

# An assessment of the Trump administration's efforts to deregulate the fossil fuel sector

By Jerome C. Muys Jr., Esq., and Jeffrey M. Karp, Esq., *Sullivan & Worcester*

MARCH 28, 2018

Out of the gate, the Trump administration has pursued an aggressive deregulatory agenda. Building on President Donald Trump's campaign promises, it has sought to roll back "economy-choking regulations."

In the past year, the administration has devoted particular attention to the moribund fossil fuel industry. The president has sought to revitalize this industry through deregulatory measures instituted by government agencies and departments, including the Environmental Protection Agency, Interior Department, Energy Department and Federal Energy Regulatory Commission.

To trigger deregulatory initiatives intended to give the fossil fuel industry a leg up, in March 2017 the president issued a wide-ranging "energy independence" executive order.<sup>1</sup> The order requires the review and reconsideration of any rule that might burden development of domestic energy sources, particularly oil, gas, coal and nuclear energy.

Also, after much drama, in June 2017 Trump fulfilled a campaign promise to withdraw the United States from the Paris climate accord. Under the agreement, which was entered into by the Obama administration, the United States had pledged to reduce the country's greenhouse gas emissions to levels 26-28 percent below 2005 levels by 2025, and to contribute up to \$3 billion in aid to an international fund that helps the world's poorest nations mitigate climate change effects.

In announcing the country's withdrawal from the accord, Trump cited an overarching need to protect U.S. workers and businesses from intrusive environmental restrictions and negative impacts on economic growth.

This analysis examines the impact of the president's energy independence executive order on the actions of federal government departments and administrative agencies, and the effect of federal court decisions bearing on the president's goal of re-establishing the vitality of the fossil fuel sector.

## ENVIRONMENTAL PROTECTION AGENCY

Much of the responsibility for implementing the executive order falls on the EPA, whose efforts have produced mixed results. On the positive side, in October 2017 the agency issued its "Final Report on Review of Agency Actions that Potentially Burden the

Safe, Efficient Development of Domestic Energy Resources Under Executive Order 13783."<sup>2</sup>

The report describes the EPA's efforts to reform the New Source Review and the National Ambient Air Quality Standards review processes under the Clean Air Act, and how it plans to assess the economic consequences of actions taken under the CAA and other federal environmental statutes.

On the other hand, the agency has faced considerable legal and procedural constraints in its efforts to expeditiously unwind the Obama administration's controversial Clean Power Plan,<sup>3</sup> which the executive order targets for revocation as an "intrusive environmental regulation."

---

## The Trump administration has learned that revoking already promulgated rules is easier said than done.

---

Promulgated in 2015 under the CAA, the CPP was intended to facilitate a reduction in carbon dioxide emissions from the utility power sector by 32 percent below 2005 levels by 2030. Shortly after the rule implementing it was promulgated, the Supreme Court stayed the plan's implementation.

When the executive order was issued, a decision on the rule's validity was pending before the District of Columbia U.S. Circuit Court of Appeals following an en banc hearing in September 2016.<sup>4</sup>

The administration has learned that revoking already promulgated rules is easier said than done. The agency that promulgated the rule must follow the same Administrative Procedure Act notice-and-comment process to rescind or modify it.

Thus, an agency cannot simply revoke and replace a rule to satisfy the policies of a new administration. Rather, the agency first must create an administrative record that supports revocation of the existing rule. Then, if it also is considering promulgating a new rule, it must conduct a separate rulemaking proceeding.

Ultimately, the administrative record created to revoke or revise a regulation must justify a different outcome than the record on which the existing rule was issued. Thus, the process of revising or revoking rules is not perfunctory or simple.

In light of the foregoing, in April 2017 the EPA announced that it would review the CPP and, if appropriate, initiate proceedings to suspend, revise or rescind the rule.

