

Legal Sidebar

New Executive Order Directs Agencies to Revise or Rescind Climate Change Rules and Policies

04/20/2017

On March 28, 2017, President Trump issued [Executive Order 13783](#), entitled “Promoting Energy Independence and Economic Growth.” The order generally aims to establish a policy to promote domestic energy development and use, and ensure affordable and reliable electricity. To accomplish these broad goals, the order directs executive agencies to review their existing regulations and “appropriately suspend, revise, or rescind those that unduly burden” domestic energy production or use, “with particular attention to oil, natural gas, coal, and nuclear energy resources.” Agency actions resulting from compliance with the order could directly affect climate change policy, guidance, regulations, and on-going litigation.

Withdrawal of Climate Change Guidance

The order rescinds guidance intended to help federal agencies determine how and when to assess climate change effects and costs in rulemakings and environmental reviews. For example, as directed by the order, the Council on Environmental Quality (CEQ) [withdrew](#) its guidance, [Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews](#) on April 5. It is difficult to determine the impact of rescinding the CEQ guidance. Prior to its issuance, some [courts](#) had faulted federal agencies for insufficiently taking into account the climate-related impacts of their proposed actions in [National Environmental Policy Act](#) (NEPA) reviews. As a result, in order to comply with such rulings, federal agencies will still likely need to consider the impacts that their proposed actions would have on greenhouse gas (GHG) emissions and climate change.

Similarly, the executive order has withdrawn “as no longer representative of governmental policy” all social cost of carbon (SCC) guidance and documents. The [SCC](#), a tool to monetize the climate-related benefits of federal regulations and programs that seek to reduce GHG emissions, was developed by the Interagency Workgroup on Social Cost of GHGs (which was also disbanded by the executive order). However, federal agencies may still be [required](#) to take into account the costs of carbon in their rulemakings and NEPA reviews. For example, [Executive Order 12866](#), issued in 1993, requires most agencies to consider the costs and benefits of economically significant rules, including the cost of adverse effects on the “natural environment.” The new Executive Order 13783 does not remove the requirement to consider environment-related costs and benefits associated with regulatory actions, including revisions or withdrawals of rules. In these instances, the executive order directs agencies to be consistent with the guidance in the [Office of Management and Budget \(OMB\) Circular A-4](#), dated September 17, 2003, when analyzing the value of changes in GHG emissions resulting from regulations. Although the OMB Circular A-4 provides guidance on how to conduct cost-benefit analysis in rulemakings, it mentions climate change costs and benefits only once. In the circular, OMB recommends that federal agencies should analyze and present uncertainties related to its cost-benefits analysis of regulatory options, including, “for example, the uncertain knowledge of how some economic activities might affect future climate change.” Without additional guidance, in order to comply with [Executive Orders 12866](#) and 13783 and NEPA requirements, federal agencies will likely still need to determine how to assess the climate-related costs and benefits associated with rulemakings.

Review of Climate Change Regulations

To promote the use of domestically produced energy resources, the executive order requires agencies to amend and lift the [moratorium](#) on coal leasing on federal lands; review regulations related to GHG emissions from [coal-fired power plants](#) and [oil and gas sources](#); and review restrictions on [oil and gas development](#) on federal and Indian lands. Upon review of these regulations, if appropriate, agencies “shall, as soon as practicable, suspend, revise, or rescind” those rules. Because these rules have been finalized and are currently in effect, the agencies will likely need to go through a new [notice-and-comment rulemaking](#) to revise or repeal the rules.

This process could have direct effects on related litigation. For example, the day Executive Order 13783 was released, EPA announced its review of the [New Source Performance Standards](#) (NSPSs) and the [Clean Power Plan](#), which limit GHG emissions from new and existing power plants, respectively. These rules are currently being [challenged](#) in the U.S. Court of Appeals for the District of Columbia (D.C. Circuit). The Department of Justice, on behalf of EPA, filed motions in both power plant cases seeking to hold the cases in abeyance (i.e., pause the cases) until after EPA completes its review of the rules and its subsequent rulemakings resulting from the review. EPA argues that the court should grant the abeyance to allow the agency to respond to the executive order and reconsider the policy decisions of the prior administration. Because EPA will likely modify the rules, the agency claims that pausing the case would be the “most efficient and logical course of action.” [Stakeholders](#) supporting these rules oppose holding these cases in abeyance, arguing that the court should proceed to resolve issues related to EPA’s authority under the Clean Air Act, which they claim will likely arise again in future power plant rules. The Clean Power Plan is currently stayed pending resolution of the [litigation](#), and the D.C. Circuit has not yet issued an opinion after it heard oral argument in September 2016. That same court has cancelled the oral argument that was scheduled for April 17 regarding the new power plant NSPSs.

Likewise, EPA is reviewing regulations affecting oil and gas development. The agency is following a path similar to its treatment of the Clean Power Plan in reviewing its [June 2016 regulation](#) of methane emissions from new oil and gas operations and is seeking to pause the litigation pending review. The executive order also directs the Department of the Interior (DOI) to review the Bureau of Land Management (BLM) [November 2016 regulation](#) of methane emissions from new and existing oil and gas operations. DOI must also reexamine [BLM’s hydraulic fracturing rule](#), which was vacated by a [federal district court](#) and is now on appeal to the U.S. Court of Appeals for the Tenth Circuit.

Other Climate Change and GHG-related Rules and Guidance

The executive order did not specifically address other climate change regulations, including motor vehicle [GHG emission standards](#); EPA’s findings that GHG emissions from [motor vehicles](#) and [commercial aircraft](#) contribute to the pollution that causes climate change and endanger the public health and welfare; or the [methane emission limits](#) for municipal solid waste landfills. EPA and other agencies could identify these and other regulations as potentially burdening the development or use of domestic energy resources and recommend that they should be revised or rescinded. As discussed above, the agencies would likely have to initiate a new rulemaking to do so.

Posted at 04/20/2017 10:00 AM