proceeds at a furious pace to 'Fight Donald Trump's Environmental Assault', as the Natural Resources Defense Council urges.[128] Whether they bring citizen suits, intervene in already commenced enforcement efforts by the government to hold industry accountable, or team up with or against states, environmental NGOs will play a powerful role in energy and environmental law while the Trump Administration is in power.

States also will rise to the challenges presented by Trump's deregulatory agenda. The Trump Administration is already causing some states to redouble their own efforts to regulate industry to protect the environment.[129] States like California already lead much of the world on progressive climate change policy.[130] And certain states can also be anticipated to partner with NGOs on filing enforcement cases and trying to pick up some of the dockets that may decline at EPA and DOJ. Other states, such as Colorado, which will continue to regulate the oil and gas industry in unprecedented ways – from baseline groundwater monitoring to methane detection and repair[131] – will fill regulatory roles the federal government either has never fully occupied, or will cease to occupy in the same way under President Trump.

127 www.sierraclub.org/.
128 www.nrdc.org.
129 See, eg, Bobby Magill, 'States May Drive U.S. Climate Policy under Trump' (Cilmate Central, 10 November 2016) www.climatecentral.org/news/us-climate-policy-under-trump-20866.
130 See, eg, http://climatechange.ca.gov/.
131 See, eg, Colorado Oil & Gas Ass'n, 'Colorado's Oil and Gas Regulatory Timeline: 2010–2016' (2016) www.coga.org/wp-content/uploads/2016/04/Whitepaper-Regulatory-Timeline-.pdf.

5. Impacts of Trump Administration on specific energy sectors

5.1. *Upstream oil and gas*

As discussed above, encouragement of energy development on federal lands and the abandonment of Obama's aggressive enforcement regime can only be seen as positive developments for oil and gas producers.[132] These developments, in combination with stabilising commodity prices, have resulted in a positive sentiment and optimism in the industry.[133] The nomination and confirmation of Rex Tillerson, former CEO of Exxon-Mobil, as Secretary of State further demonstrates the President's admiration of the industry.

However, oil and gas development on private lands is largely subject to state law and regulation by state agencies – not federal law. Moreover, there is a growing grass-roots political movement to provide local governments – cities, towns and other municipalities – with increased authority over drilling and production.[134] And, similar to the increased activities of NGOs in citizen suits, it seems likely that these organisations will lobby their state and local governments for increased regulation of the industry.

Perhaps nowhere else has the issue of state-versus-local regulation of oil and gas development been more controversial than in Colorado. In 2012 and 2013, through voter referendum, two Colorado cities, Longmont and Fort Collins, banned hydraulic fracturing.[135] Another municipal government, Boulder County, enacted ordinances in 2012 that putting a moratorium on oil and gas drilling.[136] The Fort Collins and Longmont laws were challenged in court by industry and, in May of 2016, the Colorado Supreme Court ruled that the local laws violated state primacy and were struck down as unconstitutional.[137] In response, citizen groups attempted to place on the statewide ballot amendments to the Colorado constitution that would have expressly allowed local governments to regulate oil and gas development, putting these governments on par with the state.[138] This was an alarming proposition for industry because the amendment would have allowed local governments to ban oil and gas activities within their jurisdictions and, at the very least, would have resulted in a patchwork of regulations across the state.[139] The proponents of these

132 See above, sections 1–4.

133 See, eg, Joshua Mann, 'Stabilizing Oil, Gas Prices Drive Megadeal in Houston, Statewide' *Houston Business Journal* (23 November 2016) www.bizjournals.com/houston/news/2016/11/23/stabilizing-oil-gas-prices-drive-megadeals-in.html.

134 See David Sirota, 'Republican Attorney General Moves to Block Local Fracking Regulations after Flood of Fossil Fuel Campaign Cash' *International Business Times* (15 February 2017) www.ibtimes.com/political-capital/republican-attorney-general-moves-block-local-fracking-regulations-after-flood.

135 See, eg, Joshua Mann, 'Stabilizing Oil, Gas Prices Drive Megadeal in Houston, Statewide' *Houston Business Journal* (23 November 2016) www.bizjournals.com/houston/news/2016/11/23/stabilizing-oil-gas-prices-drive-megadeals-in.html.

136 See *City of Longmont v Colorado Oil & Gas Ass'n*, 369 P3d 573, 577 (Colo 2016); *City of Fort Collins v Colorado Oil*, 369 P3d 586, 589 (Colo 2016).

137 *City of Longmont*, 369 P3d at 585; *City of Fort Collins*, 369 P3d 594.

138 See Aldo Svaldi, 'Colorado Business Coalition Reactivates to Fight "Economically Damaging" Oil and Gas Initiatives' *Denver Post* (22 July 2016) www.denverpost.com/2016/07/22/colorado-business-fight-for-oil-and-gas/; see also *Matter of Title, Ballot Title & Submission Clause for 2015-2016 #63*, 370 P3d 628 (Color 2016).

139 See Svaldi (n 138).

measures narrowly missed getting enough signatures to place the amendment on the ballot.[140]

Despite the Colorado Supreme Court striking down the Fort Collins and Longmont fracking bans, ten days after the election of Trump, Boulder County approved an extension of its drilling moratorium.[141] In response, the Colorado Secretary of State sued the County arguing that the outcomes in the *Fort Collins* and *Longmont* cases preclude extension of local drilling bans.[142] Another municipality, Broomfield, considered a moratorium but the measure was withdrawn by the county commissioners in exchange for the withdrawal of drilling permit applications by an oil and gas producer.[143]

Given Trump's energy policy and dedication to roll back regulation aimed at climate change, it seems likely that anti-oil and gas activists will focus their attention on the state and local government in states like Colorado to attempt to influence energy policy.

5.2. *Natural gas and oil/liquids pipelines regulation and infrastructure*

5.2.1. Keystone XL Pipeline

On 24 January 2017, President Trump issued a presidential memorandum inviting TransCanada Keystone Pipeline, LP ('TransCanada Keystone') 'to promptly re-submit its application to the Department of State for a Presidential permit for the construction and operation of the Keystone XL Pipeline'.[144] The memorandum directs the Secretary of State to reach a final permitting determination, 'including a final decision as to any conditions on issuance of the permit that are necessary and appropriate to serve the national interest', within 60 days of a re-submitted application.[145] The memorandum further directs the Secretary of the Army, in the event that a presidential permit is granted, to instruct the Assistant Secretary of the Army for Civil Works and the US Army Corps of Engineers ('Corps') to review and approve as warranted, in an expedited manner, requests for authorisation to utilise Nationwide Permit 12 under section 404(e) of the Clean Water Act,[146] with respect to crossings of 'waters of the United States' by the Keystone XL Pipeline,[147] and further directs the Secretary of the Interior and the Directors of the Bureau of Land Management and the US Fish and Wildlife Service to approve requests for approvals related to the pipeline.[148]

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140 Mark K Matthews, 'Colorado Anti-Fracking Measures Fail to Make Ballot; Possible Forgery Alleged' *Denver Post* (29 August 2016) www.denverpost.com/2016/08/29/colorado-anti-fracking-measures-fail-to-make-ballot.

141 Jesse Paul, 'Boulder County's Oil, Gas Ban Has Gone on Long Enough, Colorado AG Says in Lawsuit' *Denver Post* (15 February 2017) www.denverpost.com/2017/02/14/boulder-county-oil-and-gas-moratorium-colorado-ag-sues.

142 *Ibid.*

143 Jennifer Rios, 'Broomfield Indefinitely Postpones Vote on Oil, Gas Moratorium' *Denver Post* (1 March 2017) www.denverpost.com/2017/03/01/broomfield-oil-gas-moratorium-vote-postponed.

144 Presidential Memorandum Regarding Construction of the Keystone XL Pipeline (24 January 2017) s 2 (the 'Keystone Memorandum').

145 *Ibid*, s 3(a)(i).

146 33 USC s 1344(e).

147 Keystone Memorandum (n 144), s 3(b).

148 *Ibid*, s 3(c).

