

Trump Administration Rolls Back Climate Change Initiatives

Contributing Partner

Don J. Frost, Jr. / Washington, D.C.

Counsel

Henry C. Eisenberg / Washington, D.C.

As expected, the Trump administration has been actively engaged in efforts to reverse the federal government's regulatory direction with respect to climate change. In 2017, President Donald Trump announced plans to withdraw from the Paris climate accord and proposed reducing the Environmental Protection Agency's (EPA) budget. Under Administrator Scott Pruitt's leadership, certain EPA regulations are being reconsidered or proposed for repeal. A shift away from the previous administration's efforts on climate change is expected to continue in 2018.

The Endangerment Finding

In 2009, the EPA determined that the emission of six greenhouse gases, in combination, endangers the health and welfare of future generations (the Endangerment Finding). The finding has since become the basis for the regulation of emissions from a range of sources, both mobile (such as vehicles) and stationary (most notably power plants). The finding's significance is that, depending on the section of the Clean Air Act being invoked, it serves as a basis for the EPA to exercise discretionary authority to regulate greenhouse gas emissions and may (as in the case of regulating greenhouse gas emissions from mobile sources) obligate the EPA to regulate such emissions. The Endangerment Finding provides a basis for more climate activist administrations to use the Clean Air Act to attempt to reduce greenhouse gas emissions and for environmental activists to use the courts to attempt to force action by more reluctant administrations.

Whether the Trump administration will attempt to reverse the Endangerment Finding is uncertain. Conservative organizations have filed a number of petitions calling for it to be revoked. At a December 7, 2017, hearing before the House Energy and Commerce Committee, Administrator Pruitt criticized the EPA's reliance on the reports of the United

Nations Intergovernmental Panel on Climate Change (IPCC) to make the Endangerment Finding, notwithstanding that the U.S. Court of Appeals for the District of Columbia Circuit previously rejected a challenge to the Endangerment Finding based on this premise in 2012. Administrator Pruitt also stated that he intends to conduct a "red team/blue team" exercise in 2018, during which climate skeptics and climate scientists will debate the validity of mainstream climate science.

Nonetheless, the extensive administrative record developed by the EPA in 2009 in support of the Endangerment Finding will likely be a formidable obstacle to attempts to reverse it. More recent climate evaluations, including the 2014 IPCC report and the first volume of the Fourth National Climate Assessment — produced by the interagency U.S. Global Change Research Program and released in November 2017 — are consistent with the conclusions of the Endangerment Finding. Its durability will be an important issue to monitor in the coming battles over federal climate change regulatory policy.

The Paris Climate Accord

On the international front, President Trump has announced his intention to withdraw from the Paris climate accord, and U.N. Ambassador Nikki Haley formally notified the United Nations in

This article is from Skadden's 2018 *Insights*.

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

Four Times Square
New York, NY 10036
212.735.3000

August 2017 that the U.S. intends to do so “unless the United States identifies suitable terms for reengagement.” However, there is little reason to believe that the parties would be able or willing to renegotiate the agreement for the benefit of the United States. The earliest the U.S. can submit its withdrawal notice is November 4, 2019, with the effective date no earlier than one year from the date the notice is submitted.

Climate Change and the Budget

The Trump administration has proposed reducing the EPA’s 2018 budget by over 30 percent, including a proposed staffing cut of 25 percent. The administration has specifically targeted for elimination the EPA’s Global Climate Change Research Program and various climate-related partnerships with outside groups, such as the EPA’s state and local climate and energy programs. The justification for these proposed cuts is that climate change and sustainability are not among the EPA’s core statutory obligations to protect air, water and land. The administration also has proposed substantial cuts to the Department of Energy’s Office of Energy Efficiency and Renewable Energy; cuts to NASA earth science missions, including missions to track the distribution of carbon dioxide emissions and to better understand climate change; a reduction in support for climate science at the Department of the Interior; a reduction in funding for the U.S. Geological Survey’s carbon sequestration research; and cuts to climate change programs at the U.S. Agency for International Development and the State Department.

EPA Regulatory Developments

Regulation of Carbon Dioxide Emissions From Power Plants

On the regulatory front, the Trump administration is taking aim at some of President Barack Obama’s most

significant actions in the regulation of carbon dioxide emissions from power plants. At the administration’s request, the D.C. Circuit issued an order in April 2017 freezing the litigation challenging the Clean Power Plan, the EPA’s emissions guidelines governing the regulation of carbon dioxide emissions from existing fossil fuel-fired power plants. On October 16, 2017, the EPA proposed repealing the Clean Power Plan on the basis that the regulation — which would require electric power generators and the electric generator sector to shift to low- or zero-emitting electricity generation sources, such as wind and solar — exceeded the agency’s statutory authority.

On December 18, 2017, Administrator Pruitt signed an advance notice of proposed rulemaking soliciting information about a possible future rule providing emission guidelines to regulate greenhouse gas emissions from existing power plants. The notice seeks comment on potential technologies and strategies that feasibly could be applied at individual sources, with a primary focus on heat rate or efficiency improvements. The proposal also seeks comment on the respective roles of the states and the federal government in establishing performance standards for existing power plants.

The D.C. Circuit also agreed in April 2017 to the Trump administration’s request to freeze the litigation challenging the 2015 regulation establishing carbon dioxide limits for new, modified and reconstructed coal-fired and natural gas-fired electrical generating units (Carbon New Source Performance Standard). In an October 23, 2017, court filing, the EPA stated that it was still conducting its review of this regulation. One difference between the Clean Power Plan and the Carbon New Source Performance Standard is that the Supreme Court issued a stay of the Clean Power Plan in February 2016, while

the Carbon New Source Performance Standard remains in effect. The practical import of this distinction is limited, given that coal-fired power plants are being retired rather than constructed, but it is important to note that under the Clean Air Act, the EPA cannot issue a regulation governing carbon dioxide emissions from existing power plants without first having promulgated a regulation for new, modified or reconstructed power plants.

Regulation of Methane Emissions From Oil and Gas Drilling

As a result of industry petitions for reconsideration, the EPA also issued an administrative stay of the Obama-era regulation that established limits on fugitive greenhouse gas methane emissions from new oil and gas drilling operations. However, in July 2017, the D.C. Circuit vacated this stay and held that the rule will remain in effect until the EPA completes a new rulemaking to revise the regulation. In June 2017, the EPA issued a proposed rule to stay the regulation pending its reconsideration, and in November 2017, it issued a notice of data availability soliciting further comment on the proposed stay and other aspects of the regulation.

NEPA and the Social Cost of Carbon

On March 28, 2017, President Trump issued his executive order “Promoting Energy Independence and Economic Growth.” Among other moves, the order disbanded the Interagency Working Group on Social Cost of Carbon and withdrew the group’s technical documents, which were being used to evaluate the impacts of carbon pollution in connection with federal actions. The most recent technical document had established the social cost of carbon at \$36 per ton. On April 5, 2017, the Council on Environmental Quality (CEQ) withdrew the document it had issued in August 2016 providing guidance

to federal agencies on evaluating greenhouse gas emissions and climate change impact of projects when conducting reviews under the National Environmental Policy Act (NEPA).

The withdrawals of the NEPA guidance and social cost of carbon technical documents do not mean that federal agencies will be able to avoid consideration of climate change when conducting NEPA

reviews. However, the absence of guidance may mean less consistency in such evaluations. Given the administration's skepticism toward global warming, it also is possible that the evaluation of the impact of federal actions with respect to climate change could be given short shrift in NEPA environmental reviews, which could make such assessments (and the underlying projects that require them) more vulnerable to legal challenge.