



## Trump Order Sets Up Rollback of Obama Energy and Climate Action

MARCH 30, 2017

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On Tuesday March 28, President Donald Trump signed an [Executive Order](#) that takes the first step in rolling back executive actions that had been undertaken by the Obama Administration to address climate change and energy resource development. The far-reaching order directly revokes or rescinds certain presidential and regulatory actions and directs the review and potential subsequent rescission or revision of other key programs and regulations administered by a variety of agencies. However, it does not go as far as the Trump Administration might have in uprooting the underpinning of the federal government's climate authority—the Environmental Protection Agency's (EPA) 2009 endangerment finding—or in walking away from the international process to address climate change as codified in the 2015 Paris Agreement. Moreover, implementation of the measures outlined in the Executive Order will likely take significant additional time and process to fully implement and will almost certainly be challenged in the courts.

### The Executive Order directs EPA to reconsider its climate-related energy sector regulations.

#### 1. Clean Power Plan

Most prominently, the Executive Order directs EPA to immediately review the Clean Power Plan, a regulation promulgated pursuant to section 111(d) of the Clean Air Act that is intended to limit greenhouse gas emissions from existing power plants. The Executive Order directs EPA to “as appropriate” initiate rulemaking to suspend, revise or rescind the rule and related actions. Following the issuance of the Executive Order, EPA Administrator Scott Pruitt signed a *Federal Register* [notice](#) announcing that EPA is reviewing and, “if appropriate, will initiate proceedings to suspend, revise or rescind the Clean Power Plan.”

Importantly, the Executive Order cannot and did not itself rescind the Clean Power Plan. This must be done by EPA, through the same notice-and-comment rulemaking process used to promulgate the rule in the first place, which could take up to a year. A final rule rescinding or revising the Clean Power Plan rule will almost certainly be challenged by states and environmental organizations. For more details about the Clean Power Plan, see our VNF alert [here](#). For options that EPA may adopt in revising the Clean Power Plan, see our VNF alert [here](#).

The Clean Power Plan is currently subject to challenge in the D.C. Circuit and has been stayed by the Supreme Court. The Executive Order directs the Department of Justice (DOJ) to inform the D.C. Circuit of EPA's plans and ask the court to put those challenges on hold while EPA takes action to rescind or revise the rule. Late Tuesday night, DOJ filed a motion requesting that the D.C. Circuit hold its proceedings in abeyance. This request likely will be challenged by environmental groups, states, and businesses that have supported the Clean Power Plan.

#### 2. Carbon Pollution Standards Rule

The Executive Order directs EPA to review and, as appropriate, suspend, rescind or revise its Carbon Pollution Standards Rule, which sets emission limits for new, modified and reconstructed power plants. Most significantly, this rule establishes a limit on carbon dioxide emissions from new coal-fired power plants that is achievable only if such a plant installs carbon capture technology. Following issuance of the Executive Order, EPA Administrator Scott Pruitt signed a *Federal Register* [notice](#) announcing EPA's review and intent to suspend, revise, or rescind the Carbon Pollution Standards Rule as appropriate. As with the Clean Power Plan, any revision or repeal of the rule must be done through notice-and-comment

rulemaking and will most likely be subject to legal challenge in the D.C. Circuit. For more details about the Carbon Pollution Standards Rule, see our VNF alert [here](#).

The Carbon Pollution Standards Rule is currently subject to challenge at the D.C. Circuit. The Executive Order directs DOJ to notify the court of EPA's plans and ask the court to put the challenges on hold while EPA takes action to reconsider the rule. Late Tuesday night, DOJ filed a [motion](#) requesting that the D.C. Circuit hold its proceedings in abeyance. As with the request related to the Clean Power Plan, this request likely will draw opposition from those entities that have supported the Carbon Pollution Standards Rule.