The Keystone Memorandum is the latest development in a long and politically fraught process. The Keystone XL Pipeline is proposed to transport Western Canadian Sedimentary Basin crude oil from an oil supply hub near Hardesty, Alberta to delivery points in Oklahoma and Texas. TransCanada Keystone initially applied for a presidential permit for the border-crossing facilities in September 2008.[149] Over time, the project became a 'flashpoint' for environmentalists, who alleged that the pipeline would result in higher GHG emissions.[150] In December 2011, Congress passed legislation requiring the President to decide within 60 days whether to approve the application; in response, President Obama denied the application on 18 January 2012, stating that the Department of State required additional time to obtain and analyse necessary information.[151] TransCanada Keystone submitted a second application for a presidential permit in May 2012,[152] but after further review, the Department of State in November 2015 determined to deny the permit, citing the need 'for the United States to prioritize actions that are not perceived as enabling further GHG emissions globally'.[153] In response, TransCanada Keystone filed a complaint in the federal district court alleging that the decision constituted unlawful executive action and seeking declaratory and injunctive relief.[154] In addition, TransCanada Keystone's parent sought arbitration under Chapter 11 of the North American Free Trade Agreement (NAFTA) before the International Centre for the Settlement of Investment Disputes, alleging that the US' actions with respect to the Keystone XL project violated NAFTA.[155]

Following issuance of the memorandum, TransCanada Keystone submitted its application for a presidential permit to the State Department on 26 January 2017,[156] thus starting the clock for action by the Department of State to issue a final decision on or before 27 March 2017.[157] The Keystone Memorandum does not guarantee that

149 Application of TransCanada Keystone Pipeline, LP for a Presidential Permit Authorizing the Construction, Connection, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to Be Located at the United States-Canada Border (19 September 2008). TransCanada Keystone has constructed segments of the pipeline that do not involve border-crossing facilities and thus do not require federal approval.

150 See Matthew Daly, 'Chu Suggests US Support for Canada Oil Pipeline' (*Associated Press*, 1 September 2011) www.yahoo.com/news/chu-suggests-us-support-canada-oil-pipeline-195400449.html accessed 28 February 2017.

151 Presidential Memorandum – Implementing Provisions of the Temporary Payroll Tax Cut Continuation Act of 2011 Relating to the Keystone XL Pipeline Permit (18 January 2012).

152 Application of TransCanada Keystone Pipeline, LP for a Presidential Permit Authorizing the Construction, Connection, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to Be Located at the United States-Canada Border (4 May 2012).

153 Record of Decision and National Interest Determination (3 November 2015) at 29.

154 *TransCanada Keystone Pipeline, LP v Kerry*, Case No 4:16-cv-00036, Complaint (SD Tex 6 January 2016).

155 *TransCanada Corp & TransCanada PipeLines Ltd v The Government of the United States of America*, Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the North American Free Trade Agreement (6 January 2016). Recent news reports indicated that President Trump believes that TransCanada should drop its claim based on the memorandum. See Damian Paletta and Steven Mufson, 'Trump Says He Told Aide to Threaten Keystone XL Pipeline over Arbitration Case' *Washington Post* (22 March 2017).

156 Application of TransCanada Keystone Pipeline, LP for a Presidential Permit Authorizing the Construction, Connection, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to Be Located at the United States-Canada Border (26 January 2017).

157 The district court issued an order abating TransCanada Keystone's complaint until 1 May 2017, to afford an opportunity for the Department of State to act upon the renewed permit application.

the Keystone XL Pipeline will be permitted and completed, but it provides an opportunity for revival of the project and, in conjunction with changing agency leadership as a result of the change in administrations, provides a more favourable political environment. The project still requires some state permits, and there remains the possibility of litigation, potentially fuelled by allegations that agency decisions have been influenced by political considerations rather than record evidence.

5.2.2. Dakota Access Pipeline

On 24 January 2017, President Trump issued a presidential memorandum directing the Secretary of the Army to instruct the Assistant Secretary of the Army for Civil Works and the Corps to take actions necessary to 'review and approve in an expedited manner, to the extent permitted by law and as warranted, and with such conditions as are necessary or appropriate', requests for approvals to construct and operate the DAPL.[158] The memorandum also called for consideration of whether to rescind or modify, as appropriate, a 4 December 2016 memorandum by the Assistant Secretary of the Army for Civil Works concerning a proposed crossing of Lake Oahe in North Dakota, as well as a 18 January 2017 notice of intent to prepare an environmental impact statement concerning an easement to cross the lake.[159]

The DAPL is a 30-inch diameter pipeline that will extend approximately 1,172 miles, and connect the Bakken and Three Forks oil production areas in North Dakota to an existing crude-oil market near Patoka, Illinois, and is projected to transport approximately 570,000 barrels of crude oil per day.[160] Ninety-nine per cent of the pipeline's route traverses private land,[161] and DAPL has received applicable regulatory approvals in North Dakota,[162] South Dakota,[163] Iowa[164] and Illinois[165] for construction of the pipeline. However, the proposed pipeline route also crosses federal water at Lake Oahe on the Missouri River in North Dakota, and thus requires authorisation from the Corps. The proposed crossing is located approximately one-half mile upstream of the boundary of the Standing Rock Sioux Tribe ('Standing Rock Sioux') reservation.[166]

TransCanada Keystone Pipeline, LP v Kerry, Case No 4:16-cv-00036, Order (SD Tex 30 January 2017). In addition, TransCanada has suspended the arbitration proceeding for one month. Reuters, 'TransCanada's U.S. Keystone XL Lawsuit Suspended – Arbitration Court' www.reuters.com/article/canada-pipeline-lawsuit-idUSL2N1GD0QQ accessed 1 March 2017.

158 Presidential Memorandum Regarding Construction of the Dakota Access Pipeline (24 January 2017), s 2(a)(i) (Dakota Access Memorandum).

159 *Ibid*, s 2(a)(ii).

160 Notice of Intent to Prepare an Environmental Impact Statement in Connection with Dakota Access, LLC's Request for an Easement to Cross Lake Oahe, North Dakota, 82 FR 5543, 5544 (18 January 2017) (NOI).

161 *Standing Rock Sioux Tribe v US Army Corps of Engineers*, Memorandum Opinion at 2, Case No 1:16-cv-00534-JEB (DDC 9 September 2016) (*Standing Rock*).

162 *Dakota Access, LLC*, Case No PU-14-82, Findings of Fact, Conclusions of Law and Order (N Dak PSC 20 January 2016).

163 *In the Matter of the Application of Dakota Access, LLC for an Energy Facility Permit to Construct the Dakota Access Pipeline*, Case No HP14-002, Final Decision and Order (S Dak PUC 14 December 2015).

164 *In re: Dakota Access, LLC*, Docket No HLP-2014-0001, Hazardous Liquid Pipeline Permit (Iowa Utils Bd 8 April 2016).

165 *Dakota Access, LLC*, Case No 14-0754, Order (Ill Commerce Comm'n 16 December 2015).

166 NOI (n 160) at 5544.

On 25 July 2016, the Corps issued an environmental assessment finding that the proposed construction would cause 'no significant impact' and granted DAPL pre-construction notice and verification determinations.[167]

The Standing Rock Sioux filed a complaint in the federal district court, seeking to halt the pipeline's construction and alleging that the Corps had failed to fulfil its obligation to consult with the tribe in conducting its review.[168] The district judge denied injunctive relief on 9 September 2016.[169] Litigation continued before the district court, and on 18 January 2017, two days before the end of President Obama's term in office, the Corps issued a Notice of Intent to Prepare an Environmental Impact Statement in Connection with DAPL (NOI), stating that it had determined that the decision to permit the crossing at Lake Oahe 'merits additional analysis, more rigorous exploration and evaluation of reasonable siting alternatives, and greater public and tribal participation and comments…'.[170]

The Dakota Access Memorandum effectively removed the last obstacle to completion of the pipeline. On 8 February 2017, Dakota Access announced that it had received an easement from the Corps enabling it to complete construction.[171] The federal district court litigation continues, and individual Standing Rock Sioux recently filed a motion to intervene in the case, alleging that as a result of the Dakota Access Memorandum, the Corps improperly expedited and abandoned its review without appropriate consideration of alternative locations.[172] Given that injunctive relief previously has been denied, it appears unlikely that efforts to halt completion of the pipeline will succeed at this point. However, as with the Keystone XL Pipeline, the DAPL approval process has been significantly affected by political considerations from both opponents and supporters of the projects, and any decision would necessarily have led to litigation.

5.2.3. American steel

As mentioned above, President Donald Trump's Memorandum Regarding Construction of American Pipelines ('Pipeline Memorandum') requires the Secretary of Commerce, in consultation with all relevant executive departments and agencies, to develop a plan ('Plan') under which all new pipelines, including retrofitted, repaired or expanded pipelines, shall use materials and equipment produced in the US to the maximum extent possible and to the extent permitted by law. The memorandum provides the Secretary 180 days to submit the Plan to the President. This memorandum, and the resulting Plan submitted by the Secretary of Commerce will have far-reaching implications for the US pipeline industry.

