Potential For *Concern*

A recent Supreme Court decision could have serious impacts on the energy sector. BY MICHAEL S. GIANNOTTO

On March 9, 2015, the United States Supreme Court rendered a decision (Perez v. Mortgage Bankers Association) that allows federal agencies (such as the Environmental Protection Agency ("EPA") and the Department of the Interior ("DOI")) to alter longstanding interpretations of their regulations without first obtaining any input from regulated entities – even where those entities may have spent hundreds of millions of dollars designing, constructing and operating facilities in reliance upon the existing interpretations, and where compliance with the new interpretation might require retrofitting those facilities. While the Perez case did not involve a regulation impacting the energy or mining sectors, the holding of the court could nonetheless have a significant effect on those sectors.

By way of background, the mining and energy sectors are heavily regulated in the United States by a host of federal agencies. These agencies have adopted regulations governing issues ranging from where facilities may be located; to how those facilities must be designed, operated and constructed; to how such facilities must be closed and reclaimed at the end of the operating lives. Prior to promulgating (or amending) such regulations, the federal agency involved must adhere to certain procedural requirements

set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. 551 et seq. Among other things, the agency must: (a) provide public notice of the proposed regulation; (b) give potentially regulated entities an opportunity to submit formal comments and data; (c) consider and respond to any significant comments received; and (d) if the agency promulgates the regulation (or a formal amendment to it), describe its basis, purpose, and justification. See 5 U.S.C. §553(b)-(c). In addition, pursuant to Executive Order No. 12,866 (Oct. 4, 1993), the regulation must prior to finalization be vetted by the Office of Management and Budget. Finally, any regulated entity that is dissatisfied with the final regulation (or final amendment to the regulation) has the ability to challenge the regulation in court as contrary to statute or other law, or as arbitrary or capricious. See 5 U.S.C. §§701-706.

OPEN TO INTERPRETATION

Despite the numerosity and complexity of federal regulations governing the energy and mining sectors, those regulations often contain ambiguities or fail to address particular matters that are of importance. To deal with such situations, and frequently in order to avoid the procedural requirements of the APA, federal agencies (including EPA and DOI) often issue "interpretations" of existing regulations, rather than formally amending the regulation, to address ambiguities or fill gaps. Various vehicles are used for this purpose, including "guidance" documents, statements in the preambles to final rules, internal Agency memoranda, and correspondence from agency officials to regulated entities. The federal courts normally give substantial deference to such agency interpretations as being the correct construction of the agency's own regulations. In most instances, therefore, when carrying out their operations, mining and energy companies are effectively forced comply not just with the text of a regulation itself, but also with the agency's interpretation of that regulation. Companies accordingly make highly consequential investment, business and engineering decisions – such as whether and how to design or expand their operations – based on the regulations as the agency has interpreted them.

Despite the numerosity and complexity of federal regulations governing the energy and mining sectors, those regulations often contain ambiguities or fail to address particular matters that are of importance.

The issue in Perez was whether an agency must go through the procedures specified in the APA – including public notice and comment, response to comments, and statement of basis and purpose of the rule – when it issues a new interpretation of a regulation that changes an existing interpretation. The regulated entity in Perez argued that once an existing interpretation becomes "definitive" (i.e., clearly stated as the agency's view), and regulated entities have relied on it, the existing interpretation has effectively become part of the regulation, and therefore it should only be allowed to be amended through the formal APA rulemaking process. The National Mining Association submitted a "friend of the court" brief to the Supreme Court supporting the regulated entity's position, and pointing out instances where agencies have in the past changed longstanding interpretations on which hardrock mining companies rely and which caused or threatened substantial havoc to regulated entities. This included a change of interpretation by the Solicitor of the DOI during the Clinton Administration relating to the numerical limits imposed by the Mining Laws for mill sites located by hardrock mining companies on federal lands to support their mining activities. The "reinterpretation" would have erased over 100 years of existing doctrine and wiped out substantial investments in existing and planned mines by making illegal many operations that had existed or been planned for decades. Fortunately, the Congress stepped in to preclude this new "reinterpretation" from taking effect, and it was formally retracted during the Bush Administration.

