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Energy Under Trump:
Impacts of the 2017 Election

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I. Introduction

There has been a seismic shift in the U.S. environmental regulatory landscape with the election of President Trump in November 2016 and his inauguration in January 2017. This shift is particularly significant concerning the regulation of power generation facilities and electric utilities. Like a pendulum that swung to expansive and strict environmental regulatory requirements under the previous Obama administration, the pendulum is swinging back to a less burdensome environmental regulatory state.

As with the election of any new president, there have been significant changes in the executive branch. There are new Administrators/Secretaries in each of the regulatory agencies and departments that regulate electric generation and related environmental concerns, including but not limited to: Environmental Protection Agency ("EPA") Administrator Scott Pruitt,[1] Department of Energy ("DOE") Secretary Rick Perry,[2] and Department of Interior ("DOI") Secretary Ryan Zinke.[3] Numerous new members of the Federal Energy Regulatory Commission ("FERC") have also been nominated.

While not turning away from the potential of renewable energy sources, each of these new Administrators/Secretaries emphasize energy independence and expansive use of traditional fossil fuels. These changes are driven internally at each respective agency, but they are also guided by the President via Executive Order, Executive Memoranda, and other Executive guidance, which have called for a prioritization of domestic energy production and relaxation of regulatory burdens.[4]

The policy preferences of the new Administration were recently outlined in the Trump Administration's Unified Agenda of Regulatory and Deregulatory Actions ("Unified Agenda"), prepared by the Office of Information and Regulatory Affairs ("OIRA"), within the Office of Management and Budget ("OMB"), and released on July 20, 2017. As summarized by the OIRA, the "Agenda represents the beginning of fundamental regulatory reform and a reorientation toward reducing unnecessary regulatory burden on the American people," with the goal of "amending and eliminating regulations that are ineffective, duplicative, and obsolete."[5] Across

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[1] Confirmed February 17, 2017, Senate Vote 52-26.

[2] Confirmed March 2, 2017, Senate Vote 62-37.

[3] Confirmed March 1, 2017, Senate Vote 68-31.

[4] Energy specific Executive Orders/Memoranda are discussed below. More generally, the President has also issued an Executive Order to reduce regulatory burdens across all industries, including the creation of the Regulatory Reform Task Forces within agencies to evaluate existing regulations and make recommendations to the agency head regarding their repeal, replacement, or modification. Each Task Force is ordered to identify regulations that: (i) eliminate jobs, or inhibit job creation; (ii) are outdated, unnecessary, or ineffective; (iii) impose costs that exceed benefits; (iv) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; (v) are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001; or (vi) derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified. *See Presidential Executive Order on Enforcing the Regulatory Reform Agenda*, February 24, 2017.

[5] *See* OIRA, Current Unified Agenda of Regulatory and Deregulatory Actions, https://www.reginfo.gov/public/do/eAgendaMain (last accessed July 23, 2017).

all agencies of the federal government, the Unified Agenda states that agencies have: withdrawn 469 actions proposed in the Fall 2016 Agenda; reconsidered 391 active actions by reclassifying them as long-term (282) and inactive (109), allowing for additional review; and reduced the number of economically significant regulations by roughly 50 percent since the Fall 2016 Agenda. Agencies are also now required, for the first time, to post and make public their list of "inactive" rules, providing notice to the public of regulations still being reviewed or considered.

The new Administration's preferences are also demonstrated in proposed budget cuts that call for large reductions in spending and manpower at these agencies/departments. For example, the proposed EPA FY 2018 budget calls for a roughly one-third reduction in spending, one-quarter reduction in staff, and the elimination of 56 programs.

It is under this regulatory environment that there have been advancements and changes to the majority of the environmental regulations impacting the electric generation industry, including but not limited to, EPA's regulation of greenhouse gas ("GHG") emissions, interstate transport of air emissions, haze-causing air emissions, disposal of coal combustion residuals, and impacts to water bodies and streams, as well as other agency actions and rules. Many of these rules were subject to ongoing litigation, and in many of these cases, these challenges have been stayed, abated, or continued while EPA formulates plans to reconsider, repeal, or take other action regarding these rules. These rules and actions are discussed in detail below.

II. Regulation of Greenhouse Gas Emissions

A. Energy Independence Executive Order

President Trump's March 28, 2017 Executive Order – Promoting Energy Independence and Economic Growth ("Energy Independence Executive Order," "Executive Order," or "Order") – began the process of suspending, revising, or rescinding a significant portion of the Obama Administration's efforts to reduce GHG emissions nationwide, particularly in the electric generation industry. The Order requires taking affirmative steps to repeal the Clean Power Plan ("CPP" or "111(d) Rule"),[6] the new-source electric generating unit ("EGU") 111(b) Rule ("111(b) Rule"),[7] and other related climate orders/memoranda, such as National Environmental Policy Act ("NEPA") guidance to consider GHG emissions and the Social Cost of Carbon Technical Support Document ("Social Cost of Carbon TSD").