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167 *Standing Rock* (n 161) at 33.

168 *Standing Rock Sioux Tribe v US Army Corps of Engineers*, Complaint for Declaratory and Injunctive Relief, Case No 1:16-cv-00534-JEB (DDC 27 July 2016).

169 *Standing Rock* (n 161) at 58.

170 NOI (n 160) at 5544.

171 'Energy Transfer Announces Receipt of Easement from Army Corps of Engineers on Land Adjacent to Lake Oahe' https://daplpipelinefacts.com/energy-transfer-announces-receipt-easement-army-corps-engineers-land-adjacent-lake-oahe/ accessed 1 March 2017.

172 *Standing Rock Sioux Tribe v US Army Corps of Engineers*, Motion of Proposed Intervenors, Case No 1:16-cv-00534-JEB (DDC 27 February 2017).

As an initial matter, it is important to note that the scope of the Pipeline Memorandum extends beyond simply ensuring that the physical pipeline itself uses materials produced in the US. In fact, the text of the Pipeline Memorandum arguably requires that all 'equipment' used to construct new, retrofitted, repaired or expanded pipelines be produced in the US. Already many pipeline pumps and valves assembled in the US typically contain both US and foreign parts. If interpreted broadly, this provision could mean that pipeline companies must use only American-produced building equipment, such as backhoes and drills, when constructing, expanding or repairing a pipeline within the US. Should the Secretary of Commerce take such an expansive reading of the Pipeline Memorandum, the potential consequences for the pipeline industry could be substantially significant. In fact, it is unclear whether pipeline companies could keep pace with current construction should the ultimate Plan require American-produced equipment to be utilised in any pipeline construction activity.

Just how far the Plan could go in requiring American-produced equipment to be used in the pipeline construction process remains a hotly contested issue. However, a key phrase in the Pipeline Memorandum requiring that pipeline builders use US products 'to the maximum extent possible and to the extent permitted by law' may render the ultimate Plan relatively toothless. In the meantime, the language provides cover for the Secretary of Commerce to investigate further whether it would be legal for the government to require that private pipeline companies use American-made steel and equipment in the construction process.

Notwithstanding this issue, President Trump indicated in initial comments regarding the Pipeline Memorandum that he not only wants pipeline companies to purchase pipelines fabricated in the US, but also expects pipeline suppliers to use raw US steel.[173] It is unclear whether US manufacturers, already struggling under the rising cost of raw steel due to trade policies designed to prevent foreign countries from dumping cheap supplies into the US, would have the capacity to meet the increased demand the Plan may create. In addition, few American steelmakers produce the type of steel required for pipelines transporting natural gas and petroleum-based liquids. The type of steel required for these types of pipelines is very high strength steel that few US manufacturers produce. To increase US production of this kind of steel would require current steel manufactures to retool their plants and it is unclear whether, in the face of low steel margins, manufactures would agree to do so.

In addition to the potential construction-related ramifications the Pipeline Memorandum could have for pipeline companies and the US steel industry, it is certain to also have far-reaching regulatory ramifications as well. In discussing potential compliance with the Pipeline Memorandum, the President indicated that the government's power of eminent domain could be harnessed to ensure pipeline companies comply with the ultimate Plan. President Trump indicated that if pipeline companies exercised the right to eminent domain following pipeline certification by the FERC, then he wants the pipeline to be manufactured with US steel. Should the FERC be required to withhold eminent domain power, or prohibit certification of new, expanded or replaced

173 Tom DiChristopher, 'Donald Trump Increases Pressure on Pipeline Makers, His Latest Industry Target' (*CNBC*, 20 January 2017) www.cnbc.com/2017/01/26/trumps-plan-to-force-pipeline-makers-to-use-us-steel-is-dictatorial-and-a-bad-idea.html.

pipelines that do not use US steel or equipment produced in the US, the potential ramifications for the pipeline industry could be severe.

Additionally, while the President has indicated his desire to increase natural gas and oil development, including pipeline construction, the Pipeline Memorandum may have inadvertently given pipeline opponents another tool to fight additional pipeline construction. Landowners have already seized on the President's Pipeline Memorandum to attempt to halt construction of pipelines that have already obtained their federal permits and are in the construction phase of development. On 6 February 2017, Georgia landowners filed a complaint with the FERC urging it to immediately halt construction of Williams Partners LP's $472m Transcontinental Pipeline Dalton expansion claiming that the company is violating the Pipeline Memorandum by using pipeline in the expansion produced in Greece.[174] Even though the pipeline was granted its the FERC certificate in August of 2016, landowners argued that the Pipeline Memorandum was nevertheless applicable to the Dalton expansion and that construction should cease immediately to ensure compliance with the Pipeline Memorandum. Landowners argued that if FERC fails to act, pipeline developers will be encouraged to speed up construction to deplete their non-US pipeline inventory pending further guidance from the Commerce Department and President Trump. At the time of this writing the FERC has yet to respond to the complaint.

Without the Plan in place, it is still unknown whether or not the Pipeline Memorandum will extend to projects already certificated or will simply be prospective in nature aimed at future pipeline projects. However, early indications are that the Plan will not apply to pipelines already under construction. On 2 March, a White House spokesperson indicated that the Keystone XL pipeline (discussed above) would be exempt from the Plan's buy-American requirement noting that since it is already under construction it does not qualify as a new, retrofitted, repaired or expanded pipeline subject to the buy-American requirement. Whether or not other pipelines currently under construction will receive similar treatment remains to be seen. Notwithstanding this clarification, in whatever form the Plan is finalised, it is certain to have major implications for the pipeline industry, not only for greenfield expansions, but for existing projects looking to expand or modify facilities. In addition, pipeline opponents will surely use it as another means to attempt to slow or even halt pipeline development.

No matter the various downstream effects of the President's American-steel proclamation, the edict itself is indicative of numerous of the new administration's decisions. They tend to be focused on achieving a goal without accounting for the details and reality that govern whether such an outcome would cause more problems than it supposedly solves.

5.2.4. High-priority infrastructure

On 24 January 2017, President Trump signed the Executive Order Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects ('Infrastructure

174 *Transcontinental Gas Pipe Line Company, LLC*, Emergency Motion to Stay, Docket No CP15-117 (filed 6 February 2017).

Executive Order'). The Infrastructure Executive Order is intended to streamline federal environmental review and approvals for infrastructure projects, including natural gas pipeline projects. According to the administration, it is emphasising projects that are vital to the nation. This order demonstrates the Trump Administration's desire to reduce regulatory burdens in order to encourage the building of such infrastructure projects across a variety of sectors.

The Infrastructure Executive Order establishes a procedure to identify and expedite federal environmental review for high-priority projects. The procedure laid out in the Infrastructure Executive Order consists of two general steps: (1) identification of high-priority projects; and (2) establishment of expedited procedures and deadlines for environmental reviews and approvals for high-priority projects. Under the first step, any governor of a state or the head of any executive department or agency can request that the Chairman of the CEQ determine whether an infrastructure project qualifies as a 'high-priority' project. Once such a request is made, the CEQ Chairman must make a determination within 30 days whether the project qualifies as 'high priority' based on 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 has been designated as a 'high-priority' project, the second step requires the CEQ Chairman to coordinate with the head of the relevant agency (for pipeline projects, this would be the FERC) to establish expedited procedures and deadlines for completion of environmental reviews and approvals. In the event that deadlines are established under this order and not met, the head of the relevant agency must provide a written explanation to the Chairman explaining the causes for delay and providing an accounting of the actions taken by the agency to complete the review as quickly as possible. While the Infrastructure Executive Order is relatively short and has the stated goal of streamlining the federal environmental review process to allow infrastructure projects to be built quickly, there are many factors at play that will have an impact on how and when this order will affect the natural gas pipeline industry.