On Oct. 10, 2017, almost seven months after the president signed the executive order, the agency issued a notice of proposed rulemaking to repeal the CPP on the basis that the rule exceeded the agency's statutory authority under the CAA.<sup>5</sup>

Given the overriding interest in the proceeding's outcome, the comment period was extended several times. The administrative record will remain open for comment until April 26.<sup>6</sup>

Also, in late December 2017 the EPA announced that it would consider a differing approach than applied in the CPP rule for states to address greenhouse gas emissions from existing electric utility generation units. The comment period for EPA's advanced notice of proposed rulemaking closed Feb. 26.<sup>7</sup>

---

### In December 2017 the Bureau of Land Management rescinded the rule restricting fracking activities on federal land.

---

In the meantime, in connection with its April 2017 announcement to review the CPP, the EPA sought to delay the D.C. Circuit's issuance of its impending decision on the rule's validity to enable the agency to administratively determine the rule's fate.

The D.C. Circuit declined to issue a permanent stay or dismiss the case with remand of the rule for the EPA's reconsideration. Instead, the court retained jurisdiction, agreeing only to hold the case in abeyance while requiring the EPA to file frequent status reports on its reconsideration of the CPP rule.<sup>8</sup>

The EPA has also been frustrated with respect to its efforts to delay implementation of the Methane Rule,<sup>9</sup> an Obama-era greenhouse gas emissions reduction rule requiring that oil and gas companies fix methane leaks and upgrade equipment at extraction sites. Following the receipt of multiple industry petitions<sup>10</sup> for reconsideration of the rule, the EPA announced that it would delay implementation for two years.<sup>11</sup>

Opponents of the delay filed suit, and the D.C. Circuit ruled July 3, 2017, that the EPA lacked authority under the CAA to delay the regulation's implementation while the agency reconsidered it.<sup>12</sup> The court subsequently rejected a request by industry groups and some states to reconsider its ruling.

### DEPARTMENT OF THE INTERIOR

The executive order lifted an Obama-era moratorium on leasing federal lands for coal mining. The day after the order was issued, Interior Secretary Ryan Zinke issued his own order

requiring the Bureau of Land Management to reevaluate the Obama administration's planning policies for federal lands.<sup>13</sup>

Under President Barack Obama, the BLM had issued regulations that sought to manage federal lands through the implementation of top-down, large-scale land use plans that zoned public lands for conservation and development.

In March 2017, Congress issued, and Trump signed, a resolution under the Congressional Review Act repealing those regulations.<sup>14</sup>

In addition to lifting the BLM's moratorium on leasing federal land for coal mining, the executive order instructed the Interior Department to consider rescinding a 2015 regulation restricting hydraulic fracturing on federal and tribal land.<sup>15</sup>

Before the BLM acted on the president's instruction, in June 2016 a Wyoming federal judge invalidated the rule, finding that the agency had exceeded its statutory authority.<sup>16</sup>

Nonetheless, the BLM published a proposal to rescind the regulation, asserting that the rule needlessly burdens industry with unjustified compliance costs.<sup>17</sup>

In September 2017 the 10th U.S. Circuit Court of Appeals dismissed an appeal filed by supporters of the rule.<sup>18</sup>

The appeals court directed the lower court to vacate its opinion and dismiss the case, stating, "Given the changed and changing circumstances, we conclude these appeals are prudentially unripe."

In December 2017 the BLM rescinded the rule restricting fracking activities on federal land.<sup>19</sup>

### FEDERAL ENERGY REGULATORY COMMISSION

Among other responsibilities, FERC approves and issues construction certificates for interstate gas pipelines and related infrastructure under Section 7 of the National Gas Act.<sup>20</sup> The commission's decisions are guided by an agency policy statement issued in 1999.<sup>21</sup>

The criteria for evaluating projects include whether the project developers have taken steps to eliminate or minimize any adverse effects on existing customers, on other pipelines in the market and their customers, and on landowners and communities along the proposed project's route.

FERC then weighs any potential residual adverse effects against the projected benefits. If it concludes that the project's benefits outweigh its adverse affects, it proceeds to conduct an environmental review pursuant to the National Environmental Policy Act.