### 3. Oil and Gas Sector Methane Emission Limits

The Executive Order directs EPA to review and, as appropriate, suspend, rescind or revise a 2016 rule establishing new source performance standards limiting methane emissions from new, modified, and reconstructed sources in the oil and gas sector. That rule covers equipment, processes, and activities in the onshore production, gathering, transmission, and storage segments of the sector, and also expands upon a 2012 regulation directed at limiting emission of volatile organic compounds (VOCs). Among other things, the rule requires performance of a rigorous protocol for leak detection and repair (LDAR) on a periodic basis. The rule is currently being challenged in the D.C. Circuit, and the Executive Order directs DOJ to request the case be suspended pending reconsideration of the regulation. The Order also directs EPA, "if appropriate" and "as soon as practicable," to suspend, rescind, or revise "any rules and guidance issued pursuant to" its oil and gas methane rule. The impact this directive will have on EPA's voluntary Methane Challenge Program and Control Technique Guidelines for VOC emissions from the oil and gas sector—policies that were included in the Obama Administration's Methane Strategy (which the Executive Order also rescinds, as discussed below)—is uncertain. For more details about the oil and gas methane new source performance standards, see our VNF alert [here](#).

## The Executive Order directs the Department of the Interior to reconsider specific energy-related regulations and policies.

### 1. Coal Leasing Program Review and Coal Leasing Moratorium

The Executive Order directs the Department of the Interior (DOI) to amend or withdraw Secretarial Order 3338, which called for the Bureau of Land Management (BLM) to prepare a programmatic environmental impact statement (PEIS) to analyze potential leasing and management reforms to the federal coal leasing program. Among other topics, the PEIS was to address the process, timing, and location of leasing; whether existing bonus bid, rent, and royalty payment policies provide a fair return to the United States; and the climate change and other impacts of coal development and use. The BLM published a scoping report in January 2017 summarizing the issues raised in meetings and public comments during the scoping period that began in March 2016, and the issues, including preliminary reform options, to be considered in the PEIS.

The Executive Order further directs DOI to suspend a moratorium that the Obama Administration BLM had placed on the leasing of new coal development on federal land while the agency reconsidered the coal leasing program. Unlike some of the other actions specifically identified in the Executive Order, the coal leasing moratorium and environmental review of the coal leasing program can be suspended without going through notice-and-comment rulemaking.

Recognizing "the critical importance of the Federal coal leasing program to energy security, job creation, and proper conservation stewardship" and "finding that the public interest is not served by halting the Federal coal program for an extended time" and that a PEIS is not necessary to consider potential improvements to the program, on March 29, Secretary of the Interior Ryan Zinke issued [Secretarial Order 3348](#) revoking Secretarial Order 3338, halting further activity on the PEIS, and reopening the coal leasing program. Simultaneously, DOI [established](#) a Royalty Policy Committee to regularly advise the Secretary on the fair market value of, and collection of revenues from, energy and mineral resource development on federal and Indian lands.

## 2. Fracking Rule

The Executive Order directs DOI to review and, if appropriate and as soon as practicable, suspend, revise, or rescind BLM's March 26, 2015 [final rule](#) entitled "Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands." The final rule imposed certain requirements related to well integrity, surface waste water management, and disclosure of details regarding the composition of hydraulic fracturing fluids. The final rule had been vacated by the U.S. District Court for the District of Wyoming, but that decision is currently on appeal in the U.S. Court of Appeals for the Tenth Circuit. *Wyoming v. Jewell*, No. 15-8134 (10th Cir. filed June 24, 2016). The Executive Order directs DOJ to inform the court of this order and seek "appropriate relief," such as requesting that the case be suspended or otherwise stayed pending DOI's reconsideration of the regulation.