First, the Infrastructure Executive Order requires action to be taken by the CEQ Chairman. The CEQ is an entity within the Executive Office of the President that Congress established as part of the National Environmental Policy Act of 1969 (NEPA). The Chairman position requires an appointment by the President with the advice and consent of the Senate.[175] Thus, once a nominee has been named by the President, he or she must be confirmed by the Senate. As of 28 February 2017, President Trump has not nominated any individual to fill the position. There are 549 key positions requiring Senate confirmation; thus far,[176] 15 nominees have been confirmed by the Senate, 18 are awaiting confirmation and 516 are awaiting nomination.[177] The nomination and confirmation process during presidential transitions usually suffers delays,[178] in part

175 See PL 114-113, 129 Stat 2569.

176 As of 28 February 2017.

177 The Washington Post, 'Tracking How Many Key Positions Trump has Filled So Far' *The Washington Post* www.washingtonpost.com/graphics/politics/trump-administration-appointee-tracker/database/ accessed 28 February 2017.

178 Congressional Research Service, 'Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress' (R41872, 9 October 2012) at 8 https://fas.org/sgp/crs/misc/R41872.pdf.

due to the sheer number of vacancies that must be filled, as well as due to the process itself and the opportunity for delay tactics by Senators who oppose certain nominees.

The Trump Administration has faced opposition from Senate Democrats to its Cabinet nominees, which are among the first positions to be filled. There are also a large number of positions that the Trump Administration has not yet nominated anyone for – the CEQ Chairman position is just one of 516 positions that do not yet have a nominee. It is unclear when a nominee will be named, and how long the confirmation process will take; however, the Infrastructure Executive Order cannot be implemented without a CEQ Chairman, as the order specifically requires the CEQ Chairman to make determinations as to whether a project qualifies as 'high priority'.

Second, the Infrastructure Executive Order is not limited to the energy industry; rather, it applies to many different industries and types of infrastructure, including highways, bridges, ports and airports. The wide variety of infrastructure projects eligible for designation as high-priority projects under the order means that there will most likely be a large number of projects put forward for consideration by the CEQ Chairman. Although the order states that the CEQ Chairman must make a determination as to whether a project is 'high priority' within 30 days, the expected multitude of proposed projects will likely result in a delay in determinations. Coupled with the fact that there is currently no CEQ Chairman nominee and that any nominee will have to undergo the Senate confirmation process, it is likely that there will not be any projects designated as 'high priority' under the Infrastructure Executive Order for quite some time.

Evidence of a glut of infrastructure projects can be found in the National Governors Association list of 428 'shovel-ready', priority projects from each of 43 states and US territories.[179] While this list was a separate initiative undertaken by the National Governors Association based on guidance from the Trump Administration's transition team, it demonstrates that the states have many infrastructure projects across various industries that they would like to prioritise.

Third, the order itself is constrained by existing law. The Infrastructure Executive Order states that '[t]his order shall be implemented consistent with applicable law'. Currently applicable laws related to environmental review and permitting of natural gas pipelines include NEPA, which requires an environmental assessment and in some cases, a more comprehensive environmental impact statement. Any procedures that the CEQ Chairman and the FERC devise under the Infrastructure Executive Order must continue to comply with the NEPA, which may act to limit the order's ability to expedite environmental reviews for pipeline projects. Coordination with federal energy project permitting agencies, such as the FERC, will be essential if the CEQ prioritisation process is to have any meaningful impact.

Although the stated goals of the Infrastructure Executive Order are to streamline and expedite the federal environmental review and approvals process, the administration faces many obstacles to achieving those goals. The lack of a current CEQ nominee, the length of the Senate confirmation process in a highly charged political environment, the sheer number of infrastructure projects that will likely see priority designation, and the environmental regulatory and legislative schemes currently applicable to energy-

179 Reuters, 'US Governors Send 428-Project List for Trump's Infrastructure Plan' (*Reuters*, 8 February 2017) www.reuters.com/article/us-usa-trump-infrastructure-idUSKBN15N2VU.

related projects, all create challenges to expediting environmental review for natural gas pipeline projects. These obstacles will likely delay the timing to seeing positive impacts from this order on the natural gas pipeline industry.

5.3. *Nuclear*

5.3.1. Reforming the NRC

The nuclear energy business, which has been under economic pressure due to low prices for electricity in many regions, would stand to benefit from significant regulatory reform at the NRC. As an independent agency, particularly one whose mandate is to ensure public safety, the NRC may be less swift than other agencies to make reforms, but change should be coming nonetheless.

The President's designation of Commissioner Kristine Svinicki as Chairman may prove to be a critical move to effect this change. She is reform-minded and has worked persistently during her eight-year tenure with the NRC to ensure that the NRC's actions have been appropriately measured, often advocating that the NRC apply sound cost-benefit principles to justify new regulatory initiatives.

The President also has the chance to nominate two other Republican commissioners to fill existing vacancies, which could help transform the agency's mission and policy agenda. The NRC's last major regulatory reform push dates back to the 1990s, and was focused on revamping the NRC's oversight process for operating reactors to make it more objective and less enforcement-oriented.[180] Thus, a relook at the agency's regulations and practices is long overdue. To that end, the NRC has been undertaking an evaluation of the 'cumulative effects of regulation' since 2012, during which time it has examined ways in which the agency may be able to enhance the efficiency with which it carries out regulatory actions, while mitigating the cumulative effect of regulatory activities on both the NRC and licensees.[181]

Regulatory reform will also be focused on streamlining the NRC's licensing processes, especially for next-generation small modular and advanced reactors. Developers of next-generation reactors have been consistently critical of the NRC's licensing process,[182] which can take decades (plural) between initial discussions with the agency and issuance of design certifications and licences. Indeed, the NRC's current vision and strategy statement for advanced reactor licensing envisions a regulatory pathway with advanced reactors starting construction only by the 2030s.[183] The Trump Administration has frequently criticised long review

180 See Regulatory Information Conference Presentation, 'NRC Reactor Oversight Process' (10 March 2010) www.nrc.gov/public-involve/conference-symposia/ric/past/2010/slides/th38dapasmpv.pdf (discussing the evolution of the agency's Reactor Oversight Process).

181 SRM-SECY-12-0137, Implementation of the Cumulative Effects of Regulation Process Changes (5 October 2012) www.nrc.gov/docs/ML1307/ML13071A635.pdf.

182 See, eg, 'Group Calls for Revamp of Reactor Licensing Process' (*World Nuclear News*, 13 April 2016) www.world-nuclear-news.org/RS-Group-calls-for-revamp-of-reactor-licensing-process-1304165.html.

183 US Nuclear Regulatory Commission, 'NRC Vision and Strategy: Safely Achieving Effective and Efficient Non-Light Water Reactor Mission Readiness' (December 2016) at 20 www.nrc.gov/docs/ML1635/ML16356A670.pdf.

periods for permitting by federal agencies, which creates uncertainty and adds cost for investors and developers. The President has said that he plans to reduce agency permitting timelines.[184]

Many ideas are currently being circulated to reform the NRC's licensing process to reduce timelines and regulatory burden. These include:

- **Phased licensing path:** Advanced reactor licensees could benefit from a phased review process, taking pages from multi-phased review approaches of the Food and Drug Administration (FDA) and Federal Aviation Administration.[185] As opposed to a single large design certification or licence application, the licensing of advanced reactors could be broken down into smaller phases, with earlier phases requiring significantly less capital to complete before proceeding to the next phase.
- **Enhanced pre-application process:** Advanced reactor companies have asked the NRC to mimic Canada's nuclear regulator, which has an initial 'pre-licensing' review process that can help applicants establish credibility and identify and resolve issues early on.[186] In addition, the FDA and the FERC have a formal and well-established pre-application review process,[187] which could serve as a template for replacing the NRC's ad hoc and largely informal pre-application process.[188]
- **Affirmative use of licensing boards:** The NRC's Atomic Safety and Licensing Board Panel (ASLBP) has generally served as an avenue for environmental groups to challenge proposed new reactor projects before the NRC. However, licence applicants have a right to seek review by the ASLBP of adverse determinations by the NRC staff, to obtain an on-the-record adjudication of whether the application meets the requirements of NRC regulations and the Atomic Energy Act (subject to Commission review). In fact, new reactor applicants have used this forum in the past to overrule an NRC staff determination.[189]

  Small procedural reforms could allow the ASLBP to better serve as a vehicle to adjudicate licensing disputes between the NRC staff and the applicant early on in the licensing process, allowing applicants the ability to achieve resolution of issues where they think the NRC staff is not adhering to licensing standards or is straying from the requirements of the Atomic Energy Act. Greater use of formal or informal hearings could also increase the pace of licensing, by forcing the NRC to make decisions on key issues rather than have applications languish.

184 See, eg, 'Trump Looks to Mend Fences with Detroit Car Makers' *Wall Street Journal* (24 January 2017) www.wsj.com/articles/trump-criticizes-environmental-regulations-1485272407.