To further assist the domestic energy sector, the executive order also seeks to ease permitting of fossil fuel energy projects. In particular, it rescinds an Obama-era directive that federal agencies performing NEPA project reviews must consider greenhouse gas emissions and climate change impacts.<sup>22</sup>

Taking its cue from Trump, who granted national permits shortly after taking office for two cross-border projects previously rejected by the Obama administration (the Keystone XL and Dakota Access pipelines), FERC swiftly approved several proposed interstate pipelines during the Trump administration's first year.

Despite the executive order's instruction to disregard GHG and climate issues in conducting NEPA reviews, in August 2017 the D.C. Circuit ruled that FERC had failed to adequately analyze the downstream impacts of GHG emissions in approving a Southeast Market natural gas pipeline project extending from Georgia to Florida.<sup>23</sup>

The court vacated the commission's project approval and ordered it to conduct a further environmental review.

That decision came on the heels of a ruling by a Montana federal district court judge that the U.S. Office of Surface Mining Reclamation and Enforcement did not adequately assess the effect of GHG emissions before approving a coal mine expansion plan on federal lands.<sup>24</sup>

The D.C. Circuit vacated FERC's approval of the project.<sup>25</sup>

It is expected that courts will continue to play a prominent role in defining the scope of environmental reviews that agencies must conduct under NEPA.

In December 2017 FERC chair Kevin McIntyre announced that the commission would review its 1999 pipeline approval process. McIntyre provided further context for the review during a presentation to state utility commissioners in February 2018.<sup>26</sup>

Not surprisingly, a major focus of the pending evaluation will be the appropriate scope of the commission's environmental review in light of the recent D.C. Circuit ruling requiring that FERC's NEPA assessments include consideration of the GHG impacts from a pipeline project.

It is unclear, though, how the commission will reconcile the executive order's directive with the D.C. Circuit's Southeast Market pipeline decision.

## DEPARTMENT OF ENERGY

On April 14, 2017, Energy Department Secretary Rick Perry issued a memorandum directing that a study be conducted reviewing "concerns about the erosion of critical baseload resources" and potential related effects on grid reliability.<sup>27</sup>

Although the study<sup>28</sup> did not conclude that greater reliance on "critical baseload resources" such as coal and nuclear energy was necessary to ensure grid reliability, in October 2017 the Energy Department petitioned FERC, via a notice of proposed rulemaking, to propose subsidies for coal and nuclear energy.<sup>29</sup>

FERC roundly rejected the Energy Department's petition, stating that the request to require regional transmission

organizations and independent system operators to implement tariff changes must comply with Section 206 of the Federal Power Act, which requires a showing that current tariffs are unjust, unreasonable, unduly discriminatory or preferential.<sup>30</sup>

Additionally, the proposed remedy itself must be shown to be just, reasonable and not unduly discriminatory, or preferential.

FERC found that the Energy Department's petition satisfied neither of these legal standards. Nevertheless, it initiated a new proceeding to evaluate the resilience of the bulk power systems in ISO/RTO territories. The commission directed ISO/RTOs to submit information regarding resilience and other related concerns to enable FERC to "holistically" examine the resilience of the bulk power system.

---

Despite Trump's efforts to bolster the moribund fossil fuel sector, it seems doubtful that the decline in coal-fired power generation will be reversed.

---

## CONCLUSION

Despite Trump's efforts to bolster the moribund fossil fuel sector, it seems doubtful that the decline in coal-fired power generation will be reversed.

First, coal is not competitive with lower-priced and widely available natural gas.

Second, the cost of developing renewable energy resources continues to drop.

Third, state renewable portfolio standard programs and corporate commitments to further reduce greenhouse gas emissions continue to drive the growth of the renewables market.

Fourth, carbon emissions from power plants have fallen by 5 percent during each of the last two years, which is largely due to the switch by the utility sector, coal's largest customer, to natural gas and renewables.