## 3. Waste Prevention Rule

The Executive Order directs DOI to review and, if appropriate, suspend, revise, or rescind BLM's final rule on the prevention of waste of natural gas from venting and flaring. On November 18, 2016, BLM issued a [final rule](#), entitled "Waste Prevention, Production Subject to Royalties, and Resource Conservation," intended to reduce natural gas waste and air pollution resulting from onshore flaring, venting, and leaks by oil and gas production on federal and tribal lands, and to provide a beneficial return on public resources for states, tribes, and federal taxpayers. The final rule, among other things, prohibits the venting of natural gas except in limited circumstances; requires operators to capture most of their gas after accounting for specified volumes of allowed flaring; and imposes rigorous LDAR protocols for limiting equipment leaks. The final rule took effect January 17, 2017, after an unsuccessful attempt by several states and industry groups to enjoin implementation of the rule in federal court in Wyoming. *Western Energy Alliance et al. v. Jewell*, No. 2:16-cv-00280 (D.Wyo. filed Nov. 15, 2016). However, litigation concerning the final rule is ongoing, and the Executive Order directs DOJ to seek appropriate relief from the court, such as requesting the case be suspended pending reconsideration of the regulation, which the agency had already done.

Additionally, the House of Representatives has passed, but the Senate has not yet taken up, a joint resolution of disapproval under the Congressional Review Act that would rescind this rule and limit BLM's authority to issue a substantially similar regulation in the future.

For more details on BLM's Waste Prevention Rule, see our VNF alert [here](#).

## 4. Non-Federal Oil and Gas Rights Rules

The Executive Order calls for DOI to review and, as appropriate, suspend, rescind or revise two final rules related to non-federal oil and gas rights on National Park Service (NPS)-managed lands and Fish and Wildlife Service (FWS)-managed refuges.

The [first rule](#), issued by NPS on November 4, 2016, and entitled "General Provisions and Non-Federal Oil and Gas Rights," updated the regulations (called the "gB regulations") that govern private and state-owned oil and gas rights in the National Park System, which had not been updated since being promulgated more than 37 years ago. The final rule, which took effect December 5, 2016, eliminated provisions that previously exempted more than 300 oil and gas operations and requires all operators, except those in Alaska, to comply with the gB regulations. The final rule also eliminated the cap on financial assurances, and strengthened enforcement authority by incorporating existing NPS penalty provisions.

The [second rule](#), issued by FWS on November 14, 2016, and entitled "Management of Non-Federal Oil and Gas Rights," updated the regulations governing the exercise of non-Federal mineral rights located outside of Alaska within the National Wildlife Refuge System (NWRS), which had not been updated since being promulgated more than 50 years ago. The final rule, which took effect December 14, 2016, instituted a permitting process for new operations; requirements related to well-plugging and reclamation; operating standards; and provisions for fees, financial assurances, and penalties.

Resolutions of disapproval have been introduced in the House of Representatives that would rescind both of these rules under the Congressional Review Act.

### **The Executive Order directs federal agencies to review regulations that burden domestic energy development.**

In addition to directing review of specifically-identified regulations and policies at EPA and DOI, the Executive Order directs all “executive departments and agencies” to review and report on “all existing regulations, orders, guidance documents, policies, and any other similar agency actions” that “necessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of” domestic energy resources. The Executive Order directs agencies to pay “particular attention to oil, natural gas, coal, and nuclear energy resources”; it does not specifically mention renewable energy. “Executive department and agency” is not defined, and the application of this requirement to independent agencies is not clear.

Specifically, each agency is directed to submit a plan outlining how it will conduct its review to the Office of Management and Budget (OMB) within 45 days. Draft reports detailing the actions reviewed and including recommendations to address the burdens those actions impose on domestic energy production are due to OMB within 120 days, and final reports are due within 180 days. Identified regulations that are rescinded can be used by the agency to comply with the President’s Regulatory Review Executive Order (for details on this order see our VNF alert, [here](#)).

The Secretary of the Interior already has issued [Secretarial Order 3349](#) commencing DOI’s review, requiring DOI bureaus and offices to submit reports within 21 days identifying regulations, orders, guidance documents, policies, and any other similar agency actions that burden energy development. DOI has further committed to developing a department -wide plan within 35 days.

