

# ENERGY & ENVIRONMENT

## NOT NECESSARILY A COMPLETE REVERSAL OF OBAMA'S OBJECTIVES



The Trump administration has made energy and environmental policy a top priority and has outlined some of the regulatory reforms it intends to pursue, including easing major regulatory burdens on industry, promoting coal production and consumption, and shifting authority

from the federal government to the states. While these initiatives would represent a departure from many of the Obama administration's priorities, they would not necessarily reverse other objectives that the prior administration held near and dear, such as improving the nation's power grid and loosening regulatory burdens on infrastructure development. President Trump's promotion of coal as an energy source, for example, doesn't necessarily equate to a rejection of renewables.

### WHAT WE KNOW:

#### R.I.P. THE CLEAN POWER PLAN AND THE WATERS OF THE UNITED STATES RULE

As a candidate, Trump promised to rein in the Environmental Protection Agency, which he alleged was making it too difficult for energy companies to develop and operate their facilities. He also criticized the Obama administration for legislating by executive order, sidestepping both Congress and the courts. The installation of Scott Pruitt—who as Oklahoma attorney general sued the EPA at least 14 times—to lead the EPA underscored the president's commitment to making the agency more business friendly.

Within its first 100 days, the administration has made a significant down payment on its promises with regard to two recent and controversial EPA rulemakings: the Waters of the United States rule and the Clean Power Plan, both of which are on appeal in the federal courts. On February 28, 2017, the president signed an executive order directing the EPA

to review and reconsider the WOTUS rule, and on March 28, the president ordered the EPA to "take all steps necessary" to review, suspend, revise, or rescind the Clean Power Plan, including all legal guidance developed in support of that rule. On April 28, 2017, the D.C. Circuit granted a 60-day abeyance of the case and ordered supplemental briefing on important procedural matters.

These EOs, while very significant, are only the beginning of a lengthy regulatory process that is certain to result in protracted litigation. "The administration's swift action on the WOTUS rule is no surprise," says [David Chung](#), a partner in Crowell & Moring's [Environment & Natural Resources Group](#). "But undoing a final regulation itself entails a rule-making process, whether the administration simply rescinds the rule or whether it rescinds and replaces it. Whether the forthcoming rulemaking actions stick is an entirely different question. So there is significant uncertainty."

The WOTUS rule asserts EPA power over every creek, pond, or other wet spot with a "significant nexus" to a "navigable waterway." President Obama said its purpose was to "provide the clarity and certainty business and industry need about which waters are protected by the Clean Water Act" and hold polluters accountable. But interests in homebuilding, agriculture, and other industries rallied against the rule because of the power it could give the EPA to penalize them if, for instance, a farmer uses fertilizer in or near a ditch.

Because of President Trump's and Administrator Pruitt's opposition to the WOTUS rule, as well as its uncertain status on appeal, "we don't expect any aspect of the WOTUS rule to go into effect this year, if ever," Chung says. "The questions are, how will it be pulled back, and what will replace it. Nothing is locked in yet." Interestingly, the U.S. Supreme Court recently decided not to stay proceedings on the narrow issue of whether facial challenges to the WOTUS



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rule belong in a federal district court or a court of appeals in the first instance. But those proceedings have no bearing on the merits of the rule.

The March 28 EO on the Clean Power Plan, one of Obama’s signature regulatory achievements, has broad implications for the nation’s environmental and energy policy. The final rule, promulgated in 2015, was the first national regulation to address carbon emissions from new and existing power plants and was announced as a historic and important step in reducing national greenhouse gas emissions and curbing climate change. The Obama EPA characterized the Clean Power Plan as offering the utility sector “the ability to optimize pollution reductions while maintaining a reliable and affordable supply of electricity for ratepayers and businesses.”

Opponents of the plan (including Pruitt, then attorney general of Oklahoma) have fought the Clean Power Plan on a number of grounds, including allegations that the EPA exceeded its legal authority and impinged on core state prerogatives with regard to resource planning and the development of electric power infrastructure, and the concern that the Clean Power Plan represents an economically destructive, “job-killing” approach to curbing carbon dioxide emissions. Many of the rule’s opponents, including the president, have also challenged the science that supports greenhouse gas reduction policy.

Today, the rule remains stayed by the Supreme Court while pending before the D.C. Circuit, and has been publicly disavowed by the new administration. The EO does not moot the pending D.C. Circuit appeal of the Clean Power Plan, but it essentially ensures that the Clean Power Plan will not become the law of the land. What replaces it, however, will be litigated for many years to come, and may ultimately be addressed by Congress.