Currently, coal's market share is in the low 30 percent range, and the U.S. Energy Information Administration expects the share of coal to remain stagnant or slightly decrease, averaging 30 percent in 2018 and 28 percent in 2019.<sup>31</sup>

Furthermore, withdrawal from the Paris climate accord is unlikely to have a short-term impact in the United States. GHG emissions from U.S. energy sources hit a 25-year low in 2017, and they are expected to continue to decrease.

It appears that the train has left the station regarding the overriding support of many corporations and states to increase development of renewable energy resources — and with respect to ongoing conservation and sustainability

measures designed to further reduce greenhouse gas emissions.

In light of the foregoing developments, it seems that market forces — and not Trump’s energy independence executive order or government agencies’ efforts to deconstruct the Obama-era climate initiatives — will dictate the fate of the fossil fuel industry.

## NOTES

- <sup>1</sup> Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017).
- <sup>2</sup> U.S. Evtl. Prot. Agency, Final Report on Review of Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources Under Executive Order 13783 (Oct. 25, 2017), <http://bit.ly/2i5CuRa>.
- <sup>3</sup> 80 Fed. Reg. 64661 (Oct. 23, 2015).
- <sup>4</sup> Sullivan & Worcester filed an amicus curiae brief in support of the EPA’s Clean Power Plan. The brief was filed on behalf of Adobe Systems Inc., Mars Inc., IKEA North America Services LLC and Blue Cross Blue Shield of Massachusetts Inc., a coalition of sustainability-conscious companies that purchase and consume a significant amount of electricity in their business operations. As reflected in the brief, these companies desired to reduce their carbon footprints by procuring their electricity from low- and zero-emitting greenhouse gas sources and viewed the CPP as a viable “national market solution” that would create market certainty. They also informed the court that any delay in implementation of the CPP could cause economic, social and business disruptions, including to their own supply chain management, and strategic and financial planning.
- <sup>5</sup> 82 Fed. Reg. 48035 (Oct. 16, 2017).
- <sup>6</sup> See Repeal of Carbon Pollution Emission Guidelines for Extending Stationary Sources: Electric Utility Generating Units, 83 Fed. Reg. 4620 (noticed Feb. 1, 2018).
- <sup>7</sup> See State Guidelines for Greenhouse Gas Emissions from Existing Utility Generating Units, 82 Fed. Reg. 61507 (proposed Dec. 28, 2017).
- <sup>8</sup> *West Virginia v. Evtl. Prot. Agency*, No. 15-1363, order issued (D.C. Cir. Aug. 8, 2017).
- <sup>9</sup> 81 Fed. Reg. 35824 (June 3, 2016).
- <sup>10</sup> Letter from E. Scott Pruitt, Administrator, U.S. Evtl. Prot. Agency, to Howard J. Feldman, Am. Petroleum Inst., RE: Convening a Proceeding for Reconsideration of Final Rule, “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed and Modified Sources,” published June 3, 2016, 81 Fed. Reg. 35824 (Apr. 18, 2017), <http://bit.ly/2o4DLxV>.
- <sup>11</sup> 82 Fed. Reg. 27645 (June 16, 2017).
- <sup>12</sup> *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017).
- <sup>13</sup> Ryan Zinke, Sec’y of the Interior, Order No. 3348, Concerning the Federal Coal Moratorium (2017), <https://on.doi.gov/2oijj9a>.
- <sup>14</sup> *Disapproving the rule submitted by the Department of the Interior relating to Bureau of Land Management regulations that establish the procedures used to prepare, revise, or amend land use plans pursuant to the Federal Land Policy and Management Act of 1976*, H.R.J. Res. 44, 115th Cong., 131 Stat. 76 (2017), <http://bit.ly/2pe64lC>.

