



## The Final Fury: A User's Guide to Last-Minute Regulations and Policies

During the closing months and days of the Obama Administration, the Department of the Interior (Interior) issued a flurry of regulations, policies, Solicitor's Opinions, and other agency decisions, which will impact operations on private and federal lands. This special edition newsletter provides a short overview of several last-minute actions by Interior. This first article briefly explains the mechanics of how many of the regulations and policies could be rolled back or revised. Several other policies were also summarized in the January 2017 Beatty & Wozniak Energy News Alert, which can be found [here](#).

**Final Regulations and Rules:** The Congressional Review Act (CRA) provides the opportunity for Congress to review and disapprove formal federal regulations and agency rules. *See* 5 U.S.C. §§ 801-808. This statute is applicable to final rules provided to Congress within 60 days of adjournment of the last legislative session. This review period is extended to the new Congress in the event the entire 60-day review period was not available before the close of the prior Congressional session.

Based upon the January 3, 2017 *sine die* adjournment date of the 114<sup>th</sup> Congress, and the calendared 60 days of session/legislative days for the 115<sup>th</sup> Congress, final agency rules submitted on or after approximately June 15, 2016 may be eligible for review and disapproval under the CRA in 2017 by the 115<sup>th</sup> Congress.

The CRA provides several procedural timelines to initiate review and disapproval. In general, the 115<sup>th</sup> Congress has 60 Senate session days or 60 House legislative days (whichever is earlier) to review and disapprove a final regulation. To initiate this process, a member of Congress (from either chamber) must introduce and submit a joint resolution disapproving of the final regulation within 60 days of the formal submission date to Congress. After introduction, the CRA provides for an up or down vote on the joint resolution of disapproval. This vote is under expedited review and is not subject to Senate filibuster.

The CRA utilizes a very broad definition of agency "rule" under the Administrative Procedures Act (APA), which is defined as "the whole or part of an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4); 5 U.S.C. § 804(3).

In practice, utilization of the CRA to disapprove and roll back final regulations is difficult to achieve. Since its enactment in 1996, Congress has only disapproved one final regulation. The Senate has only disapproved a small number of regulations, but these matters were never voted

on by the House. The remainder of these disapproval initiatives were usually referred to a Congressional committee or subcommittee and then not acted upon within the statutory 60-day timeframe.

Significantly, however, given the goals and current pace of President Trump's Administration, and the Republican majorities in the 115<sup>th</sup> Congress, effective use of the CRA is more achievable now than in prior years. Utilization of the CRA by the 115<sup>th</sup> Congress will need to be targeted. A successful effort will likely require extensive coordinated advocacy by affected stakeholders, particularly given the short window for review and disapproval, combined with the existing extensive legislative agenda for the 115<sup>th</sup> Congress.

The most likely oil and gas regulation candidate for CRA review in the coming weeks is the BLM's venting and flaring rule, "Waste Prevention, Production Subject to Royalties, and Resources Conservation," issued on November 18, 2016. Another viable candidate for CRA review are BLM's Planning 2.0 regulations, titled "Resource Management Planning," issued on December 12, 2016.

In addition to these formal rulemakings, under the broad statutory definition of "rule" used by the CRA, statements of policy may also be subject to review and disapproval. While it is not likely that last minute agency policies will be addressed by Congress, potential significant policy candidates for CRA review include the U.S. Fish and Wildlife Service's (FWS) Endangered Species Act Compensatory Mitigation Policy issued on December 27, 2016, and the FWS's general Mitigation Policy issued on November 21, 2016. These types of policies, however, are often addressed by the respective Executive Branch Department or agency, and not Congress.

For final regulations and rules issued prior to June 15, 2016, formal rulemaking would need to be implemented under the APA to modify or retract these rules. In the interim, it may also be possible in certain instances for Interior to issue guidance and instructions on whether, when, and how the agencies should implement those regulations.

**Interior Solicitor Legal Opinions:** In the last two months of the Obama Administration, the Solicitor for Interior issued a series of formal legal opinions, called "M-Opinions," on a variety of matters that could impact oil and gas operations on private and federal lands. The Solicitor is the chief legal officer for Interior and is delegated "all of the authority of the Secretary." 209 DM 3.1. The Department Manual states that a Solicitor legal opinion is binding on all Departmental offices and officials, including the Office of Hearings and Appeals. 209 DM 3.

The Department Manual instructs that the Office of Hearings and Appeals (including the Interior Board of Land Appeals (IBLA)) does not have the authority to "overrule, modify, or disregard formal legal interpretations issued by the Solicitor." 212 DM 13.8(C).

The authority to modify or overrule a Solicitor Opinion is limited to three individuals: (1) the Solicitor; (2) the Deputy Secretary; or (3) the Secretary. 209 DM 3.2(A)(11).

**Other Final Rules and Policies:** Most last-minute Interior policies and instruction memoranda will need to be reviewed and potentially revised or retracted at the Assistant Secretary, agency, or bureau level. The Trump Administration will be focusing on key action items for its first 100 days, and these will likely focus on high policy level actions that promote job creation,

streamline permitting, and roll back or moderate the numerous climate change policies now embedded throughout Interior. It will likely take many weeks or even months for the Assistant Secretary and Bureau Director-level management to be confirmed, installed, oriented, and moving forward within Interior. In the interim, there will likely be delays at the project level, as career staff await guidance and instructions on the new Administration's policies and on how to address policies installed by the prior Administration.

The mechanics for revision or retraction of these policies and instruction memoranda span the range from reissuance of instruction memoranda and policy statements by an Assistant Secretary, Solicitor or Bureau Director, all the way to formal rulemaking under the APA.

Regardless of the specific issue, targeted advocacy in connection with proactively providing legal and policy roadmaps to address and resolve these challenging issues—at the project level and general policy level—will be essential in order to achieve business goals in the coming years.

Please contact [Bret Sumner](#) if you have any questions or would like to discuss further.