

Trump Order Ushers in the Future of US Energy and Environmental Regulation

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On March 28, President Trump launched a sweeping overhaul of US energy and environmental policy. The presidential Executive Order on Promoting Energy Independence and Economic Growth (Order) repeals several policies of the Obama Administration and represents a dramatic shift in direction for the development of energy and other infrastructure projects in the United States. Some immediate changes include:

- **National Environmental Policy Act (NEPA) Reviews.** The Order repeals the Council on Environmental Quality (CEQ) final guidance requiring consideration of climate change as part of agency NEPA reviews
- **Mitigation.** The Order repeals the presidential memorandum on mitigating the impacts of development and encouraging private investment in conservation to achieve a “net benefit” or at a minimum a “no-net loss” for natural resources.
- **Social Cost of Carbon.** The Order replaces the estimate of the potential economic harm from climate change—known as the “Social Cost of Carbon”—developed by the Interagency Working Group on Social Cost of Greenhouse Gases with an older estimate developed in 2003, and also disbands the working group.
- **Coal Leasing.** The Order directs the Secretary of the Interior to repeal the moratorium on the sale of new coal leases on federal land and to reevaluate the need for a programmatic environmental analysis of the federal coal leasing program.

The Order potentially implicates other federal policies by directing agencies to review regulations and “suspend, revise, or rescind” those determined to “unduly burden” domestic energy development. Most notably, the Order directs the Environmental Protection Agency (EPA) Administrator to review and, if appropriate, take lawful action to amend or revoke the Clean Power Plan and the New Source Performance Standards for greenhouse gas emissions from power plants, as well as any associated guidance or other agency actions.

The Order also requires agencies to reevaluate key regulations related to oil and gas development, including the Department of the Interior's recently finalized rules for hydraulic fracturing on federal

land, methane emissions from oil and gas facilities, oil and gas development in national parks and wildlife refuges, and oil and gas royalties. The Order directs Interior to review the final rules and any guidance issued pursuant to them, and, if appropriate, to suspend, revise or rescind them. Any effort to amend or repeal the formal regulations themselves will require the same notice-and-comment process by which the rules were promulgated in the first place.

The Order also launches a 180-day government-wide review of “all agency actions” that “potentially burden” domestic energy development, with a focus on oil, natural gas, coal and nuclear energy. Agencies have 45 days to prepare a plan for completing this review, followed by a draft final report detailing specific agency actions within 120 days and a final report within 180 days of the Order. The director of the Office of Management and Budget will coordinate this effort in consultation with the assistant to the president for economic policy.

Because so much of the practical effect of the Order is to launch this series of reviews and reconsiderations of Obama-era policies, the specific changes to existing policy will play out over the coming months (and years). While there will be opportunities for public participation of interested stakeholders where notice-and-comment rulemaking is required to alter an existing regulation, the agencies will have broad discretion to alter their less formal policies without significant stakeholder input.

For now, the Trump Administration is focused on the previous administration's efforts to increase the regulation of domestic energy production and generation. The Order does not address other elements of the Obama Administration's environmental initiatives, including the presidential directive for sustainable planning, which requires federal agencies to reduce their own greenhouse gas emissions and to engage in sustainable acquisition and procurement by favoring energy- and water-efficient products and “environmentally preferred” products that meet certain criteria established by EPA. Agencies and government contractors have already taken significant steps to implement the directive.

Interior Initiates Regulatory Overhaul

Interior Secretary Zinke has already taken steps to implement Tuesday's Order. The day after the Order was released, he signed Secretary Order 3348, which cancels the ongoing review, initiated by the previous administration, to consider reforms to the federal coal leasing program and lifts the moratorium on new federal coal leasing that had been put in place during that review. In place of the Obama-era program review, Secretary Zinke reestablished the dormant Royalty Policy Committee. The Royalty Policy Committee will “advise on current and emerging issues related to the determination of fair market value, and the collection of revenue from energy and mineral resources,” and will include both federal officials and nonfederal members, including representatives of states, Indian tribes, industry, academia and public interest groups.

Secretary Zinke also signed Secretary Order 3349 to begin the process that the Executive Order requires to reverse actions taken by Interior under the previous administration's Executive and Secretarial Orders. Order 3349 calls on Interior bureaus and offices to identify “Department Actions” (i.e., “regulations, orders, guidance documents, policies, instructions, notices, implementing

actions, and . . . similar actions”) related to climate change and mitigation policies. Order 3349 also calls on the Bureau of Land Management to rescind the “Hydraulic Fracturing on Federal and Indian Lands” rule and identifies other final rules, which the relevant bureau or office will review to determine whether they are “fully consistent with the policy set forth” in the Executive Order. Among those other rules is the “Waste Prevention, Production Subject to Royalties, and Resource Conservation” rule, which regulates methane emissions on federal oil and gas leases.

Legal Road Ahead

The Executive Order and corresponding agency actions are likely to be the beginning of a new series of legal processes, not the end. First, as the Order itself acknowledges, efforts to revise or repeal finally promulgated rules will require notice-and-comment rulemaking and, in many cases, environmental, economic and other related analyses.

Second, these new rulemaking actions are nearly certain to prompt new litigation. Moreover, as long as EPA’s 2009 finding that carbon dioxide and other greenhouse gases threaten public health—the so-called endangerment finding—still stands, the agency is obligated to regulate carbon dioxide in some fashion.

Finally, Tuesday’s Order and the subsequent agency action it will prompt occur in the context of already pending litigation challenging the same Obama-era reforms that the Order seeks to roll back. For example, the Clean Power Plan has already been challenged and, after having been stayed by the US Supreme Court, is back at the US Court of Appeals for the DC Circuit, where the court is currently assessing its validity. Just hours after the Order was released, the Department of Justice (DOJ) requested that the DC Circuit halt the lawsuits over the Clean Power Plan, noting that President Trump had directed EPA to take “all steps necessary” to review the rule and potentially initiate a new rulemaking. DOJ told the court that prior positions taken by EPA with respect to the rule “do not necessarily reflect its ultimate conclusion.” EPA also filed a motion to suspend legal proceedings related to challenges to the New Source Rule. As with the Clean Power Plan, EPA argued that federal agencies have “inherent authority” to reconsider and revise past decisions.

Defenders of the Clean Power Plan, including some state attorneys general, are likely to file a response—perhaps as early as this week—urging the court to let the case move forward and issue an opinion based on arguments presented to the court *en banc* in September 2016. The DC Circuit now must decide whether to rule, pause or take some other action. There is no deadline by which the court must act, and any decision by the DC Circuit is likely to generate a petition for review by the Supreme Court.

Conclusion

President Trump’s Executive Order combines immediate repeal of certain Obama-era actions; the identification of specific regulations that should be reconsidered; and a general call for Interior, EPA and other relevant agencies to scrub their books for any other actions taken under the previous administration that burden domestic energy development, particularly fossil fuel production and use. Among other things, the Order lifts the moratorium on federal coal leasing, rolls back requirements that the NEPA process account for climate change, and likely will result in the repeal of

the rules regulating hydraulic fracturing and methane emissions on federal oil and gas leases. The Order is likely to result in numerous legal challenges as agencies take actions to repeal or roll back Obama-era rules while shifting the ground on which ongoing challenges to the existing regulations will be fought. While much of the impact of the Order is still to play out over the coming months and years, President Trump has taken a decisive step regarding regulation of energy development in the country.