AVOIDING COMPLIANCE?

Perez legitimizes a "reinterpretation" practice that many agencies have employed in the past in order to avoid complying with the procedural requirements set forth in the APA. Given Perez, however, agencies may now have even less hesitation to reinterpret their regulations without seeking input from regulated entities, even where entities have relied on the old interpretation in designing and operating their facilities.

Even though Perez holds that agencies need not comply with the procedures in the APA in order to issue reinterpretations of regulations, there still remain substantive grounds on which to challenge the validity of a reinterpretation as being an incorrect construction of the regulation. Among other things, the Supreme Court has held that a new agency interpretation that is contrary to the Agency's initial intent at the time of the regulation's promulgation, or that conflicts with a

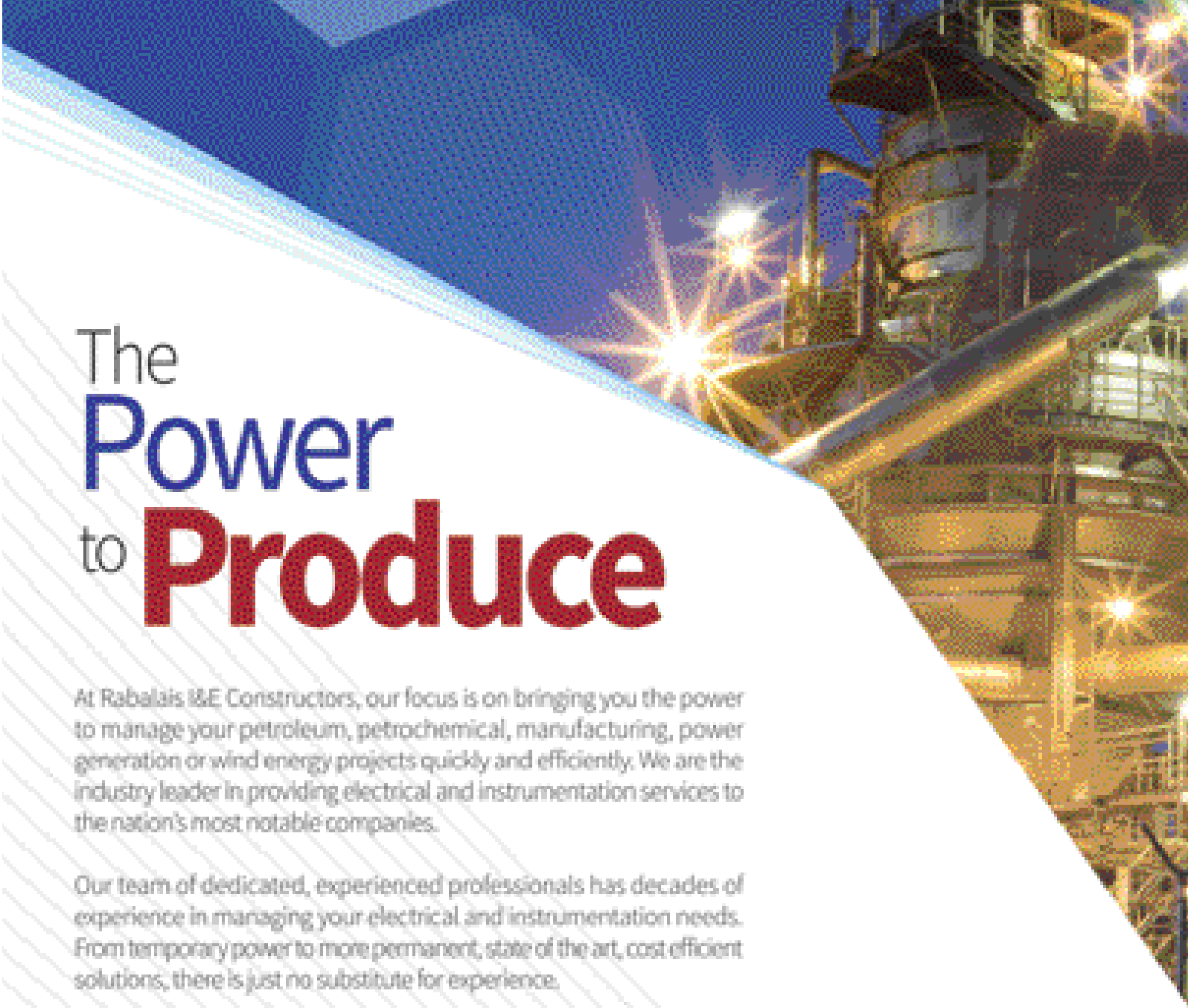
prior interpretation, is due less deference than an initial interpretation, and can therefore more easily be shown to be an incorrect construction of the regulation. Moreover, an agency must provide more substantial justification for the validity of the new interpretation when that interpretation rests upon factual findings that contradict those which underlay its prior interpretation, or when its prior interpretation has engendered serious reliance issues. Courts have in addition invoked the constitutional requirement of due process to preclude agencies from imposing penalties for failure to comply with a regulatory interpretation announced after the supposed offense, unless the regulated community had adequate notice of the interpretation. It is unclear, however, whether due process precludes the agency from requiring compliance with the new interpretation going forward – even if that might mean retrofitting existing facilities that were designed and constructed in reliance on the old interpretation.