The broad policy goals of the Executive Order are to encourage energy production, economic growth and job creation, and to ensure geopolitical security. It is further the policy of the Administration to secure affordable, reliable, safe, secure, clean energy from all sources (including coal, natural gas, nuclear, hydro, and renewables). As such, the President ordered

[6] U.S. EPA, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64661 (October 23, 2015). 111(d) refers to the Clean Air Act provision upon which the rule is based.

[7] U.S. EPA, Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64509 (October 23, 2015). 111(b) refers to the Clean Air Act provision upon which the rule is based.

executive departments and agencies to immediately review existing regulations and any other similar agency actions that potentially burden[8] the development or use of domestically produced energy resources (with particular attention to oil, natural gas, coal, and nuclear energy resources) and suspend, revise, or rescind those regulations/actions that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.

The Order's emphasis on removing barriers to domestic energy production, and request to review existing regulations that could impose a burden on this development, is a far reaching policy goal that will likely be a key component and reference point for potential future agency actions.

The Executive Order also revoked or rescinded these prior climate-related presidential actions:

- Executive Order 13653 of November 1, 2013 – Preparing the United States for the Impacts of Climate Change, which outlined general climate-related goals of the Obama Administration;
- The Presidential Memorandum of June 25, 2013 – Power Sector Carbon Pollution Standards, which outlined the Obama Administration's desire that the EPA promulgate the Clean Power Plan and 111(b) Rule;
- The Presidential Memorandum of November 3, 2015 – Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, which directed various agencies to develop climate-related mitigation plans, as well as undertake other related actions;
- The Presidential Memorandum of September 21, 2016 – Climate Change and National Security, which declared that climate change is a threat to national security and requested agencies and departments to take certain actions;
- The Report of the Executive Office of the President of June 2013 – The President's Climate Action Plan, which outlined the Obama Administration's broad goals regarding climate-related regulation; and
- The Report of the Executive Office of the President of March 2014 – Climate Action Plan Strategy to Reduce Methane Emissions, which outlined plans to reduce methane from oil and gas (and other) industries.

The effect of these revocations is immediate. Since these above-referenced prior actions are Presidential Memoranda and Executive Orders, they do not have the same force of law as regulations (or statutes) and can be revoked by the subsequent President's own Memoranda/Executive Orders. Likewise, revocation of the GHG NEPA Guidance was also accomplished with the stroke of a pen.

The Executive Order also disbanded the Interagency Working Group on Social Cost of

[8] "Burden" is defined in the Executive Order to mean "to unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources."

Greenhouse Gases ("IWG"), which was convened by the Council of Economic Advisers and the Director of the OMB. Documents generated by this working group were also withdrawn, including, as mentioned above, the Social Cost of Carbon TSD and relevant updates and addenda. These documents served as the economic foundation for an array of major air quality rulemakings. In place of the Social Cost TSD (and related documents), the Order requires that to monetize the value of changes in GHG emissions resulting from regulations, including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates, agencies shall ensure, to the extent permitted by law, that any such estimates are consistent with the guidance contained in OMB Circular A-4 of September 17, 2003.

The Order also began lifting the federal land coal-leasing moratorium. Specifically, the Executive Order required the Secretary of the Interior to take steps necessary and appropriate to amend or withdraw Secretary's Order 3338 dated January 15, 2016, (Discretionary Programmatic Environmental Impact Statement (PEIS) to Modernize the Federal Coal Program) and to lift any and all moratoria on Federal land coal leasing activities related to that Order. It also required the Secretary of the Interior to commence Federal coal leasing activities consistent with all applicable laws and regulations. Interior Secretary Zinke issued his own Department of Interior ("DOI") Order to implement the Executive Order the day after the Energy Independence Executive Order.[9] Secretary Zinke's order "direct[ed] a reexamination of the mitigation policies and practices across the Department of the Interior […] in order to better balance conservation strategies and policies with the equally legitimate need of creating jobs for hard-working American families." Secretary Zinke's order rescinds a previous order, which had implemented a landscape-scale mitigation policy. [10]

The Executive Order also required numerous other actions related to oil and gas rules. The Executive Order required the EPA Administrator to review the 2016 methane (and VOC) rule for new, reconstructed, and modified sources in the oil and natural gas sector, as well as similar rules and related guidance.[11]

In order to implement this Executive Order, impacted agencies were required to develop implementation plans and reports to be submitted to the Director of the OMB, which have been (are being) developed.

