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CLIENT ALERT

President Trump's Energy Independence Executive Order: What Does It Do, and What Comes Next?

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Earlier this week, President Trump issued a sweeping executive order that seeks to promote fossil fuel industry growth by rolling back almost every aspect of President Obama's ambitious but controversial Climate Action Plan.[1][1] Among the actions the administration seeks to rescind is the Clean Power Plan, the previous administration's signature environmental regulation, which was intended to reduce power plant CO2 emissions by 32 percent from 2005 levels by 2030. Though issued in 2015, the Clean Power Plan has never been implemented due to an extraordinary Supreme Court stay issued in early 2016. It is not yet clear how aggressive the new administration's rollback will be or whether it will succeed. Only one thing is clear: whatever the administration does will take time and result in more litigation. Beyond the Clean Power Plan, the Energy Independence Order reverses several other environmental actions and policies from the last administration and sets the stage for regulatory revision or elimination of many others.

What the Order Does

If the Order on Promoting Energy Independence and Economic Growth is to be a guide, the Trump administration has high aspirations for reshaping environmental regulation of domestic energy production. The Order announces many goals, some of which may be difficult to reconcile with others in the document. As the Order's title conveys, it is meant to increase American use of domestically produced energy, thereby "ensuring the Nation's geopolitical security." It is also meant to promote economic growth and job creation, as well as "to ensure that the Nation's electricity is affordable, reliable, safe, secure, and clean." The Order emphasizes the importance of coal and natural gas, as well as nuclear, hydroelectric, and other renewable energy sources. Finally, the Order notes the importance of federalism in environmental regulation, stating that efforts to "promote clean air and clean water for the American people" must "respect[] the proper roles of the Congress and the States concerning these matters in our constitutional republic." The emphasis on federalism bears the imprint of EPA Administrator Scott Pruitt, who, as Attorney General of Oklahoma, filed several lawsuits against the United States government alleging federal government overreach into state affairs.

The Order's directives are almost as broad as its goals. Besides its policy pronouncements, the Order contains six sections, each with a different focus. Those directives:

- Order each executive branch agency to review and suspend, rescind, or revise any regulations or agency actions "that potentially burden the development or use of domestically produced energy resources".
- Rescind certain Obama-era executive orders, guidance documents, and reports relating to consideration of climate change in federal actions.
- Order EPA to review and revise or rescind the Clean Power Plan, the related new source performance standards (NSPS) for fossil fuel-fired energy generation, and related documents such as EPA's supporting legal memorandum.

- Halt the consideration of carbon-driven climate change in evaluation of proposed regulations and other federal actions.
- Eliminate an Obama-era moratorium on granting coal leases on federal lands.
- Order the relevant agencies to review and revise or rescind certain regulations affecting oil and gas production.

Some of these directives can be accomplished quickly. Withdrawal of previously issued executive orders and White House reports, guidelines, and policy documents is within the President's power and can be made effective immediately. For example, the Energy Independence Order's dissolution of the Interagency Working Group on Social Cost of Greenhouse Gases, withdrawal of several White House reports on the social cost of carbon, and the President's directive that agencies no longer consider the cost of greenhouse gas emissions when performing cost-benefit analyses of proposed regulations will have an immediate impact on the way rules regulating carbon-emitting industries are analyzed. Similarly, withdrawal of the Council on Environmental Quality's greenhouse gas guidelines should help limit (but may not eliminate entirely) consideration of indirect climate change-related effects in environmental impact studies and assessments (EISs and EAs) required under the National Environmental Policy Act (NEPA). Such a change could have significant practical effects, as EISs and EAs must be conducted as part of approval of all major government actions, including permitting private sector energy projects.

Likewise, the government can immediately end the federal land coal leasing moratorium. The moratorium was originally put in place through an order issued by the Secretary of the Interior, and the new Secretary of the Interior may rescind that order without going through the notice-and-comment process of an Administrative Procedure Act (APA) rulemaking.