185 'Unleashing Innovation: A Comparison of Regulatory Approval Processes' (Third Way, 13 April 2016) www.thirdway.org/report/unleashing-innovation-a-comparison-of-regulatory-approval-processes.

186 'Comments Received on the NRC's Vision Statement for Advanced Reactors' (*HL New Nuclear*, 6 October 2016) www.hlnewnuclear.com/2016/10/comments-received-on-the-nrcs-vision-statement-for-advanced-reactors.

187 18 CFR s 157.21.

188 A list of ad hoc pre-application activities for advanced reactors can be found here: www.nrc.gov/reactors/new-reactors/advanced/non-lwr-activities.html.

189 *Nuclear Innovation N Am* (S Tex Proj Units 3 & 4), LBP-14-3, 79 NRC 267 (2014).

5.3.2. Recognising environmental benefits of nuclear power

As the Trump Administration is unlikely to champion efforts based on climate change concerns, the Republican-controlled Congress and states may instead take the lead. Recently, a group of senior leaders of the Republican Party have called for the introduction of a carbon tax as a conservative-principles approach to addressing climate change.[190] It is uncertain where this effort may end up, but is a sign that recognising the low-carbon environmental benefits of nuclear power will continue to be recognised.

In the past year, two states have made significant efforts to champion nuclear power as a means to reduce greenhouse gas emissions and combat climate change. New York and Illinois both have adopted zero-emissions credit (ZEC) programmes that compensate nuclear power generation for its environmental benefits, based on the Social Cost of Carbon – a US government metric developed to estimate the dollar impacts of climate change.[191] Other states, including Ohio and Pennsylvania, are being asked to consider similar programmes.

5.3.3. Promoting nuclear exports

Export of nuclear components for use abroad can be part of a boon in domestic manufacturing, and there is a push to make sure nuclear exports are given serious credit as part of any strategy to boost exports. It is expected that as part of this initiative nuclear suppliers will have an opportunity to actively participate in the Trump Administration's strategic planning efforts, such as the Secretary of Commerce's upcoming comment opportunity outlined in the Presidential Memorandum Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing.

Improving the efficiency of the regulatory pathway is critical to promoting nuclear exports. Currently three agencies control the export of nuclear materials, the NRC (radioactive materials and equipment), the DOE (technology and assistance) and Department of Commerce (dual use technologies or equipment). The result is a complex, timely and costly process for approval of exports of sometimes basic and internationally well-known technologies, particularly to emerging nuclear markets like China and India. There has been some improvement as of late – for example, as part of its process improvement programme the DOE has developed an online application page for technology exports under its 10 CFR Part 810 regulations.[192] But more can be done to streamline the nuclear export licensing process.

5.3.4. Exploring new (and revisiting old) options for spent fuel

Spent nuclear fuel is stored on site at nuclear power plants across the country. Since the cancellation of the Yucca Mountain nuclear waste repository effort under the Obama Administration, consent-based consolidated interim storage has emerged as the likely

190 'Republican Elders Float Carbon Tax, Plan White House Lobbying Campaign' (*CNN*, 7 February 2017) www.cnn.com/2017/02/07/politics/republicans-climate-change.

191 'State Action in Support of Nuclear Generation' (National Conference of State Legislatures' (26 January 2017) www.ncsl.org/research/energy/state-action-in-support-of-nuclear-generation.aspx.

192 Online Part 810 Application Portal, Dept of Energy https://e810.energy.gov.

next step for spent nuclear fuel management. Under this option, spent nuclear fuel would be transported to consolidated sites and stored temporarily, until it is disposed of in a permanent repository or, if feasible, recycled for future use. Waste Control Specialists in Texas already has an application before the NRC to develop an interim storage site,[193] and another site in New Mexico has expressed interest.[194]

Action from Congress and the DOE will be necessary to move forward with interim storage. DOE has the obligation to accept spent fuel for disposal, but current law may not give DOE the authority to undertake interim storage. On the other hand, the choice of Secretary Perry to lead the DOE is promising. As Governor of Texas, he supported Waste Control Specialists' interest in serving as an interim storage provider.

The administration has expressed interest in restarting the Yucca Mountain spent nuclear fuel repository programme.[195] DOE needs a licence from the NRC before construction can begin. At his confirmation hearing, Secretary Perry remained open to the idea of completing the repository.[196] The NRC has recently re-established the Licensing Support Network, which serves as the document database for the Yucca Mountain licensing proceeding and which holds 3.7 million documents from the NRC's adjudicatory hearing on the Yucca Mountain licence application.[197] Under Secretary Perry, The DOE is likely to be a willing participant as the applicant in the hearing process with the NRC. One of the last essential elements to restarting the licensing proceeding will be appropriations from Congress.

It should be noted though that, if the DOE restarts the Yucca Mountain programme in earnest, that will likely result in the resumption of collection of fees for disposal from nuclear facilities, which the courts put on hold when the Obama Administration halted the development of Yucca. Likewise, even if the Yucca Mountain programme were resumed immediately, the need for interim storage would continue because the DOE is so far behind schedule and spent nuclear fuel is accumulating at shut-down reactor sites around the country.

5.4. *Power and renewables*

During the campaign, the presidential transition and the early days of his administration, President Trump addressed electric sector issues only occasionally and in very general terms. The primary message in this area was to promote the 'return' of coal-fired electric generation and to disfavour renewable resources. In his 2015 book, *Great Again: How to Fix Our Crippled America*, Trump wrote that

193 Docket 72-1050, Application by Waste Control Specialists for a License for a Consolidated Interim Spent Fuel Storage Facility www.nrc.gov/docs/ML1613/ML16133A100.pdf.

194 'Holtec Partners with ELEA, LLC in New Mexico to Build Consolidated Interim Storage Facility (Press Release, 30 April 2015) https://holtecinternational.com/2015/04/30/holtec-partners-with-elea-llc-in-new-mexico-to-build-consolidated-interim-storage-facility.

195 'Trump Advisers Eye Reviving Nevada Yucca Nuclear Waste Dump' (*Bloomberg Politics*, 14 November 2016) www.bloomberg.com/politics/articles/2016-11-14/trump-advisers-eye-reviving-nevada-s-yucca-nuclear-waste-dump.

196 Secretary of Energy Rick Perry Confirmation Hearing (19 January 2017) www.c-span.org/video/?421782-1/energy-secretary-nominee-rick-perry-testifies-confirmation-hearing.

197 'NRC Makes Yucca Mountain Hearing Documents Publicly Available' (Press Release, 19 August 2016) www.nrc.gov/docs/ML1623/ML16232A429.pdf.

> the whole push for renewable energy is being driven by the wrong motivation, the mistaken belief that global climate change is being caused by carbon emissions. If you don't buy that – and I don't – then what we have is really just an expensive way of making the tree-huggers feel good about themselves.[198]

In his Senate confirmation hearing, President Trump's nominee for Secretary of Energy, Rick Perry, expressed support for an 'all-of-the-above' energy supply and touted the significant expansion of wind resource development in Texas during his time as governor.[199] However, he also suggested that policies and funding for development of renewable energy should be a matter for the states and the former head of the administration's transition team for the DOE has suggested that he expects the administration to reduce, if not eliminate, federal funding for clean energy research.[200]

The role of the federal government in making it easier for coal-fired generation to continue to operate and contribute to the nation's overall electricity supply falls primarily in the environmental sector and is discussed in detail above in section 2. However, it is important to recognise that, given the role of state regulators in actively directing utility generation sources through integrated resource plan and renewable portfolio requirements, the continuing price competitiveness of gas-fired generation and the rapidly decreasing costs of renewable generation, it is unlikely that many utilities or generation companies are prepared to invest significant amounts of money in new coal-fired generation. Any such investment during the next four years will largely be subject to potential changes back to more stringent environmental regulation under future administrations.

