



Emily Schilling

Partner
801.799.5753
Salt Lake City
ecschilling@hollandhart.com



Murray Feldman

Partner
208.342.5000
Boise
mfeldman@hollandhart.com



Andrew Emrich

Partner
303.290.1621
Denver Tech Center
acemrich@hollandhart.com

Trumping Obama-Era Environmental Policy—What's Next?

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On March 28, 2017, the climate change debate took a sharp turn with President Trump's signing of his Executive Order on Promoting Energy Independence and Economic Growth (the "EO"). The policies that defined President Obama's climate change agenda are out, and a new emphasis on promoting domestic energy production is in.

The EO is sweeping in nature, touching on every agency that has issued regulations, guidance, or policies that "potentially burden the development or use of domestically produced energy sources, with particular attention to oil, natural gas, coal, and nuclear energy resources." The EO rescinds or revokes all of President Obama's Presidential actions on climate change—from Executive Orders on preparing the country for the impacts of climate change to those directing agencies to regulate greenhouse gas emissions—and orders the Council on Environmental Quality (CEQ), the Department of Interior (DOI), and the Environmental Protection Agency (EPA) to take steps to rescind or revise a variety of regulatory actions related to climate change.

The most immediate impacts of the EO will result from rescission of discretionary administrative policies, such as the DOI's coal leasing moratorium, and CEQ's climate change guidance, and the revocation of Obama Administration changes to the social cost of carbon analytical tools, which are at issue in ongoing litigation and regulatory actions. Revisions to final agency rules, such as the New Source Performance Standards (NSPS) for the utility and oil and gas sectors and the Clean Power Plan, will take substantially longer to finalize and will be subject to judicial challenge. The following provides a summary of the policy and regulatory changes contemplated by the EO:

Revocation of CEQ Guidance: In a little-referenced provision, EO Section 3(c) directs the Council on Environmental Quality to rescind its prior August 2016 "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." That Guidance outlined CEQ's recommendations for the consideration of climate change effects by federal agencies preparing environmental impact statements or environmental assessments on federal actions.

The withdrawal of the CEQ Guidance may have more symbolic than practical effect. Even before issuance of the Guidance, the federal courts had already been addressing the standards for the consideration of climate change effects under NEPA, and some agencies had their own guidance on addressing climate change effects. *See, e.g., WildEarth Guardians v. Jewell*, 738 F.3d 298, 302 (D.C. Cir. 2013) (upholding BLM leasing



Jill Van Noord

Of Counsel
 303.295.8378
 Denver
jhvannoord@hollandhart.com



Kristin Nichols

Associate
 303.290.1613
 Denver Tech Center
kanichols@hollandhart.com

decision against NEPA climate change claims); *San Diego Navy Broadway Complex Coal. v. U.S. Dep't of Defense*, 904 F. Supp. 2d 1056, 1068 (S.D. Cal. 2012) (NEPA review properly addressed climate change).

Thus, the existing standard for the consideration of climate change effects in federal agency NEPA documents is unlikely to change. That standard as developed in the case law, apart from the to-be-rescinded CEQ guidance, indicates that federal agency NEPA documents should at least include a discussion at least of (1) the effects of climate change on the proposed federal action being reviewed, and (2) the effects of the proposed action itself on climate change including GHG contributions, general effects on species, and similar impacts.

Rescission of Social Cost of Carbon Technical Support Documents:

The EO also disbands the Interagency Working Group on Social Cost of Greenhouse Gases and withdraws several technical support documents issued by the Working Group which attempted to quantify the social cost of greenhouse gas emissions (including carbon, methane, and nitrous oxides) in the context of regulatory decision-making. Under the EO, agencies must now use the long-standing guidance contained in OMB Circular A-4 (issued September 17, 2003) to monetize the value of changes in greenhouse gas emissions for regulatory actions.

Rescission of Coal Leasing Moratorium: The EO directs the Secretary of the Interior to amend or withdraw the January 15, 2016 Secretarial Order No. 3338 that initiated a BLM-led discretionary review of the federal coal program under the National Environmental Policy Act. The EO also directs the Secretary to lift the federal coal leasing moratorium that was instituted through Order No. 3338 and proceed with federal coal leasing activities. On March 29, 2017, Secretary of the Interior Zinke implemented the EO by issuing Secretarial Order No. 3348 entitled “Concerning the Federal Coal Moratorium.” Secretary Zinke’s Order No. 3348 revokes former Secretary Jewell’s Order No. 3338, terminates the programmatic coal leasing review, lifts the leasing moratorium, and directs the Bureau of Land Management to process coal lease applications and modifications on an expeditious basis consistent with applicable law.

Department of the Interior’s Other Steps to Implement the Executive Order: Also on March 29, 2017, Secretary Zinke issued Secretarial Order No. 3349 to implement Section 2 of the EO. This new Secretarial Order No. 3349 revokes Secretarial Order No. 3330, which had implemented an agency wide landscape-scale mitigation policy, and initiates an internal agency review of mitigation and climate change policies as well as other Department actions impacting energy development.

Rollback of Methane Regulations Applicable to Oil and Gas: The EO also initiates a process to roll back EPA and Interior regulations on oil and gas development. For EPA, the EO directs the Administrator to suspend, revise, or rescind the New Source Performance Standard (NSPS) addressing methane and volatile organic compound (VOC) emissions from specific oil and gas operations, known as OOOOa. NSPS OOOOa built on the NSPS OOOO, which focused on VOC emissions from upstream oil and gas operations. Detangling OOOOa requirements from OOOO may prove

difficult, however. This is especially true where states have already adopted the OOOOa requirements into their state regulations and/or State Implementation Plans, resulting in a patchwork of regulatory requirements. Four Interior rules are also subject to the directive to suspend, revise, or rescind, including the BLM Fracking Rule and the controversial BLM Methane and Waste Reduction Rule.

Review of NSPS for Utilities and the Clean Power Plan: The EO directs EPA to review Clean Power Plan and related rules and agency actions. EPA must “immediately take all steps necessary to review” both the NSPS for GHG emissions from electric generating units (EGUs), as well as the Section 111(d) Existing Source standards, also known as the Clean Power Plan. “If appropriate” and “as soon as practicable,” EPA is directed to publish for notice and comment rules that would suspend, revise, or rescind the final NSPS and the Clean Power Plan. In addition, EPA is directed to review and as appropriate suspend, revise, or rescind the Legal Memorandum that supports the Clean Power Plan. The EO does not set a timeframe for this review, which will take time and will result in legal challenges to any revision or rescission of the rules. There still remains substantial uncertainty regarding what EPA's rulemaking notice will entail and whether EPA will rescind the standards or repropose them.