The Clean Power Plan

As the product of APA notice-and-comment rulemaking, the Clean Power Plan will not be as easily rescinded or revised. The Energy Independence Order directs the EPA Administrator to immediately review the Clean Power Plan and associated rules, memoranda, and guidance and, as soon as practicable, to publish a rule proposing to suspend, revise, or rescind those rules. It remains to be seen how the Administrator Pruitt will choose to approach that mission.

A number of options present themselves, and one of the biggest questions is how aggressively the administration will attack the underlying rationale for the Clean Power Plan. The Plan itself comprises three "building blocks." Building Block 1 calls for actions "inside the fence line" to reduce emissions from existing power plants. That is, specific plants are to make improvements to their facilities and processes in order to produce the same amount of electricity with lower carbon emissions. Building Block 1 rests on an interpretation of the Clean Air Act that is conservative and generally consistent with over 40 years of EPA practice. Building Blocks 2 and 3 rely on aggressive interpretations of the Act to require what has become known as "generating-shifting." Building Block 2 calls for shifting generation from existing coal-fired power plants to existing plants fueled by natural gas, which emit at roughly half the level of coal plants. Building Block 3 calls for an overall shift in generation from existing fossil fuel plants to renewables, which do not emit any greenhouse gases.

Option 1: Replace with a Building Block 1 Rule

The most conservative approach for EPA to take would be to rescind Building Blocks 2 and 3, but to leave Building Block 1, or something very similar to it, in place. That approach would seem to satisfy one of President Trump's main goals—eliminating the rule's explicit preference for natural gas and (even more so) renewables over coal, and requiring instead only that coal plants become more efficient to the extent they can do so. A revised rule leaving Building Block 1 in place might also be the easiest to

defend in court against the inevitable challenges from states and environmental groups, given that in general it would comport with decades of EPA practice under the pertinent section of the statute. On the other hand, such an approach would continue to impose regulatory and economic burdens on the coal industry and would leave in place an acknowledgement—anathema to many in the administration and Congress—that greenhouse gases should be considered pollutants that continue to endanger public health and welfare. It would also mean that EPA would likely remain under an obligation to consider regulating greenhouse gas emissions from other sectors.

Option 2: The Section 112 Exclusion

A second, more aggressive approach would involve reinterpreting two conflicting amendments to section 111(d) of the Act—one from the House, one from the Senate—that were never reconciled in the 1990 amendments to the Act; both were signed into law by President George H. W. Bush. The challengers to the Clean Power Plan have urged that, under the appropriate rules of construction, the House amendment governs, and the Clean Power Plan is barred because existing sources in a category cannot simultaneously be regulated under section 111 (the source of the Clean Power Plan) and section 112 (which regulates hazardous air pollutants). The challengers contend that because power plants are currently regulated under section 112 through the Mercury and Air Toxics Standards, they may not be regulated under section 111(d). Under the Obama administration's interpretation of those conflicting amendments, which favors the Senate amendment, the existence of a section 112 regulation poses no bar to regulation under section 111(d). When the Clean Power Plan case was heard before ten judges of the D.C. Circuit on September 27, 2017, the government argued that its interpretation was entitled to deference under the Supreme Court's *Chevron* doctrine. If that is correct, then it would seem the new administration could just as easily argue that *it* is entitled to *Chevron* deference if it now decides that the House version governs and that the Clean Power Plan is barred.

Pursuing this route could take the new administration less time, because it would not require development of a new factual record. It is purely a legal conclusion. EPA would have to provide the public notice of its new interpretation and an opportunity to comment on it, but it could then quickly finalize a new rule. That final rule, however, would then be subject to judicial review, the outcome of which cannot be predicted based on the pending Clean Power Plan case.

Option 3: Reversing the Endangerment Finding

Some have been urging EPA to take a far more aggressive approach to rolling back not only the Clean Power Plan but all greenhouse gas-related regulation by revisiting and possibly reversing EPA's 2009 finding that anthropogenic greenhouse gas emissions pose a risk of endangerment to public health and welfare. If EPA found there was no endangerment, then it would have no authority to regulate greenhouse gas emissions under the Clean Air Act. This would be a heavy lift, as the agency would need to put forward new scientific data and analysis demonstrating why—despite previously finding that they are harmful—greenhouse gasses no longer or, in fact, never did, pose a threat to public health and welfare. It would also be the subject of fierce legal challenge and possibly have profound political and diplomatic repercussions.