### **The Executive Order directs the Council on Environmental Quality to rescind guidance incorporating climate change into environmental reviews.**

The Executive Order directs the Council on Environmental Quality (CEQ) to rescind its [final guidance](#) encouraging federal agencies to consider impacts from greenhouse gas emissions and climate change in environmental reviews pursuant to the National Environmental Policy Act (NEPA). The final guidance, issued August 5, 2016, characterized climate change as a “fundamental environmental issue” and recommended that federal agencies consider the potential effects of a proposed action and related activities on climate change, using reasonably foreseeable, direct and indirect greenhouse gas emissions as a “proxy” for assessing impacts. Although not binding or otherwise legally enforceable, federal agencies typically strive for compliance with NEPA guidance documents, and courts may afford greater weight to interpretations and guidance issued by CEQ.

This guidance can be revoked without having to go through notice or comment or other administrative procedures. However, the Executive Order does not preclude federal agencies from continuing to consider the impacts of federal action on climate change in order to mitigate litigation risk when conducting environmental reviews.

### **The Executive Order rescinds the Interagency Social Cost of Carbon Guidance.**

The social cost of carbon is a metric for quantifying the costs of greenhouse gas emissions and the benefits of policies that reduce greenhouse gas emissions.

The Obama Administration convened an Interagency Working Group, led by OMB, to implement a uniform range of values for agencies to use when quantifying impacts of carbon dioxide emissions and emission reductions—the “Social Cost of Carbon for Regulatory Impact Analysis” (SCC). Similar guidance documents have been developed for two other greenhouse gases: methane, and nitrous oxide. The SCC has largely been used to comply with executive orders requiring agencies to analyze impacts of

regulations. In some instances, agencies have used the SCC to set the stringency of regulatory actions in order to comply with statutory obligations.

The Executive Order disbands that Working Group and rescinds the uniform SCC guidance and related documents. Based on court precedent, at least some agencies will likely still be required to consider the quantified benefits of greenhouse gas reduction in their rulemakings. See *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172 (9th Cir. 2008); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174 (D.Colo. 2014).

The Executive Order directs agencies to instead rely on long-standing cost-benefit analysis guidance outlined in OMB Circular A-4 when quantifying the costs of greenhouse gas emissions or benefits of greenhouse gas emission reductions. Whereas the cost ranges required under the interagency SCC guidance included the impacts of greenhouse gas emissions on a global basis, OMB Circular A-4 directs agencies to primarily evaluate a rule's costs and benefits only as they impact the United States. This different direction, along with a number of other important technical changes, will likely result in agencies attributing much lower monetized benefits to actions that reduce greenhouse gases, if such quantification is performed at all.

### **The Executive Order revokes certain other energy- and climate change-related executive orders, presidential memoranda, and frameworks.**

The Executive Order directly revokes the following four executive orders and presidential memoranda signed by President Obama related to energy and climate change.

First, the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment directed agencies to more fully develop and implement requirements for the mitigation of adverse impacts from development and other activities on land, water, wildlife, and other ecological resources. Among other things, the memorandum established a mitigation hierarchy (avoid, minimize, then compensate); set a "net benefit goal" or, at a minimum, a no net loss goal for natural resources; emphasized large-scale or landscape-level planning and mitigation; and directed a number of agencies to take certain, specified actions to strengthen mitigation policies. As noted above, following the Executive Order, the Secretary of the Interior issued [Secretarial Order 3349](#) which, in part, revokes Secretarial Order 3330, "Improving Mitigation Policies and Practices of the Department of the Interior," dated October 13, 2013, and directs a review of all actions taken pursuant to that order and the revoked Presidential Memorandum for possible reconsideration, modification, or rescission. This review will include the U.S. Fish and Wildlife Service's recent Mitigation Policy, dated November 21, 2016, and Endangered Species Act Compensatory Mitigation Policy, dated December 27, 2016.

Second, the Presidential Memorandum on Power Sector Carbon Pollution Standards directed EPA to conduct a rulemaking to regulate greenhouse gas emissions from the power sector. Rescinding this is consistent with the Executive Order's direction to suspend, rescind or revise the Clean Power Plan and Carbon Pollution Standards Rule. It also leaves open the possibility that EPA will only repeal, but not replace, these two rules.