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[9] DOI, Secretarial Order No. 3349, American Energy Independence, March 29, 2017.

[10] That previous order was adopted pursuant to a now-rescinded Presidential Memorandum requiring the DOI and others to implement mitigation policies on lands and resources administered by those agencies.

[11] *See* U.S. EPA, Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35824 (June 3, 2016). These additional rules include: the final rule entitled "Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands," 80 Fed. Reg. 16128 (March 26, 2015); the final rule entitled "General Provisions and Non-Federal Oil and Gas Rights," 81 Fed. Reg. 77972 (November 4, 2016); the final rule entitled "Management of Non-Federal Oil and Gas Rights," 81 Fed. Reg. 79948 (November 14, 2016); and the final rule entitled "Waste Prevention, Production Subject to Royalties, and Resource Conservation," 81 Fed. Reg. 83008 (November 18, 2016).

B. Clean Power Plan or 111(d) Rule

The Clean Power Plan, also known as the 111(d) Rule, was finalized in August 2015.[12] Ostensibly to control GHG emissions from fossil fuel electric generators, it outlined a regulatory structure imposing requirements and burdens on the entire electric generation industry, including renewable generation and electric distribution. It was subject to numerous legal challenges and requests that the rule's implementation, which was supposed to begin in mid-2016, be stayed. The United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") rejected requests that the rule be stayed, but on February 9, 2016, the U.S. Supreme Court stayed implementation of the rule pending judicial review – something the Supreme Court has never done in its history. Oral argument was held in front of the entire *en banc* panel of judges of the D.C. Circuit on September 27, 2016.[13]

Oral arguments on the Clean Power Plan were extensive. Scheduled to last for three and a half hours, arguments took nearly seven hours to complete. The majority of the discussion focused on EPA's efforts to look "beyond the fence" of power plants to require generating shifting (coal to natural gas or coal/natural gas to renewables) as part of its Best System of Emissions Reduction ("BSER") analysis. Petitioners argued that EPA had gone far beyond its statutory authority in this rule and that its actions did not warrant *Chevron* deference. Other arguments discussed the role of EPA in relation to areas traditionally reserved to state authorities; issues regarding conflicting statutory provisions; and achievability of the rule. While a decision was expected in early 2017, the Court never reached (or possibly, has yet to reach) a decision in the matter.

The day the Energy Independence Executive Order was released, EPA Administrator Pruitt signed an Announcement of Review of the Clean Power Plan. This Announcement included that EPA is reviewing the rule, providing advanced notice of forthcoming rulemaking and, if appropriate, that EPA will initiate proceedings to suspend, revise or rescind the CPP. The Announcement cites the Executive Order and concerns about EPA's legal authority and record, as well as the number of states and other parties that have sought judicial review of the rules. Citing existing case law, the Announcement also outlines that EPA's "ability to revisit existing regulations is well-grounded in the law." The Announcement went on to add that states have not been expected to work towards meeting the compliance dates set in the CPP, since the rule is stayed; the compliance dates are being reevaluated. This Announcement was published in the *Federal Register* on April 4, 2017.[14] On April 3, 2017, EPA also withdrew the proposed rule related to model trading rules and the clean energy incentive program, both components of

[12] *See* U.S. EPA, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64662 (Oct. 23, 2015).

[13] Customarily, a three-judge panel hears a case. Once that panel reaches a decision, a party may request that the entire court hear the case *en banc*. The D.C. Circuit, presumably anticipating that a decision to hear the case *en banc* would be granted regardless of the panel's decision, went directly to an *en banc* hearing. A court of ten judges heard the case, excluding Judge Merrick Garland who was under consideration for the U.S. Supreme Court at that time.

[14] U.S. EPA, Review of Clean Power Plan, Announcement of Review, 82 Fed. Reg. 16,329 (Apr. 4, 2017).

implementing the CPP.[15]

On the day the Executive Order was signed, the Attorney General filed a Motion to Hold the Case in Abeyance. Numerous protestants against the CPP filed supporting motions, which included requests that the case be held in abeyance until 30 days after the conclusion of review and any resulting forthcoming rulemaking. On April 28, 2017, the D.C. Circuit granted a temporary abeyance in the case and requested additional briefing on whether the case should continue to be held in abeyance or remanded back to the EPA.