The relaxation of environmental regulation could, however, forestall planned retirements of coal-fired generation. The *Annual Energy Outlook 2017* by the US Energy Information Administration (EIA), published on 5 January 2017, concludes that '[f]uel prices drive near-term natural gas and coal shares [for electric generation]. As natural gas prices rebound from their 20-year lows which occurred in 2016, coal regains a larger generation share over natural gas through 2020.'[201] The report further explains that '[i]n the longer term, policy (Clean Power Plan, renewable tax credits, and California's [renewable generation mandate]) and unfavorable economic conditions compared with natural gas and renewables result in declining coal generation and growing natural gas and renewables generation'. In the EIA reference case (with no change in the Clean Power Plan), they project that natural gas-fired generation will overtake coal in 2025 and renewables will overtake coal in 2029. If the Clean Power Plan is eliminated, the EIA expects coal-fired generation levels to remain relatively constant through 2040. Natural gas and renewables would continue to grow, but at a slower rate, with natural gas-fired generation not

198 Donald J Trump, *Great Again: How to Fix Our Crippled America* (Simon & Schuster 2015) at 65 https://books.google.com/books?id=K7eUCgAAQBAJ&printsec=frontcover#v=onepage&q&f=false.

199 See hearing archived video at www.energy.senate.gov/public/index.cfm/2017/1/nomination-hearing-of-the-honorable-rick-perry-for-secretary-of-energy.

200 'Former Trump Aide Says Wind and Solar Research Will Be Cut' *Time* (24 February 2017) http://time.com/4681719/donald-trump-renewable-energy-research-funding.

201 EIA, *Annual Energy Outlook 2017* (5 January 2017) at 70 www.eia.gov/outlooks/aeo/ ('EIA 2017 Outlook').

overtaking coal until approximately 2032.[202] Again, this assumes that the Clean Power Plan is eliminated and nothing comparable is reinstated by any future administration.

The federal agency with the primary responsibility for regulating the electric utility industry, the FERC, has only two sitting commissioners as of the date of this writing and lacks a quorum to conduct commission business. It is unlikely that the FERC will have a functioning quorum until April or May at the earliest. That said, the FERC has a very limited role in promoting the types of policies highlighted to date by the administration. The FERC regulation of the utility and generation industries is largely fuel-agnostic. They have, in recent years, promoted more flexibility in electric transmission system access and scheduling, and those policies have made it easier to integrated renewable generation resources. However, given the significant numbers of renewable resources already connected to the grid, it is unlikely that the FERC would have any interest in (or that the industry would promote) reversing those policies to make it more difficult for renewable resources to operate. Due, in large part, to state mandates, utilities in the majority of states remain committed to expanding the amount of power supplied from renewable resources.

Tax credits provide the most significant federal support for renewable generation and, given that the Republican Congress voted in December 2015 to extend the investment tax credit for solar to 2021 and the production tax credit for wind to 2019,[203] it would be surprising if those credits were reduced or repealed under Trump. Moreover, a Trump transition official has been quoted as stating that the President intends to leave the current renewable tax credits in place.[204]

In addition, the President's proposed cyber security executive order, which has been leaked in draft form, but not yet formally released (as of the date of writing), calls for an examination of 'the potential scope and duration of a significant cyber incident against the United States electric subsector'. But this latest draft reportedly reflects a significant change from initial drafts, which included specific statements that the US electric grid is 'vulnerable' to cyber attack. The more recent draft moderates the tone and suggests that the government will work with industry to improve cyber security.[205]

6. Energy innovation and the DOE in the Trump Administration

The Trump Administration faces a steep learning curve to fully understand the resources at its disposal at the DOE. The new Secretary of Energy, Rick Perry, has a mixed record for his new assignment. He is remembered for his announced desire to abolish the DOE when he was running for President in 2012 despite the fact – during a presidential debate – he could not remember what department it was that he

202 *Ibid.*

203 See https://energy.gov/sites/prod/files/2016/12/f34/Leveraging_Federal_Renewable_Energy_Tax_Credits_Final.pdf.

204 'Trump Insider: New Administration Won't Attack Renewable Energy' (*UtilityDive*, 11 November 2016) www.utilitydive.com/news/trump-energy-policy/430205.

205 'Latest Draft of Trump Cyber Order Emphasizes "Risk"' (*Energywire*, 10 February 2017) www.eenews.net/energywire/2017/02/10/stories/1060049859.

wanted to abolish.[206] Then, when asked to serve as Secretary, he was enthusiastic about the prospect of being a diplomat for the US oil and gas industry, not recognising the very limited role the DOE has in oil and gas.[207]

On the other hand, Secretary Perry learned quickly that he will have under his purview 17 national laboratories that collectively account for more Nobel prizes and R&D 100 awards than any other organisation in the world. He has promised to do what he can to help them continue to perform the vital role they play for the nation. And, when asked about rumours of a ten per cent budget cut for the DOE, he also said he would fight to make sure the DOE has the resources it needs to carry out its mission. His experience as Governor of Texas suggests that he should have the executive abilities to manage the complex organisation that is the DOE, and his Senate confirmation process has proceeded without the controversy that accompanied many Cabinet nominees.

6.1. *The DOE as driver of energy innovation*

Outside the nuclear weapons and nuclear clean-up missions, which account for about two-thirds of the DOE's budget, the DOE's key role has been to serve as a driver of energy innovation. While the focus has shifted through the years, the DOE has helped to support the development of a broad array of energy technologies, including many of the world's deployed nuclear reactor designs, as well as a leading small modular reactor design; geophysical advancements and fracking technologies that have helped spur the modern resurgence of the oil and gas industry; solar industry innovations, including new solar cell chemistries, plant designs and business models; and nascent efforts at carbon capture and wave power. The DOE Offices of Fossil Energy, Nuclear Energy and Energy Efficiency and Renewable Energy – along with the national laboratories – have carried out these missions with distinction. They have successfully nudged many of the most innovative energy technologies from the drawing board to the marketplace.

The Advanced Research Projects Agency-Energy (ARPA-E), which supports very early stage energy technologies but which nevertheless in its short life has had a remarkable record of seeing a significant portion of the projects it funded move rapidly to commercialisation, likewise is a fundamental part of the DOE's energy innovation mission. The same is true for the DOE's more recently conceived Innovation Institutes, which are designed to develop highly efficient, smart 21st-century manufacturing capabilities.

Finally, the DOE's loan guarantee programme, the brainchild of the last Republican administration, became the target of sharp criticism when one of the programme's borrowers failed and became the poster-child for misplaced government subsidies for renewable energy. However, it has a portfolio of innovative energy technology projects that has a 98 per cent success rate. DOE loan guarantees have, for example, supported the first deployments of large, utility scale solar projects and the first new nuclear power plant built in the US since the 1970s, and they provide a net gain to the Treasury.

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206 'Rick Perry Famously Forgot about the Department of Energy. Now He Might Lead It.' See time.com/4598910/rick-perry-department-energy-oops-gaffe/.

207 'Learning Curve as Rick Perry Pursues a Job He Initially Misunderstood' *New York Times* (18 January 2017).

Nevertheless, some think tanks criticise these programmes as corporate welfare and complain that they 'pick winners and losers', something the critics assert only the market should do. Thus, it is widely expected that these engines of innovation will see significant budget cuts under President Trump – to help fund his proposed military build-up. Indeed, given its recent laser-like focus on climate change – not a priority of this administration – a significant budget cut at the DOE seems inevitable.

However, DOE's energy programmes are designed to take risks the market is not prepared to take. If the US does not lend a hand to risky, emerging technologies, the energy jobs of the future, including the manufacturing base that President Trump campaigned to rebuild, are likely to end up disproportionately on other shores. The President may want to rebalance the portfolio to focus less on solar and wind technologies, which have taken giant leaps forward in recent years, and more on energy storage, on how the fossil fuel industry can be retooled to reduce its carbon impacts, or on how advanced nuclear reactor designs can be furthered to ensure a full range of energy options is available. But abandonment of the DOE's innovation mission would be short-sighted and counter to the President's goal to 'make America first again'. It is also significant that the DOE's laboratories, which play a key role in the energy innovation mission, are widely dispersed around the country and have many strong supporters of both parties. Many members of Congress can be expected to fight for the spending that happens in their home states.

6.2. *The the DOE's modest regulatory portfolio*

Easing regulation is a key objective of the Trump Administration, but the DOE has a very modest regulatory role, which should make it less of a target than, for example, the Environmental Protection Agency. The DOE issues permits for cross-border electricity facilities and liquefied natural gas (LNG) exports. There is no reason to think the Trump Administration will want to interfere in those roles. Rather, he may ask Secretary Perry to find ways to accelerate those activities.