If the Trump administration simply scraps the Clean Power

## THE SOCIAL COST OF CARBON

Some of the later Obama administration regulations justified their promulgation in part on cost-benefit analyses that assumed a “social cost of carbon.” Implicit in this recognition was the idea that carbon dioxide and other greenhouse gases are causing global climate change and, therefore, that decreasing the output of such gases could help roll back man-made climate change. For example, the previous administration cited the “avoided carbon” and its social costs as factors to be considered when weighing alternative power resources that would emit less greenhouse gases than, say, a new coal-fired plant, or that might replace an existing coal-fired place—*ipso facto*, putting such a “cleaner” facility online would yield the “benefit” of reducing the emissions of greenhouse gases from the older or differently sourced power plant it replaced and therefore produce a significant environmental benefit.

President Trump’s March 28 EO tackled this issue head-on, directing the elimination in all federal agencies of the “social cost of carbon” metrics used by the prior administration and disbanding the interagency working group established by Obama to assess those costs. In an administration that has already announced that it will lessen regulatory costs imposed on the business community, the burden of justifying new regulation will go up by definition if agencies are either directed not to consider a social cost of carbon or are directed to heavily discount that cost.

“The extent to which the administration even recognizes carbon consumption as having a cost associated with it remains to be seen,” Crowell & Moring’s Larry Eisenstat says. “And it isn’t clear how it will treat any externality, any potential pollutant.”



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“Nuclear power is one of the cheapest energy resources, but it’s not recovering its fixed costs in the wholesale competitive power markets.” —Richard Lehfeldt

## THE PRICE OF BACKING AWAY FROM PARIS CLIMATE COMMITMENTS

The Trump administration has questioned the scientific consensus underlying the landmark 2015 multilateral climate accord (the Paris Agreement) that was executed by President Obama in the spring of 2016. The goal of the Paris Agreement is to collectively limit the increase in global temperatures to no more than two degrees Celsius.

The new administration has already begun the process to rescind or substantially revise the Clean Power Plan, a cornerstone of Obama’s effort to achieve the Paris goals. But exiting the Paris Agreement could be risky, says Crowell & Moring’s [Tom Lorenzen](#). Withdrawal could have broad economic policy implications, he says, that range from ceding competitive advantage in trade and technology innovation to China, to hampering job growth in clean energy and infrastructure development, and could also lead to trade wars. “Trade partners, including China and the EU, each implementing aggressive, market-based climate policies, could retaliate for our backing away in a way that could have serious negative consequences for the U.S. economy,” he says.

Plan and the WOTUS rule and shifts authority over air and water pollution to the states, an additional concern is whether the states are up to the task, notes [Larry Eisenstat](#), a partner at Crowell & Moring and chair of the firm’s [Energy Group](#). “Simply counting on the states to perform federal statutory mandates doesn’t make those mandates go away—it just shifts costs to state budgets, potentially invites diverse and conflicting interpretations of the law, and is certain to spur litigation for years to come,” he says.

The Clean Air Act and the Clean Water Act already encourage delegating authority to state environmental regulators, with the EPA acting as a federal backstop to support the states, foster uniformity, and ensure compliance, adds [Elliott Laws](#), a Crowell & Moring partner, chair of the firm’s Environment & Natural Resources Group, and a member of the [Government Affairs Group](#). When coupled with Trump’s proposed 31 percent EPA budget cuts, however, the states will be called

on to shoulder statutory responsibilities they may not be able to afford and that are certain to invite citizen suits that will sap scarce resources further.

### WHAT WE DON’T KNOW: THE ROAD BACK TO “TRADITIONAL” ENERGY RESOURCES

The Trump administration has already announced that it will review another milestone of Obama’s environmental legacy: a stiff ramp-up in requirements for improved automotive fuel economy and reduced emissions. Automakers requested this review, claiming that they are unable to meet the higher standards in time, and that there is insufficient consumer demand for the types of smaller or electric-powered vehicles on which the companies are depending to meet the standards. The Trump administration could seek to rescind or delay the fuel economy standards and could also move to strip some of the federal tax credits that were put in place to promote the commercialization of all-electric and plug-in hybrid vehicles.

The Trump administration has already weighed in forcefully on energy production and the development of energy-related infrastructure. Among the first EOs signed by Trump authorized completion of the Keystone XL and Dakota Access natural gas pipelines—both projects the Obama administration held in abeyance after environmentalists objected.

“I think those pipelines will probably get built,” says Laws. “President Trump has made it clear that shale and fracking are things he wants to support.”

