



Beatty & Wozniak Special Edition Newsletter

A User's Guide for the Congressional Review Act and Last-Minute Federal Regulations and Policies

During the closing months and days of the Trump Administration, the Executive Branch and its attendant Departments and agencies issued a flurry regulations, policies, and other agency decisions, particularly germane to the oil and gas industry.

While this type of final regulatory push is common upon the conclusion of any presidential administration, the Georgia Senate special election results add an additional twist. With Democratic control of both chambers of Congress, the incoming Biden Administration has an opportunity to work with Congress to roll back several of these final regulations through the Congressional Review Act.

This special edition newsletter provides a short overview of this statute and how it might be used in the coming months.

Congressional Review Act Procedures: The Congressional Review Act (CRA) provides the opportunity for Congress to review and revoke formal federal regulations and agency rules. *See* 5 U.S.C. §§ 801-808. The CRA is applicable to final rules provided to Congress within 60 session days (not calendar days) of adjournment of the last legislative session.

Based upon the January 3, 2021 *sine die* adjournment of the 116th Congress, and the prior calendared 60 sessions of that Congress, final agency rules submitted on or after approximately June 29, 2020 may be eligible for review and disapproval under the CRA in 2021.

The CRA provides several procedural timelines to initiate review and disapproval. In general, the new 117th 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. Under the CRA, this vote is provided expedited review and 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).

Historical Use: In practice, utilization of the CRA to disapprove and roll back final regulations is difficult to achieve. Prior to 2017, Congress had only disapproved one final regulation. This historic track record changed in 2017 when Republicans entered the 115th Congress in control of both chambers. In coordination with the incoming Trump Administration, the GOP utilized the CRA to roll back sixteen significant final regulations issued in the waning days of the Obama Administration.

Likely Candidates for CRA Rollback: Given the stated goals of President-Elect Biden and his incoming Administration, as relevant to the oil and gas industry, there are many likely candidates for CRA review and rollback, including:

- EPA – Methane Emissions – OOOO and OOOOa (September 14, 2020)
- CEQ – Overhaul of NEPA Regulations (July 16, 2020)
- USFWS – ESA Listing and Critical Habitat Regulations (December 16, 2020)
- Army Corps – NWP Renewal – Clean Water Act (January 2021)
- USFWS – Migratory Bird Treaty Act Regulations (January 7, 2021)

Significantly, however, the CRA contains a provision that when Congress successfully invokes the CRA, then the agency is barred from adopting a regulation that is “substantially the same” in the future. While this phrase is not further defined, it does provide a significant consideration for the incoming Administration. As a result, from a tactical standpoint, the Biden Administration may decide to forego CRA rollback for certain regulations where it intends to revise or replace such regulations. EPA’s methane emissions regulations, for example, may fall into this category.

For final regulations and rules issued prior to June 29, 2020, formal rulemaking would need to be implemented under the APA to modify or retract those rules. In the interim, it may also be possible in certain instances for Departments and agencies to issue guidance and instructions on whether, when, and how the agencies should implement those regulations.

Timing and Permitting Implications: The Biden Administration will be focusing on key action items for its first 100 days, and these will likely focus on high policy level actions related to pausing federal oil and gas leasing and development, climate change, greenhouse gases, and promotion of renewable energy projects and infrastructure.

After the inauguration of President-elect Biden, it will take several months for political appointees to have hearings and be confirmed by the Senate, installed, oriented, and in-place to move forward with the Administration’s. 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.

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 to achieve business goals in the coming years.

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