The DOE's most prominent regulatory function is to set and enforce energy conservation standards for consumer and industrial products. The federal government has been in this business for almost four decades in one way or another, but under Presidents Bush and Obama, the standard setting rapidly accelerated, largely with bipartisan support. Product innovation has also emerged from efficiency regulation. The widespread deployment of LED lights may be among the most prominent results of this regulatory programme. However, as standards have tightened and been imposed on ever more products, and as the focus of the programme has increasingly shifted to reducing carbon emissions, the programme has drawn adverse attention from some, including some who are now inside the Trump Administration. It is hard to imagine Congress jettisoning this programme, but it is not hard to envision a sharply reduced staff devoted to establishing and enforcing ever-higher efficiency standards.

7. International resource development under the Trump Administration

7.1. *US energy independence*

With the advent of the shale revolution, the US stands on the cusp of energy independence. In his Bismarck speech, candidate Trump emphasised American energy independence as a key goal of his administration:

> American energy dominance will be declared a strategic economic and foreign policy goal.…We will become, and stay, totally independent of any need to import energy form the OPEC cartel or any nations hostile to our interests.[208]

While the Trump Administration will work to reduce the regulatory impediments to energy production, an increase in energy production in the US will be influenced more by oil prices than by the regulatory regime.[209] US producers cut back production, and reduced jobs, in response to the collapse of the oil price in later 2014. If the oil price remains stable at $50 or $60 per barrel, US oil production is likely to ramp up in the near term.[210] In the long term (looking to 2040), the US will almost certainly become a net energy exporter.[211]

But exporting energy – perhaps in the form of LNG – does not accomplish the policy goals articulated in the Trump energy policy. The US continues to import crude oil, in large part because US refineries are designed to handle heavy crude rather than the light crude produced in the US.[212] As Jack Luellen notes, 'In order to be less dependent on foreign oil, the nation's refining capabilities will have to change.'[213] Market forces will conspire against complete independence from foreign oil.

For natural gas, there is likely to be a robust domestic and international market. The EIA forecasts a significant increase in domestic gas production over both the near term and long term.[214] Some of that natural gas will be used to replace coal for electrical generation.[215] The EIA also predicts additional LNG exports for US natural gas production.[216]

7.2. *Transparency*

In 2016, the US Securities and Exchange Commission (SEC) issued a final rule requiring resource extraction companies subject to SEC regulation to disclose payments made to a foreign government or the US government for the purpose of the commercial development of oil, natural gas or minerals.[217] This rule was required by an amendment to the Securities Exchange Act under section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[218] The Dodd-Frank amendment and the final rule were designed to harmonise US law with initiatives within the global community to promote transparency as a way to combat corruption.[219]

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208 Bismarck speech (n 2).
209 Tsvetana Paraskova, 'Trump's Oil Price Dilemma' (*OilPrice.com*, 16 December 2016). http://oilprice.com/Energy/Crude-Oil/Trumps-Oil-Price-Dilemma.html accessed 7 May 2017.
210 *Ibid.*
211 See EIA 2017 Outlook (n 201) at 14–15.
212 Jack R Luellen, 'Oil and Natural Gas: Opportunities, Challenges, and Political Quandaries' (2016) 30 Nat Resources & Env't 15.
213 *Ibid.*
214 EIA 2017 Outlook (n 201) at 13.
215 *Ibid* at 9.
216 *Ibid* at 18.
217 See Securities and Exchange Commission, Final Rule: Disclosure of Payments by Resource Extraction Issuers, 81 Fed Reg 49360 (27 July 2016).
218 See Securities Exchange Act, 15 USC s 13(q).
219 See 81 Fed Reg at 49362 n 28.

President Trump, shortly after his inauguration, described Dodd-Frank as 'a disaster'.[220] He went on to say, 'We are going to be doing a big number on Dodd-Franks.'[221] Responding to this policy direction, Congress reviewed the final rule under the Congressional Review Act. On 1 February 2017, the House voted to repeal the final rule, and the Senate followed suit on 3 February 2017.[222]

7.3. *Tax reform*

7.3.1. Tax reform

President Trump and Republican congressional leaders have promised a major reform to the US tax code in 2017. This reform, if anything close to these promises, will have significant implications for the energy industry in the US and worldwide. Little of what will ultimately be included in this reform bill is clear at this point. In general, though, the goal of the White House and congressional Republicans is to make investment and production in the US more attractive by reducing the associated US tax burden.

This bill will likely affect any individual or company – US or foreign-based – with business in the US, and will likely completely revamp the nation's current tax code as it applies to multinational corporations. The road to enactment of this legislation will be far from smooth – there will be turf battles and disagreements, not only between the parties, but also between industries and different interests – and it will take time. Given the hurdles the bill will face, moving a bill through the legislative process to enactment will almost certainly take most of 2017, if not more time. Much of this reform will be positive for businesses and individuals alike, but there will be trade-offs as well that may divide industries or even different companies in the same industries.

The debate in Washington so far this year has centred around the Tax Reform Blueprint proposal issued by Speaker of the House Paul Ryan and House Ways and Means Chairman Kevin Brady in early 2016. The Blueprint was the product of extensive work by a Republican congressional task force and represents a major rewrite of the tax code, far beyond changes in rates. The Trump tax reform plan issued during the President's political campaign is similar in many basic respects to the Blueprint, but is lacking in detail. It is as yet unclear whether Trump will support the most controversial element of the Ryan/Brady Blueprint: the border adjustment mechanism. Trump has recently promised to release a more detailed tax plan in the coming weeks, which is reportedly being developed chiefly by Director of Trump's National Economic Council, Gary Cohn, and newly installed Secretary of the Treasury Steven Mnuchin. At the same time, Senate Finance Committee Chairman Hatch has announced the development of his own tax reform plan, and that he will seek the support of Senate Democrats for this bill.

If, as many expect, US tax reform becomes a Republican-only effort, the bill could still move through Congress via the reconciliation process under the Budget Act of 1974, which would allow Republicans to pass a bill with only 51 votes in the Senate, avoiding risk of a Democrat filibuster in the Senate, which would otherwise

220 Glen Thrush, 'Trump Vows to Dismantle Dodd-Frank "Disaster"' *New York Times* (30 January 2017).
221 *Ibid.*
222 See Timothy Cama, 'Senate Votes to Repeal Transparency Rule for Oil Companies' (*The Hill*, 3 February 2017) http://thehill.com/policy/energy-environment/317700-senate-votes-to-repeal-transparency-rule-for-oil-companies accessed 7 May 2017.

require 60 votes to overcome. Moving a bill through reconciliation, though, will make the process much more complicated. This would require that the House and Senate pass a budget resolution, and that the Senate comply with the Byrd rule, requiring 60 votes to overcome a point of order if the bill results in any revenue loss after the years included in the budget resolution. In addition, Republicans may have trouble getting sufficient support even within their own caucus, over issues such as concern over the rising US national debt and the potential for tax reform to increase this debt. Although Trump, during his campaign, did not express much concern about the US debt, the issue remains a concern among many Republican deficit hawks.

The following are some of the primary elements of the Trump and Ryan/Brady Blueprint tax reform proposals. Neither Trump nor Ryan/Brady have as yet released legislative language for their proposals, though the Ryan/Brady Blueprint is far more detailed than the current Trump proposal.

Ryan/Brady Blueprint:

- 20 per cent corporate tax rate
- 25 per cent rate for pass-through business income
- A cash-flow 'destination-based' consumption tax structure for business:
  - Full expensing for capital investments
  - No deductibility of interest expense beyond interest income
  - Territorial tax system with one-time tax on accumulated foreign earnings and profits (E&P) (8.75 per cent cash/3.75 per cent non-cash rates)
  - Border adjustment mechanism: tax imports and deduct exports
- Industry-specific tax preferences and other unspecified tax preferences (presumably including energy-related tax incentives) would be repealed
- Transition rules – Blueprint: 'The Committee on Ways and Means will craft clear rules to serve as an appropriate bridge from the current tax system to the new system, with particular attention given to comments received from stakeholders on this important matter'[223]
- Individual income tax rates lowered to 12 per cent, 25 per cent, 33 per cent
- Individual investment income (taxed at half of earned income rates).

Trump tax reform plan:

- 15 per cent corporate tax rate
- 15 per cent rate for pass-through business income
  - Manufacturers have option to fully expense capital investments if they opt to waive deduction of interest expense
  - Campaign expressed support for a one-time tax on accumulated foreign E&P, but the plan appears to retain the US extraterritorial system
  - Repeal most corporate tax expenditures, except R&D credit
- Individual tax rates lowered to 12 per cent, 25 per cent, 33 per cent
- Caps itemised deductions at US$100k, US$200k.

