Climate Change Revisions Lead to an Uncertain Regulatory Environment

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This is the second issue of WilmerHale's 10-in-10 Hot Topics in Energy Series. Over the next 10 weeks, our attorneys will share insights on current and emerging issues affecting the US energy sector. Attorneys from across various practice groups at the firm will offer their take on issues ranging from congressional investigations, to the impact of key regulatory reforms, to emerging trends in domestic litigation and international arbitration. Read our other recent publications.

Over the last two years, the Trump Administration has sought to roll back numerous policies and regulations aimed at addressing greenhouse gas (GHG) emissions and climate change. A March 28, 2017 executive order aimed at reversing signature portions of the Obama Administration's climate change agenda was an early signal of things to come; subsequent efforts have spanned various arms of the executive branch, including the Environmental Protection Agency (EPA), the Department of the Interior, the Federal Energy Regulatory Commission (FERC), and the Council on Environmental Quality (CEQ). *See* Executive Order 13783: *Promoting Energy Independence and Economic Growth* (March 28, 2017).

While executive orders can be repealed or issued with the stroke of the presidential pen, more complicated changes to Obama-era climate regulations are at various stages of repeal, substitution and judicial challenge; several of these initiatives are discussed below. As proposed replacement rules are finalized, court challenges brought by coalitions of states, environmental groups and other stakeholders inevitably will follow. In addition, as discussed in last week's alert, numerous lawmakers in the new Democratic-majority House of Representatives have promised aggressive oversight of deregulatory efforts. As a result, the policy and regulatory environment for climate change measures likely will remain in flux for the foreseeable future, but project proponents and others impacted by the regulatory changes should have significant lead time to adjust to and implement finalized changes.

1. Clean Power Plan

Among the most high-profile regulatory actions related to climate change is EPA's proposed replacement of the Obama Administration's signature climate change initiative, the Clean Power

Plan (CPP). The CPP, proposed in June 2014, mandated an overall 32 percent reduction in CO2 and related GHG emissions by 2030. Although the regulation's primary purpose was to reduce pollutants emitted by existing coal-burning power plants, it also promoted renewable energy and energy conservation measures. Each state was given a specific emissions reduction target and was directed to develop plans outlining how it would meet that target. States were encouraged to use a variety of measures, including improving the operating efficiency of power plants and increasing the use of wind, solar, nuclear, hydropower and natural gas. In other words, rather than focusing solely on a particular power plant's emissions, states were to use a combination of approaches to meet their specific GHG reduction targets. 80 Fed. Reg. 64662 (Oct. 23, 2015).

In August 2018, the EPA published for a 60-day public comment period a proposed replacement of the CPP titled the "Affordable Clean Energy" (ACE) rule. 83 Fed. Reg. 44746 (Aug. 31, 2018). Like the CPP, the ACE rule would allow states to develop plans to reduce carbon emissions from existing fossil fuel-fired power plants. But, unlike the CPP, the ACE rule does not set numerical standards or targets for GHG reductions, and allows states wide latitude to establish their own performance targets. Perhaps most strikingly, the ACE rule adopts an exclusively "inside the fence line" approach: performance standards would reflect only those emission reductions that can be achieved on a plant-by-plant basis, and do not take into account switching to cleaner energy sources or adoption of demand-side efficiency measures. Under the ACE rule, states may consider the "cost, suitability and potential improvement" that a technology would bring to an individual power plant, and—unlike under the CPP—a plant's age and remaining useful life may be factored into the analysis. The ACE rule also would allow states to exempt certain power plants from performance standards.

When it was promulgated, the CPP was challenged by a number of states, trade associations, electricity producers and labor unions. *See West Virginia v. EPA*, No. 15-1363 (D.C. Cir., filed Oct. 23, 2015). Implementation was stayed by the Supreme Court (Order, *West Virginia v. EPA*, No. 15A773), and subsequently, EPA moved to hold the case in abeyance after President Trump issued Executive Order 13783 directing EPA to review the CPP. *See* Motion to Hold Case in Abeyance, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir., filed Mar. 28, 2017). The case remains in abeyance. Recently, newly elected attorneys general in Colorado and Michigan withdrew their states' challenges to the CPP. *See* Order Granting the State of Colorado's Motion to Withdraw Party, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir., Jan. 30, 2019); Order Granting the State of Michigan's Motion to Withdraw Party, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir., Jan. 23, 2019).

EPA had targeted March 2019 for promulgation of a final ACE rule. The now-concluded government shutdown almost certainly will extend that timeline later into the spring, and once issued, the final rule will face numerous challenges. As a result, it will likely be years before regulations regarding GHG emissions from power plants are fully in place and implemented.

2. Mercury and Air Toxics Standards

EPA also had proposed reconsidering another set of limits on power plant emissions: the Mercury and Air Toxics Standards (MATS) rule. 84 Fed. Reg. 2670 (Feb. 7, 2019). Although MATS does not directly regulate GHG emissions, it is a proposal to change how EPA approaches emissions from

fossil fuel-fired power plants. Following a Supreme Court ruling directing it to consider the costs and benefits associated with compliance (*Michigan v. EPA*, 135 S.Ct. 2699 (2015)), EPA indicated it would rescind its initial finding that regulation of hazardous air pollutants from plants was "appropriate and necessary." Because of the timing of this announcement, that news was met with concern from industry sectors that already had come into compliance with the original rule. More recently, EPA has indicated that it will not rescind MATS, though it still plans to make changes to the underlying appropriate and necessary finding. Although the immediate industry-facing aspects of MATS would remain intact, such an approach could give rise to additional litigation and alter future agency rulemaking processes. The comment period begins February 7, 2019 and will end on April 8, 2019.

