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Administration's Executive Order on Climate and Energy Is Controversial, and May Shift Action to States

By Christopher J. Carr, Michael Jacob Steel, Robert S. Fleishman, and Ali A. Zaidi*

The authors of this article discuss President Trump's "Executive Order on Promoting Energy Independence and Economic Growth."

President Trump has issued an "Executive Order on Promoting Energy Independence and Economic Growth"[1] ("Executive Order") that takes aim at a broad range of federal climate and energy programs and regulations. The Executive Order articulates a policy direction that runs counter to the previous administration's Climate Action Plan and sets in motion a process to reverse many of the actions associated with that Plan. In addition, the Executive Order lifts the current leasing moratorium on federal coal and starts a process to revise certain oil and gas programs and rules.

Implementation and execution of the Executive Order and this new policy direction will almost certainly face significant procedural and operational hurdles, as well as strong opposition from diverse constituencies on multiple fronts. Additionally, states that have long been leaders in the climate and clean energy area, such as California, and states that have more recently begun to assert leadership in that area, such as New York, can be expected to increase their efforts.

RESTARTING THE CLEAN POWER PLAN PROCESS

The Executive Order restarted the process around the Clean Power Plan ("CPP"). In 2015, the Environmental Protection Agency ("EPA") finalized the CPP, the first-ever greenhouse gas emissions limits for existing power plants

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[1] https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economi-1.

under the Clean Air Act. As anticipated, the regulations were challenged by a number of states and industry interests in the D.C. Circuit. On February 9, 2016, the U.S. Supreme Court issued a stay,[2] keeping the regulations from taking effect before a decision on the merits could be issued. On September 27, 2016, the D.C. Circuit heard oral argument *en banc*. It has not yet ruled on the merits.

On the same day the Executive Order was signed, the Justice Department on behalf of the EPA filed a motion asking the D.C. Circuit to "hold these cases in abeyance" while the agency conducts its review of the CPP. Advocates of the CPP, including environmental organizations and also States, strongly opposed any such suspension of the case. However, on April 28, the D.C. Circuit granted the motion to hold the cases in abeyance for 60 days.

On April 4, before the court even granted the stay, EPA announced it would review the Clean Power Plan. This lengthy process of public comment will involve not just regulations on existing sources but also related regulations on new sources, trading, and model state plans.[3] That same publication also announced the withdrawal of two related proposed rules (*i.e.*, "Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations,"[4] and "Clean Energy Incentive Program Design Details,"[5] *via* Federal Register on April 3.[6]

The exact direction the Administration will choose remains unclear. In announcing the Executive Order, senior officials questioned[7] whether greenhouse gas emission limits for power plants are required at all. This question—namely, whether the decision in *Massachusetts v. EPA*, a "mobile source" case, applies to "stationary sources"—was raised by some in the utility industry in litigation before the D.C. Circuit in *UARG v. EPA*, which upheld greenhouse

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[2] https://www.supremecourt.gov/orders/courtorders/020916zr3_hf5m.pdf.

[3] *See* https://www.federalregister.gov/documents/2017/04/04/2017-06522/review-of-the-clean-power-plan.

[4] 80 FR 64966.

[5] 81 FR 4294.

[6] *See* https://www.federalregister.gov/documents/2017/04/03/2017-06518/withdrawal-of-proposed-rules-federal-plan-requirements-for-greenhouse-gas-emissions-from-electric.

[7] *See* https://www.whitehouse.gov/the-press-office/2017/03/27/background-briefing-presidents-energy-independence-executive-order.

gas regulation of stationary sources. The Supreme Court declined to take up that specific issue when it granted review in the case.[8]

TAKING AIM AT OTHER CLIMATE ACTION PLAN ELEMENTS

The Executive Order creates uncertainty around other elements of the Climate Action Plan. Two elements of the Executive Order unsettle programmatic approaches, returning the default agency action to project-by-project level judgments. The result could be litigation involving executing agencies.

First, the Executive Order abandons use of the "social cost of carbon" ("SCC") in federal decision making. The SCC was the product on an interagency process undertaken by the previous Administration, seeking to quantify the costs of climate inaction and use that economic analysis in rulemakings. Recent litigation shows how failure to account for the social costs of carbon may be challenged, at least at the project-level. For example, in Colorado, the U.S. Forest Service was admonished by a federal judge for failing to use the social cost of carbon in a National Environmental Policy Act ("NEPA") analysis. The *High Country* case shows how other laws could be used to challenge a lack of analysis of climate impacts with respect to federal undertakings.

Second, the Executive Order withdraws the Council on Environmental Quality guidance that outlined how executive department agencies undertake climate analysis as part of NEPA processes. Again, this decision is likely to introduce the same project-level uncertainty that prevailed before the guidance was adopted.[9]

Finally, the Administration is pulling back Executive Order 13653 of November 1, 2013 (Preparing the United States for the Impacts of Climate Change), and the Presidential Memorandum of September 21, 2016 (Climate Change and National Security). Both had laid out internal procedures for federal agencies and departments—especially as they relate to internal planning around climate adaptation and resilience.

ENERGY ACTIONS REACHING BEYOND THE CLIMATE ACTION PLAN

The Executive Order also seeks to reverse the previous Administration's approach to coal, oil, and natural gas in other ways. First, the Executive Order ends the moratorium on leasing of new coal mining lands through the Interior

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[8] *See* https://www.supremecourt.gov/qp/12-01146qp.pdf.

[9] *See Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172 (9th Cir. 2008), *available at* http://www.americanbar.org/publications/trends/2011_12/may_june/greenhouse_gas_litigation_and_nepa_split_in_the_courts.html.

Department. Future leases, however, may be subject to environmental litigation. Second, the Executive Order seeks to revise or rescind Interior Department regulations associated with hydraulic fracturing on public lands. The Interior Department recently signaled this move in a motion before the U.S. Court of Appeals for the Tenth Circuit, where the fracking rule is being litigated.[10]

The Executive Order takes a similar approach to the Interior Department's regulation regarding venting and flaring of natural gas for production on public lands. In addition to these steps on public lands, the Executive Order directs the EPA to review the final rule entitled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources" for consistency with the Trump Administration's policy direction.

Finally, the Administration has kicked off a process that pulses the federal agencies for new ideas on ways to promote "Energy Independence" by focusing on existing agency actions that potentially burden the safe, efficient development or use of domestic energy resources, signaling likely future executive actions on this subject.

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[10] https://www.law360.com/articles/902558/doi-plans-to-rescind-obama-era-fracking-rule.