223 A Better Way: Our Vision for a Confident America at 31 (24 June 2016) Tax Reform Task Force Blueprint https://abetterway.speaker.gov/_assets/pdf/ABetterWay-Tax-PolicyPaper.pdf accessed 7 May 2017.

7.3.2. Significance for the energy industry

Full expensing of capital expenditures and a reduction in the US corporate tax rate from the current 35 per cent to 20 per cent or 15 per cent will on balance significantly reduce the tax cost of doing business in the US. On the other hand, the loss of the deduction for net interest expense – proposed in the Blueprint – will raise the cost of debt in the US.

The ability for US-based corporations to repatriate profits from foreign subsidiaries on a tax free basis (after paying a one-time tax on all accumulated E&P of foreign subsidiaries) should significantly increase the incentive for these companies to repatriate cash and use it to make US investments (or perhaps to pay down debt or pay dividends).

The Blueprint's border adjustment mechanism (also known as a border adjustment tax, or BAT) would have significant implications for the energy industry. Under this proposal, businesses with US income would not be able to deduct imports (including any property, services or intangibles) as part of their cost of goods sold. Conversely, all export income for US business taxpayers would be untaxed. This would mean, for example, that US oil refiners using imported crude oil would lose their deduction for the cost of the imported crude; and US exporters of LNG would deduct the cost of domestic-sourced natural gas, but would not have to pay tax on export income. Businesses with US sales that rely heavily on imports would have significantly higher US tax liability; the opposite would be true for US businesses with significant net export income. US-based multinationals that have established foreign subsidiaries and tax structures in low-tax jurisdictions to sell goods or services abroad might find greater tax savings by locating in the US, since export income would be free from US tax. Any tax advantage of locating operations or assets abroad and importing goods or services into the US could also disappear, since imports would not be deductible to US business taxpayers. Many economists predict that the enactment of a US border adjustment tax would result in a fairly immediate increase (by as much as 25 per cent) in the value of the US dollar against non-US currencies to offset the increased cost of US imports. This, if true, should result in a corresponding reduction in the US-denominated price of commodities like oil and gas. It would also, of course, mean a significant reduction in the US dollar value of assets held in non-US currencies.

7.3.3. Prospects for US tax reform

Most US political prognosticators believe it is likely that a major tax reform bill will be enacted in late 2017 or early 2018. The ultimately enacted legislation, however, is likely to look very different from the current Blueprint or Trump plans. Prospects for the House Blueprint's border adjustment proposal are uncertain at best, and dimming recently. There is growing scepticism of the proposal, including some outright opposition, among Republicans and Democrats alike in the US Senate. Also, in recent weeks, there has been an intensifying lobbying effort in opposition to the BAT in particular by retail business interests that sell mostly imported goods, as well as among oil refiners and other US businesses that rely on imported goods, services and intangibles. If President Trump does not ultimately come out in full support of the BAT proposal, it will almost certainly be dead.

Although full details on the BAT proposal have not yet been released by its authors, reports suggest a structure that may not withstand World Trade Organization (WTO) scrutiny, since the BAT would adjust a direct, rather than indirect, tax, and the resulting structure could not be said to be economically equivalent to European-style value added

taxes that are allowed by the WTO. If the BAT is included in the US tax reform bill that is ultimately enacted, it is a near certainty that it would be challenged before the WTO, which could very likely result in retaliatory tariffs and, possibly, a full trade war among many WTO members and the US. Whether or not Trump proposes a BAT in similar form, however, it is very possible that he will propose some kind of structure that would impose taxes on at least some imported goods, which itself would be likely to face intense WTO scrutiny.

In any case, the global energy industry has much at stake as US tax reform continues to develop, and undoubtedly will be watching this process very closely.

7.4. *Foreign direct investment by the US*

The 'America First' energy policy adopted by the Trump Administration presents an interesting set of issues for global energy development. The US, both through governmental agencies and through US-based companies, invests heavily in energy development outside the US. Rex Tillerson, the former CEO of Exxon, and now the Secretary of State, recognises the role that energy development can play in improving the quality of life in the developing world.[224] It appears, however, that the Trump Administration will seek cuts in the budget for the State Department and the US Agency for International Development (USAID), with the most dramatic cuts in foreign development assistance.[225] With the emphasis in the America First energy policy on US energy independence, foreign energy investment may take a back seat.

Given the robust investment by US companies outside the US, however, the federal government can provide investment support outside the US in a manner that benefits the US. The Power Africa programme is a useful example. The Power Africa programme is designed to bring electrification to Africa. It is not a programme where US money is used to construct power plants for African nations. Rather, it is an integrated programme to promote investment in generation and distribution: 'Interagency teams focused on transactions that serve as catalysts to bring power and transmission projects to fruition by leveraging financing, insurance, technical assistance, and grant tools from across the U.S. government and our private sector partners.'[226] Through this process, Power Africa provides financial benefits for the US:

> In a narrow sense, Power Africa boosts American jobs by creating opportunities for US companies. Both ExIm and OPIC are explicitly barred from activities that harm American jobs. Power Africa has not shied away from large-scale natural gas plants, where US firms have the best technology.…But even more importantly than the immediate power projects, new electricity in sub-Saharan Africa helps to generate economic growth and millions of new consumers in fast-growing markets, which are all potential customers for American exporters and targets for American investors.[227]

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224 Laurie Garrett, 'All Rex Tillerson Cares About Is Energy' (*Foreign Policy*, 16 December 2016) http://foreignpolicy.com/2016/12/16/all-rex-tillerson-cares-about-is-energy-state-department-foreign-aid/ accessed 7 May 2017.

225 Matthew Lee, 'Trump's Budget Entails Steep Cuts for Diplomacy, Foreign Aid' (*Associated Press*, 28 February 2017). https://apnews.com/fb7a5f0a55154ae69891936ce24979d8 accessed 7 May 2017.

226 www.usaid.gov/powerafrica/howwework.

227 Baker Institute, 'What Does the Trump Administration Mean for Power Africa?' (*Forbes*, 5 January 2017). https://www.forbes.com/sites/thebakersinstitute/2017/01/05/what-does-the-trump-administration-mean-for-power-africa/#729e89ec3cae accessed 7 May 2017.

Power Africa is one example of how the US can (and perhaps will) use foreign aid and foreign investment to promote a global energy policy. At this stage, it appears that the Trump Administration is not committed to this more global vision of what an 'America First' energy policy might look like, given the proposed cuts to the State Department budget. Still, these programmes are deeply entrenched, and may gain support from the administration over time.

7.5. *Climate change and the Paris agreement*

As a candidate, Donald Trump complained that the Paris Climate Agreement 'gives foreign bureaucrats control over how much energy we use right here in America'.[228] He promised as part of his 100-day action plan to 'cancel the Paris Climate Agreement and stop all payments of U.S. tax dollars to U.N. global warming programs'.[229] The President, however, cannot cancel or renegotiate the Paris Climate Agreement.[230] The President might, however, adopt policies designed to prevent compliance with the Paris Climate Agreement.[231] The pledges to reduce GHG emissions in the Paris Climate Agreement are not legally binding.[232] The recently released budget proposal eliminates climate change research and prevention programmes.[233] At present, the Trump Administration appears to be divided on how to address the Paris Climate Agreement. Some officials want the US to disavow the deal, while others caution against that move, fearing 'sharp diplomatic blowback'.[234] Thus, the Trump Administration will have an interesting balancing act between international diplomatic considerations and energy policy goals.

8. Conclusion

The foundation of the America First energy policy is straightforward: pursue policies that (1) promote American energy independence, and (2) create American jobs. The world of energy, however, is not straightforward. It is global and layered and complex. As a result, the design of an America First energy policy will necessarily become more nuanced and sophisticated as the policy-makers seeking to implement these principles navigate the legal, commercial and political structures of the energy industry.

228 Bismarck speech (n 2).
229 *Ibid.*
230 See BMI United States Country Risk Report, 'Trump's Legislative Agenda Will Not Be Smooth Sailing' (1 April 2017).
231 *Ibid.*
232 See Michael B Gerard and Edward McTiernan, 'Three Major Developments in International Climate Change Law' (American Law Institute Environmental Law, 9–10 February 2017).
233 Coral Davenport, 'Trump Lays Plans to Reverse Obama's Legacy' *New York Times* (22 March 2017).
234 Inside EPA, 'Amid Trump Uncertainty, Study Highlights Cost of Obama's Paris GHG Goal' (20 March 2017).