On May 15, 2017, the parties filed briefs in response to the D.C. Circuit's requests to provide supplemental briefing regarding whether the case should be held in abeyance. Numerous briefs were filed. On one side were environmental/public health groups, pro-rule power generators, and pro-rule states. These briefs advocated against holding the case in abeyance. Essentially, these pro-rule groups argued that holding the case in abeyance would be the equivalent of indefinitely suspending the rule, without EPA having to go through the normal process for revoking a rule. Therefore, these parties requested either that the court just make its decision in the 111(d) Rule case or remand the rule back to the EPA. Remand would effectively lift the stay of the 111(d) Rule while EPA conducts its new rulemaking. According to these parties, the stay was only meant to apply during the course of the litigation, not while EPA administratively reconsiders the 111(d) Rule. On the other side of these cases were industry and states against the rule. These industry/states requested that the case be held in abeyance, which received the support of EPA, based on long-standing precedent in support of holding the case in abeyance pending agency reconsideration of the rule.

It was reported in late May 2017 that EPA had developed a draft rule to roll back the Clean Power Plan and that it was developing a related economic analysis to support this rollback.[16] The Trump Administration's Unified Agenda also states that the CPP will be withdrawn "on grounds that it exceeds the statutory authority provided under section 111 of the Clean Air Act." The Unified Agenda does not provide a timeline for this action, and at the time of the drafting of this paper, this rollback rule had yet to released.

Further, in the most recent litigation status update provided by the Department of Justice ("DOJ") on July 31, 2017, the DOJ stated that a draft of a proposed 111(d) replacement rule has been transmitted to the OMB and requested that the case remain in abeyance. The D.C. Circuit on August 8, 2017, issued an Order continuing to hold the case in abeyance for an additional 60 days.[17] Interestingly, Judges Tatel and Millett filed a concurrence statement to this Order, making two distinct points. First, in the two Judges' opinion, the Supreme Court's February 2016 stay of the CPP "now operates to postpone application of the Clean Power Plan indefinitely while the agency reconsiders and perhaps repeals the Rule," and that creates a

[15] U.S. EPA, Withdrawal of Proposed Rules: Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; and Clean Energy Incentive Program Design Details, Withdrawal of proposed rules, 82 Fed. Reg. 16,144 (Apr. 3, 2017).

[16] *See* E&E News, Emily Holden, *EPA has early draft of rollback*, May 25, 2017.

[17] *State of West Virginia v. EPA*, 15-1363 (D.C. Cir.), Doc. No. 1687838.

problem because EPA is under "an affirmative statutory obligation to regulate greenhouse gases."[18] The judges cited to the Supreme Court's decision in *Massachusetts v. EPA*[19] and the D.C. Circuit's own decision in *Coalition for Responsible Regulation.*[20] The two Judges believe that "[c]ombined with this court's abeyance, the stay has the effect of relieving EPA of its obligation to comply with that statutory duty for the indefinite future." However, the Judges added that "[q]uestions regarding the continuing scope and effect of the Supreme Court's stay, however, must be addressed to that Court."

C. Carbon Pollution Standards or 111(b) Rule

The Carbon Pollution Standards rule, otherwise known as the 111(b) Rule, was finalized in August of 2015. It established emissions limits for coal and natural gas-fired EGUs. The emissions limit for coal-fired EGUs was dependent on partial use of carbon capture and sequestration ("CCS"), a yet-to-be-commercially demonstrated technology, that effectively made the construction of new coal-fired generation economically unachievable for the short to medium term. The rule – while challenged at the D.C. Circuit – was never stayed; it is currently in effect.

Similar to the CPP, the day the Energy Independence Executive Order was released, EPA Administrator Pruitt signed an Announcement of Review of the 111(b) Rule. This Announcement included that EPA is reviewing the rule, providing advanced notice of forthcoming rulemaking and, if appropriate, that EPA will initiate proceedings to suspend, revise or rescind the Rule. The Announcement cites the Executive Order and concerns about EPA's legal authority and record, as well as the number of states and other parties that have sought judicial review of the rules. Citing existing case law, the Announcement also outlines that EPA's "ability to revisit existing regulations is well-grounded in the law." This Announcement was published in the *Federal Register* on April 4, 2017.[21]

Again, like the CPP, on the day the Executive Order was signed, the Attorney General filed a Motion to Hold the Case in Abeyance in the 111(d) Rule case. On March 30, 2017, the D.C. Circuit issued an Order canceling the oral argument in the 111(b) Rule case that was previously scheduled for April 17, 2017, pending the court's disposition of the Motion to Hold the Case in Abeyance. On April 28, 2017, the D.C. Circuit granted a temporary abeyance in the case and requested additional briefing on whether the case should continue to be held in abeyance or

[18] *Id*., citing to the following language from *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007):

> "Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do."