Third, the Presidential Memorandum on Climate Change and National Security established a framework and directed agencies to take actions to ensure that climate change-related impacts are fully considered in the development of national security doctrine, policies, and plans.

Fourth, Executive Order 13653 (Preparing the United States for the Impacts of Climate Change) directed federal agencies to take steps to prepare for climate change impacts and to support state and local resilience efforts, and established a State, Local, and Tribal Leaders Task Force on Climate Preparedness and Resilience.

The Executive Order also rescinds the Obama Administration's Climate Action Plan, which identified addressing climate change as a priority and established a framework for doing so across federal agencies, and the Obama Administration's Methane Strategy, a framework for addressing emissions of

methane across a number of federal agency programs. Rescinding these documents will have no independent legal effect and can be done with no further process.

The Executive Order directs agencies to review and, as appropriate, suspend, rescind, or revise regulations, orders, guidance documents, policies, and any other similar agency actions made in furtherance of these executive orders, presidential memoranda, and frameworks. Such actions may require notice-and-comment rulemaking. As noted above, DOI already has initiated its [review](#), requiring that departments identify all such actions issued pursuant to them or currently under development within 14 days, identify actions that should be reconsidered, rescinded, or revised within 30 days, and submit to the Deputy Secretary draft revised or substitute actions within 90 days.

### The Roads Not Taken

Finally, the Executive Order is notable for two actions that it does not take.

It does not direct reconsideration of, or even discuss, EPA's 2009 finding that greenhouse gas emissions cause air pollution which endangers public health and welfare (the "endangerment finding"). This finding was made under the Clean Air Act in response to the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding that greenhouse gases are an "air pollutant" under the Clean Air Act) and upheld by the D.C. Circuit, *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012). The endangerment finding serves as the necessary factual and legal predicate authorizing EPA to adopt greenhouse gas regulations under the Clean Air Act. Doing so would have called into question not only EPA's energy-related greenhouse gas regulations targeted for repeal or revision by the Executive Order, but also regulations under Clean Air Act section 202 limiting greenhouse gas emissions from passenger cars and trucks, and heavy duty vehicles and its requirement that large new and modified stationary sources install the best available control technology to limit greenhouse gas emissions pursuant to the Clean Air Act Prevention of Significant Deterioration program.

Second, the Executive Order does not direct the State Department to withdraw the United States from the Paris Agreement or otherwise mention that agreement. However, this silence cannot be interpreted to mean that the United States will remain and continue to participate in the Paris Agreement in the manner set forth by the Obama Administration. For example, if the Trump Administration reverses or significantly revises the policies targeted by the Executive Order, it will be difficult, if not impossible, to achieve the level of emission reductions that correspond to the U.S. pledge under the Paris Agreement. This pledge—referred to as the U.S. "Nationally Determined Contribution" (NDC)—is a 26 percent reduction in greenhouse gas emissions below 2005 levels by 2025, and requires periodic updating of the greenhouse gas emissions reductions pledged under the NDC to assure the achievement of the Paris Agreement's goals. Accordingly, the Executive Order might presage a future action by the Trump Administration either to withdraw from the Paris Agreement or to submit a revised NDC with a significantly lower greenhouse gas reduction pledge. For an explanation and analysis of the Paris Agreement, see the VNF alert [here](#).

**The Executive Order calls for a large number of specific actions from a wide variety of agencies. How agencies go about implementing those actions and the outcome of the inevitable legal challenges to those actions remains to be seen.**

### For more information

Van Ness Feldman continues to monitor the ongoing actions of the new Administration and the implications of these actions for regulated businesses. The firm can provide specialized and practical strategic counseling on the issues touched upon in this Alert. For further information, please contact any member of the firm's [Energy](#), [Environmental](#), or [Government Relations](#) practice areas.

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