Trump also has put a major emphasis on reviving the coal industry, which has been stymied both by historically low natural gas prices and by Obama-era environmental regulations.

“It will be interesting to see how the president and his agencies balance their goal of wanting to preserve coal and coal-fired plants against their preference for free markets and competition, because right now coal-fired generation is above market,” says Eisenstat. “The president may not want to pick winners and losers or subsidize various technologies for cleaning up coal. But in today’s market, various coal plants would have to be subsidized in order to stay in operation or be built.”

“Elections have consequences,” said President Obama in 2010, and the new administration could appropriately seek to put its thumb on the scale for the coal industry much as the prior administration did for renewables and demand response—through direct subsidies, tax reform, research and de-



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velopment, and procurement policy (the federal government being the largest electricity consumer in the country). But all of these come at substantial literal and political cost. Undoing regulations is more difficult than Candidate Trump made it out to be, and it is not likely to revive the coal industry on its own; the next steps in that initiative are largely unwritten.

## THE ROLE OF REGULATION

“The good news for the utility industry is that the president has singled out the power grid as something that must be significantly augmented for reliability and security purposes,” Eisenstat says, “and that he wants to plow \$1 trillion into rebuilding the nation’s infrastructure.” Electric power infrastructure has traditionally been financed through ratepayer charges, rather than through the federal authorization and appropriations process, and that makes such development potentially easier politically.

The administration could help support electric infrastructure development in at least two ways. It could throw its weight behind efforts to liberalize and speed up the approval process for new transmission lines and upgrades to existing lines. Interstate transmission lines now require regulatory approvals from all states through which the line passes, giving effective veto power to any state on the line. Congress last tried to give the Department of Energy and the Federal Energy Regulatory Commission limited federal backstop authority to override a state’s refusal to approve a transmission line in the 2005 Energy Policy Act, but successful challenges to that provision all but neutered its effectiveness. The underlying problem still needs to be addressed: if the nation’s transmission system is to be strengthened and modernized, the century-old regulatory structure supporting its development has to be reexamined, streamlined, and rationalized.

A different issue has emerged with regard to power plant development and plant life extension. Last year, in the *Talen v. Hughes* case, the Supreme Court held that supplemental payments to the developer of a new natural gas power plant, authorized by the state of Maryland and effectuated through contracts that compensated the developer for the difference between the PJM cost of power and the competitively bid cost of actually building the plant, were preempted under the Federal Power Act.

The Court made clear that its decision was limited to the particular facts, but the *Talen* case has spawned numerous dis-

putes before FERC and several state regulatory commissions, in federal district court cases, and in an ongoing technical conference at FERC, all asking the same question: under what circumstances may a state within a wholesale competitive market provide additional payments to a developer to build or (in the case of existing plants) continue to operate plants it wants to include in its resource mix? Some market participants have taken the position that *any* payment that exceeds the market price may be an unconstitutional subsidy, and FERC and DOE are looking for middle ground in what will be a long dispute.

This evolving battle has significant ramifications for nuclear power and coal-fired generation—each of them a significant part of the national portfolio, but neither currently competitive with natural gas. “Nuclear power is one of the cheapest energy resources out there, but it’s simply not recovering its fixed costs in the wholesale competitive power markets,” says [Richard Lehfeldt](#), a Crowell & Moring partner, a member of its Energy Group, and former counsel to the House Energy & Commerce Committee. “Many states have enacted or are considering legislation that compensates these plants for their environmental attributes, but those payments have been challenged by numerous stakeholders as either anti-competitive or unconstitutional,” following the rationale of the *Talen* decision.

Similar challenges may arise, at least in the organized markets, should the administration throw its support behind attempts to extend the plant life of the existing coal fleet. FERC’s and the states’ efforts to balance and accommodate these sometimes competing interests, and Trump’s appointments to FERC, will play a large role in how that balance is achieved.

In addition, one shouldn’t necessarily equate Trump’s desire to help the coal industry with hostility toward wind, solar, and other renewable power, so long as the role of these resources is market-oriented and not interventionist, as it was in the Obama administration. The rapidly expanding solar and wind industries also support tens of thousands of jobs across the United States, a factor that is likely to mitigate against “anti-renewable” initiatives.

“Trump clearly has not shown any sympathy or support for renewables,” says Eisenstat, “but he also hasn’t indicated he’s hostile to renewables either, and those resources are increasingly competitive in today’s market. I think we’ll see a continued increase in diversity in the energy infrastructure regardless of what other power sources the Trump administration wants to support.”