

# Legal Update

## Biden Executive Order on Energy Regulation

On January 20, 2021, President Joseph Biden signed a series of executive orders to begin to set forth his administration's policy agenda. Among the executive orders he signed was the executive order "*Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*" (the "Order"). This Order contains a series of directives to federal agencies and departments that will significantly impact the energy sector and signals the high priority the Biden administration is placing on addressing climate change.

The Order states the administration's policy on advancing environmental justice and directs agencies and departments to take specific steps to implement that policy. The Order's directives are phrased in terms of instructing agency and department heads to "consider" taking action, likely so as to avoid running afoul of the Administrative Procedure Act by prejudging the outcome of a rulemaking or other agency action. In practice, however, agency and department heads will consider the Order's directives as mandates. Accordingly, the policy set forth in the Order will likely guide agency actions for the entire administration.

In addition, the Order revokes a series of Trump-era executive orders and Presidential proclamations that sought to promote US energy production. Further, and significantly, the Order establishes a process for calculating the "social cost of carbon" for use in federal decision-making, including cost-benefit analysis for rulemakings.

**1. Policy Statement.** The Order sets forth the Biden administration's policy to advance environmental justice. It states that it is the policy of the administration to:

listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.

**2. Regulatory Review.** The Order directs federal agencies to "immediately commence work to confront the climate crisis" and to undertake an immediate review of all actions issued during the Trump administration (including existing regulations, orders, and guidance documents) that are

contrary to policies set forth in the Order. The Order directs all executive departments and agencies to “take action to address” the Trump administration actions, which includes suspending, revising, or rescinding those actions. The Order directs agency heads to submit to the Office of Management and Budget (“OMB”) (a) within 30 days, a preliminary list of actions they are considering that would be completed by December 31, 2021, and (b) within 90 days, an updated list of actions they are considering that would be completed by December 31, 2025. It also directs agency heads to send to the National Climate Advisor (former Senator John Kerry) each list submitted to OMB as well as a list of any actions that would not be subject to OMB review.

The Order also directs agency heads to consider any new actions to fully enforce the policy set forth in the Order

**3. Specific Regulatory Reviews.** The Order specifically directs federal agencies to “consider” suspending, revising, or rescinding a series of specified Trump administration regulations related to methane emissions, fuel economy standards, efficiency standards, and pollution standards by specified dates.

The regulations specified by the Order and the deadlines for agency action are as follows:

- **Methane Emission.**
  - Emission Standards for New, Reconstructed, and Modified Sources Reconsideration (85 Fed. Reg. 57938), by September 2021.
- **Fuel Efficiency.**
  - The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program (84 Fed. Reg. 51310), by April 2021; and
  - The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks (85 Fed. Reg. 24174), by July 2021.
- **Efficiency Standards.**
  - Energy Conservation Program for Appliance Standards: Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment (85 Fed. Reg. 8626), by March 2021 (major revisions) and June 2021 (remaining revisions);
  - Final Determination Regarding Energy Efficiency Improvements in the 2018 International Energy Conservation Code (IECC) (84 Fed. Reg. 67435), by May 2021; and
  - Final Determination Regarding Energy Efficiency Improvements in ANSI/ASHRAE/IES Standard 90.1-2016: Energy Standard for Buildings, Except Low-Rise Residential Buildings (83 Fed. Reg. 8463), by May 2021.
- **Pollution Standards.**
  - National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review (85 Fed. Reg. 31286), by August 2021;
  - Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process (85 Fed. Reg. 84130), as soon as possible; and
  - Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information (86 Fed. Reg. 469), as soon as possible.

In addition, the Order separately specifically directs the EPA Administrator to consider:

- Proposing new regulations to establish standards for methane and volatile organic compound emissions from existing operations in oil and gas sector by September 2021; and
- Proposing a federal implementation plan for ozone standards for California, Connecticut, New York, Pennsylvania and Texas by January 2022.

**4. Litigation Review.** The Order instructs that the Attorney General “may” “in his discretion” request a stay or otherwise dispose of any pending litigation related to Trump administration actions in a manner consistent with the policy set forth in the Order.