Agencies may now have even less hesitation to reinterpret their regulations without seeking input from regulated entities, even when entities have relied on the old interpretation in designing and operating their facilities.

Despite these substantive protections, Perez makes clear that regulated entities have no right to notice of proposed reinterpretations, or to provide the agency with data or arguments regarding the wisdom, desirability or impact of a proposed reinterpretation, before it is finalized. Nor does the agency have the duty to review or respond to any such data or arguments that might be submitted to it. In addition, a regulated entity will typically not be able to obtain judicial review of a reinterpretation at the time it is issued, but instead will usually be able to obtain such review only if it violates the regulation as reinterpreted and an enforcement proceeding is brought against it. As such, a regulated entity may have to risk civil or criminal penalties in order to challenge the validity of a reinterpretation. **EMI**

—

MICHAEL S. GIANNOTTO *is a senior partner in Goodwin Procter's Business Litigation and Environmental Groups and head of litigation for the firm's Washington, D.C., office. He is a nationally recognized expert in environmental issues impacting domestic and international hardrock mining companies and in bankruptcy and bad faith litigation for insurance companies.*



The Power to Produce

At Rabalais I&E Constructors, our focus is on bringing you the power to manage your petroleum, petrochemical, manufacturing, power generation or wind energy projects quickly and efficiently. We are the industry leader in providing electrical and instrumentation services to the nation's most notable companies.

Our team of dedicated, experienced professionals has decades of experience in managing your electrical and instrumentation needs. From temporary power to more permanent, state of the art, cost efficient solutions, there is just no substitute for experience.

- Primary & Secondary Systems
- Distributive Control Systems
- Cathodic Protection
- Ground Testing/Certification
- Generator Systems
- Design/Build Capability
- High Voltage Splicing, Terminations & Testing
- Solar/Wind Energy
- Lighting Systems
- Panel Fabrication
- Teledata/Fiber Optics
- Security/Access Controls
- Conveying Systems
- RTU/SCADA Services
- Wiring/Panel Upgrades

RABALAIS
INSTRUMENT & ELECTRICAL CONSTRUCTORS

11200 Up River Rd
Corpus Christi, TX 78410

T: (361) 242-3121

www.rabalais.com/emi
TECL #29608

Five Offices to Serve You:

Corpus Christi, Houston, San Antonio, Dallas, Midland/Odessa, TX