The New Source Performance Standard

The President also directed EPA to reconsider the Obama administration's NSPS and standards for modified and reconstructed sources in the fossil fuel-fired power sector. We focus here on the NSPS, which is the most significant and, as promulgated by

EPA, requires that new coal-fired generation install and operate partial carbon capture and sequestration (CCS) technology, which is not yet in commercial use anywhere in the United States, and that new gas units be based on a combined cycle (NGCC) design. If EPA determines to retain the greenhouse gas endangerment finding, expect it to reconsider whether CCS has been “adequately demonstrated” for use, and likely to replace its rule with one requiring use of a technology such as supercritical pulverized coal that has been demonstrated and is in use in the United States. If it reverses the endangerment finding, on the other hand, there will be no replacement NSPS.

What Happens to the Pending Litigation?

Typically, new administrations ask the courts to put pending litigation challenging the past administration’s regulations on hold when the new administration is reconsidering those regulations. EPA has now made precisely such requests of the D.C. Circuit, which is considering challenges to both the Clean Power Plan and the NSPS. And, typically, the D.C. Circuit grants such requests, preferring not to continue litigation when the challenge may become moot due to the reconsideration. In line with that usual practice, on March 30 the D.C. Circuit removed the NSPS case from the court’s April 17 argument calendar because of EPA’s announced intent to reconsider that rule. We expect the court will ultimately dismiss this case once EPA concludes its rulemaking to revise or rescind the rule. Any new judicial challenge will then be to that new rulemaking.

It’s less clear what will happen to the Clean Power Plan litigation. Past experience suggests the court will put that case in abeyance, too. That case, however, has a number of unique aspects to it that make past experience less salient: the case has not only been briefed, it has been argued; not only has it been argued, but it was argued to the court sitting *en banc*; and the argument took place over six month ago. Ultimately, the decision to hold the case in abeyance rests in the court’s exercise of its discretion.

Effect on other Rules

The Energy Independence Order also prescribes a process for identifying and revising or rescinding other rules, not specifically addressed in the order, that could impose burdens on the production and use of domestic energy resources. The review process includes three milestones that must be met according to set deadlines:

First, within forty-five days of the Energy Independence Order’s issuance (May 12, 2017), the head of each executive branch agency that might have regulations, orders, guidance, policies, or any other rules or programs that “potentially burden the development or use of domestically produced energy resources” must submit a plan for reviewing such rules and programs to the Vice President, the Director of the Office of Management and Budget (OMB) and a number of other White House officials. Agency heads who do not believe their agencies have any such regulations or programs must submit statements saying so. Seventy-five days later (July 26, 2017), each agency must submit a draft report describing the agency’s review and including specific recommendations for alleviating or eliminating regulatory burdens on domestic energy production. Sixty days after that (September 24, 2017), the draft reports must be finalized.

The Energy Independence Order dictates that the agencies shall then act “as soon as practicable” to suspend, revise, or rescind burdensome rules or actions identified in the review process and reports. For some actions, guidelines, and policy documents, the change may be nearly instantaneous. To revise or rescind final regulations, however—including the Clean Power Plan and other regulations specifically mentioned in the Energy Independence Order—the agencies will have to draft new proposed rules

with sufficient factual and policy bases, publish those rules for comment, consider comments and revise the draft rules, and then publish final rules. After completing that process, the agencies are sure to face litigation on at least the most controversial rules. All in all, despite the short time table under the Energy Independence Order for identifying rules to be revised or eliminated, actually doing so may take several years.

Conclusion

President Trump's Energy Independence Order marks a striking turn in policy regarding climate change from the direction taken over the past eight years. While certain elements of it may be implemented almost immediately, most will require notice-and-comment rulemaking. That in itself is a complex and time-consuming process, and the follow-on litigation will consume an additional one to two years for each significant rule that is revised or rescinded. The regulated sectors and other stakeholders should be prepared for this period of uncertainty. They should also be gearing up to make sure their voices are heard, and their information considered, in the coming rulemakings and litigation.

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