3. Fuel Economy Standards

In August 2018, the Trump Administration announced a long-expected plan to dismantle an Obama-era Clean Air Act (CAA) regulation that would have raised vehicle mileage standards. The original regulations required light cars manufactured after 2012 to become almost twice as efficient by 2025—ultimately averaging nearly 54.5 miles per gallon. 77 Fed. Reg. 62624, 62627 (Oct. 15, 2012). The "Safer Affordable Fuel-Efficient" (SAFE) replacement rule was proposed jointly by EPA and the National Highway Traffic Safety Administration, and would freeze fuel economy standards at 2020 levels—approximately 37 miles per gallon—through 2026. 83 Fed. Reg. 42986 (Aug. 24, 2018).

The SAFE rule also would revoke the California CAA waiver, which has—since the inception of the CAA—allowed California to set more stringent fuel emissions standards than the federal requirements. *Id.* at 42999. Other states currently are permitted to adopt California standards, and a number (including New York, Pennsylvania, New Mexico and Colorado) have done so. The public comment period for SAFE ended on October 26, 2018; EPA has not yet issued a final rule, but one is expected in spring 2019. If the regulation becomes final, more than a dozen states, led by California, will surely sue to block it and to reinstate the California waiver.

4. EPA Methane New Source Performance Standards

EPA also has announced plans to change course on regulation of methane and other emissions from the oil and gas industry. 83 Fed. Reg. 52056 (Oct. 15, 2018). CAA New Source Performance Standards promulgated toward the end of the Obama Administration aimed to limit emissions of methane and volatile organic compounds from oil and gas facilities through leak detection and repair requirements. 81 Fed. Reg. 35824 (June 3, 2016). EPA recently proposed revisions, in part to respond to previous public comments, and to streamline implementation of the rule. Key changes would reduce the frequency of required leak monitoring, extend the amount of time operators have to repair detected leaks, and carve out exemptions to certain detection and repair requirements. The agency accepted public comments through December 17, 2018, and has not issued a final rule, but it seems likely that a final rule will issue in summer 2019.

5. BLM Methane Rule

The Bureau of Land Management (BLM) has repealed and replaced an Obama-era rule that sought to limit methane emissions from oil and gas development and production sites on federal lands. 83

Fed. Reg. 49184 (Sept. 28, 2018). The 2016 rule required operators to prevent loss of natural gas through flaring, venting and leaks from operations on BLM lands, and gradually increased the percentage of gas required to be captured rather than released into the atmosphere. 82 Fed. Reg. 83008 (Nov. 18, 2016). It also imposed leak inspection requirements for different types of facilities. In September 2018, BLM issued a final revised rule, reverting to the pre-2016 standards and rolling back certain leak prevention requirements.

Shortly after BLM issued the 2018 final rule, California, New Mexico and numerous environmental groups sued the Department of the Interior, alleging that the new rule violates the Mineral Leasing Act, the Administrative Procedure Act and the National Environmental Policy Act (NEPA). *See California, et al. v. Zinke*, No. 4:18-cv-05712 (N.D. Cal., filed Sept. 18, 2018); *Sierra Club v. Zinke*, No. 4:18-cv-5984 (N.D. Cal., filed Sept. 28, 2018). That litigation is ongoing.

6. FERC GHG Policy

FERC has shifted its policy for analyzing upstream and downstream GHG emissions associated with its review of natural gas projects. Since 2016, FERC's practice had been to include in its pipeline orders estimates of upstream and downstream emissions. In 2017, the DC Circuit held that FERC must consider and analyze downstream emissions in conducting its NEPA review. In May 2018, however, a majority of FERC commissioners denied a rehearing request and indicated that FERC's previous practice of analyzing upstream and downstream GHG emissions and the potential climate impacts was generic and speculative. That denial, and FERC's refusal to analyze GHG emissions in its review, has been challenged in the DC Circuit and is currently being briefed. *See Otsego 2000, Inc. v. FERC*, No. 18-1199 (D.C. Cir., filed July 16, 2018).

7. CEQ GHG Guidance

On March 28, 2017, President Trump signed Executive Order 13783, which, among other things: (1) directed CEQ to rescind its Final Guidance on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, 81 Fed. Reg. 51866 (August 5, 2016) and (2) withdrew the Social Cost of Carbon tool for climate change impact analysis. *See* Executive Order 13783: *Promoting Energy Independence and Economic Growth*. On April 5, 2017, CEQ published a notice in the Federal Register announcing the withdrawal of its GHG guidance. 82 Fed. Reg. 16576 (Apr. 15, 2017). However, as discussed in our previous alert, some courts are continuing to require an analysis of GHG impacts of proposed actions, which creates continuing uncertainty for both agency staff and project proponents in the aftermath of the rescission of the CEQ guidance.

8. Rescission of Executive Orders

Executive Order 13783, discussed above, also rescinded key executive orders issued by President Obama related to climate change, including:

- Executive Order 13653 of November 1, 2013 (Preparing the United States for the Impacts of Climate Change), which directed federal agencies to take steps to prepare for climate change impacts and to support state and local resilience efforts;
- The Presidential Memorandum of June 25, 2013 (Power Sector Carbon Pollution

Standards), related to the promulgation of the CPP; and

- The Presidential Memorandum of September 21, 2016 (Climate Change and National Security), which directed federal agencies and functions to ensure that climate change impacts are considered in the development of national security doctrine, policies and plans.

The rescission of regulations and executive orders related to climate change and GHG emissions will continue to be a key focus of the Trump Administration. Those rollbacks and, where applicable, replacement rules will continue to spur challenges by states, public interest groups and other stakeholders—further delaying clarity on applicable standards and the timing to implement certain regulatory requirements.