- <sup>15</sup> 80 Fed. Reg. 16127 (Mar. 26, 2015).
- <sup>16</sup> *Wyoming v. U.S. Dep’t of Interior (Jewell)*, No. 15-cv-43, 2015 WL 5845145 (D. Wyo. June 21, 2016).
- <sup>17</sup> 82 Fed. Reg. 34464 (July 25, 2017).
- <sup>18</sup> *Wyoming v. Zinke*, 871 F.3d 1133 (10th Cir. 2017).
- <sup>19</sup> 82 Fed. Reg. 61924 (Dec. 29, 2017).
- <sup>20</sup> 15 U.S.C.A. § 717f (1982).
- <sup>21</sup> Fed. Energy Regulatory Comm’n, Certification of New Interstate Natural Gas Pipelines, No. PL99-3-000 (1999), <http://bit.ly/2BfSEzQ>.
- <sup>22</sup> Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017) (stating “(c) The Council on Environmental Quality shall rescind its final guidance entitled Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews”) (internal quotations omitted).
- <sup>23</sup> *Sierra Club v. Fed. Energy Regulatory Comm’n*, 867 F.3d 1357 (D.C. Cir. 2017).
- <sup>24</sup> *Mont. Evtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074 (D. Mont. 2017).
- <sup>25</sup> In ruling on a challenge to issuance of the final permit to complete construction of the Dakota Access pipeline, the U.S. District Court for the District of Columbia last June found that aspects of the Army Corps of Engineers’ environmental assessment were inadequate. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101 (D.D.C. 2017). The court ordered the Army Corps to conduct further review. In this case, the court ordered a separate briefing to assess whether the pipeline should be shut down while the additional environmental review was conducted. On Oct. 11 the court denied a request for injunctive relief to halt oil-pumping operations pending the Corps’ completion of further review. However, on Dec. 4 the court imposed three interim measures on the pipeline company: completing oil spill response plans, obtaining an independent audit of the pipeline’s compliance with permit conditions and standards, and filing regular reports on any incidents or repairs to the pipeline.
- <sup>26</sup> Greenhouse Gas Emissions to Get Closer Look in Pipeline Review, Daily Rep. for Exec. (BNA) (Feb. 14, 2018).
- <sup>27</sup> Memorandum from Rick Perry, Sec. of Energy, to the Chief of Staff, Study Examining Electricity Markets and Reliability (Apr. 14, 2017), <http://bit.ly/2peuzWd>.
- <sup>28</sup> U.S. DEP’T OF ENERGY, STAFF REPORT TO THE SECRETARY ON ELECTRICITY MARKETS AND RELIABILITY (2017), <http://bit.ly/2g91V71>.
- <sup>29</sup> 82 Fed. Reg. 46940 (Oct. 10, 2017).
- <sup>30</sup> Fed. Energy Regulatory Comm’n, Grid Reliability and Resilience Pricing (RM18-1-000); Grid Resilience in Regional Transmission Organizations and Independent System Operators (AD18-7-000) (Jan. 8, 2018), <http://bit.ly/2Fg4mgv>.
- <sup>31</sup> EIA Forecasts Natural Gas to Remain Primary Energy Source for Electricity Generation, U.S. ENERGY INFO. ADMIN. (Jan. 22, 2018), <http://bit.ly/2Drguto>.

***This article first appeared on the Practitioners Insight Energy & Environment web page on March 15, 2018.***

---

## ABOUT THE AUTHORS



**Jerome C. Muys Jr.** (L) (jmuys@sandw.com) and **Jeffrey M. Karp** (R) (jkarp@sandw.com) are partners in the Washington office of **Sullivan & Worcester**. Muys specializes in environmental regulatory, transactional and litigation matters, representing clients in the energy, automotive and consumer products sectors. He also advises clients on regulatory consideration and due diligence requirements concerning the funding, siting, permitting and construction of renewable energy projects. Karp assists clients in resolving environmental regulatory matters and high-stakes business disputes. He also advises corporations, developers and financiers on renewable and other energy projects worldwide.

**Thomson Reuters** develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world's most trusted news organization.