**5. National Monuments.** The Order directs the Secretary of the Interior undertake a review of the following Presidential proclamations to determine whether to restore the boundaries and conditions to the relevant monuments that existed on January 20, 2017:

- Proclamation 9681 of December 4, 2017 (Modifying the Bears Ears National Monument);
- Proclamation 9682 of December 4, 2017 (Modifying the Grand Staircase-Escalante National Monument); and
- Proclamation 10049 of June 5, 2020 (Modifying the Northeast Canyons and Seamounts Marine National Monument).

The Interior Secretary must provide to the President within 60 days a report summarizing his findings and recommendations for presidential or other actions to carry out the policies of the Order.

**6. Anwar/Arctic Energy Exploration.** The Order directs the Interior Secretary to impose a temporary moratorium on federal government activities with respect to implementing the Coastal Plain Oil and Gas Leasing Program in the Arctic National Wildlife Refuge and to conduct a new analysis of the environmental impacts of the oil and gas program.

The Order reinstates President Obama’s executive order and proclamation withdrawing the arctic from oil and gas drilling that were revoked by President Trump. The Attorney General is also instructed to consider taking actions to stay litigation pending the completion of the Interior Secretary’s review.

**7. Pricing the Social Cost of Carbon/Oxide/Methane.** The Order establishes an “Interagency Working Group on the Social Cost of Greenhouse Gases,” which is co-chaired by the Chair of the Council of Economic Advisors, the Director of OMB, and the Director of the Office of Science and Technology Policy. The working group is charged with publishing interim estimates of: (a) the social cost of carbon, (b) the social cost of nitrous oxide, and (c) the social cost of methane within 60 days. The working group is instructed to publish final figures by January 2022. Federal agencies are instructed to use the interim estimates when assessing the impact of regulations on greenhouse gas emission until the final figures are completed. The working group is required to provide recommendations to the President by September 1, 2021, on where the federal government should use the estimates in decision-making, budgeting, and procurement.

**8. Keystone Pipeline.** The Order revokes the permit for the Keystone XL Pipeline.

**9. Revoking Trump Executive Orders and Presidential Memorandums.** The Order revokes a series of Trump-era executive orders and Presidential memorandums aimed at streamlining the federal permitting process, especially for infrastructure and energy-related projects, as well as the well-publicized executive order relating to the revocation of the Environmental Protection Agency’s

“Waters of the United States rule.” The full list of revoked executive orders and Presidential memoranda is as follows:

- Executive Order 13766 of January 24, 2017 (Expediting Environmental Reviews and Approvals For High Priority Infrastructure Projects);
- Executive Order 13778 of February 28, 2017 (Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule);
- Executive Order 13783 of March 28, 2017 (Promoting Energy Independence and Economic Growth);
- Executive Order 13792 of April 26, 2017 (Review of Designations Under the Antiquities Act);
- Executive Order 13795 of April 28, 2017 (Implementing an America-First Offshore Energy Strategy);
- Executive Order 13868 of April 10, 2019 (Promoting Energy Infrastructure and Economic Growth);
- Executive Order 13927 of June 4, 2020 (Accelerating the Nation’s Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities);
- Executive Order 13834 of May 17, 2018 (Efficient Federal Operations), except for sections 6, 7, and 11;
- Executive Order 13807 of August 15, 2017 (Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects);
- Presidential Memorandum of April 12, 2018 (Promoting Domestic Manufacturing and Job Creation Policies and Procedures Relating to Implementation of Air Quality Standards);
- Presidential Memorandum of October 19, 2018 (Promoting the Reliable Supply and Delivery of Water in the West); and
- Presidential Memorandum of February 19, 2020 (Developing and Delivering More Water Supplies in California).

Additionally, Executive Order 13920 of May 1, 2020 (Securing the United States Bulk-Power System) is suspended for 90 days. The Secretary of Energy and the Director of OMB are to jointly consider whether to recommend that a replacement order be issued.

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