[19] *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007)

[20] *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (per curiam), aff'd in part and rev'd in part on other grounds, *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

[21] U.S. EPA, Review of the Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units, Announcement of Review, 82 Fed. Reg. 16,330 (Apr. 4, 2017).

remanded back to the EPA. On May 15, 2017, the parties filed briefs in response to the D.C. Circuit's requests to provide supplemental briefing regarding if the case should be held in abeyance. Numerous briefs were filed. The parties took similar positions as were taken in the CPP case. The parties requested that the D.C. Circuit make its decision on the merits. However, regarding abeyance v. remand, these parties generally did not have the same strength of opinion as in the 111(d) case, since the 111(b) Rule was never stayed by the courts. The majority of the pro-rule parties argued that under either an abeyance or remand, the 111(b) Rule would remain in effect; however, the pro-rule states (California, Connecticut, etc.) requested that the Court provide additional clarification if a remand is issued. In the most recent litigation status update provided by the DOJ on July 31, 2017, the DOJ stated that EPA continues to review the 111(b) Rule and requested that the case remain in abeyance.

On August 10, 2017, the D.C. Circuit issued an Order that the case would remain in abeyance pending further order of the Court, requiring status updates to be provided at 90-day intervals.[22] The Order also directs parties to file motions to govern future proceedings "within 30 days of the conclusion of EPA's proceedings." Unlike the CPP case, the D.C. Circuit never heard oral arguments on the 111(b) Rule. This Order and that fact indicate that the Court will likely provide EPA significant time to develop a new 111(b) Rule. However, this may prove moot. As articulated in the briefing of industry in the case, and apparent in the Clean Air Act itself, a valid 111(b) Rule is a necessary predicate for a 111(d) Rule. Therefore, in order to promulgate a CPP replacement rule (i.e. a new 111(d) Rule), unless EPA intends to rely on the existing 111(b) Rule, EPA will have to release a 111(b) Rule before (or concurrently with) a CPP replacement rule. This may also mean that, despite no explicit statements from EPA, it is possible that a 111(b) replacement rule is also at the OMB undergoing review (*see* II.B. above, discussing 111(d) Rule undergoing OMB review).

Similar to the CPP, the Trump Administration's Unified Agenda states that EPA "proposes to withdraw these standards on grounds that they exceed the statutory authority provided under section 111 of the Clean Air Act." The Unified Agenda does not provide a timeline for this action, and at the time of the drafting of this paper, this rollback rule had yet to be released.

D. Relevance of D.C. Circuit's Discussion of Affirmative Duty to Regulate GHGs.

The two-judge concurrence statement in the 111(d) Rule litigation (discussed above) refers to EPA's "affirmative…obligation" to regulate GHGs. This brings up issues associated with the 111(d) Rule *and* 111(b) Rule litigation (and subsequent rulemakings).

The prior administration took the position that the 111(b) Rule and 111(d) Rule did not require an endangerment finding. According to EPA, an endangerment finding was only required to *list* a subcategory, not to impose new standards on an already listed category.[23] EPA's position in these rulemakings has been subject to legal challenge, including arguments that have been

[22] *State of North Dakota v. EPA*, 15-1381 (D.C. Cir.), Doc. No. 1688176.
[23] U.S. EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule, 74 Fed. Reg. 66,496, 64,529-64,530 (Dec. 15, 2009).

made that a new endangerment finding should be required for both the 111(b) Rule and 111(d) Rule. These arguments have not yet been ruled upon given the abeyance of the two cases.

The fact that EPA has not yet made a 111 source category- and GHG-specific endangerment determination could prove significant. There is a notable difference between the endangerment finding standard in Section 111 and the lower threshold in Section 202 dealt with in the 2009 Endangerment Finding that warrants discussion.

The 2009 Endangerment Finding was promulgated in the context of tailpipe emissions and, thus, governed by CAA §202(a)(1). In both statutory tests, the agency must find a contribution to a condition of air pollution "which may reasonably be anticipated to endanger public health or welfare…" But the standard governing the amount of contribution is notably different between the two sections. CAA §202(a)(1) states:

> *The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare…* (Emphasis added)

Yet, CAA §111(b)(1)(A) states:

> *The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes **significantly** to, air pollution which may reasonably be anticipated to endanger public health or welfare.* (Emphasis added)

This distinction regarding the materiality of the contribution could prove quite important in the coming months/years as the Administration navigates the promulgation and judicial review of a replacement set of 111(b) and (d) rules for EGUs and evaluates other source categories that, taken individually as the statute mandates, may not meet the "significantly" contributes standard.

E. Withdrawal from the Paris Climate Accord

On June 1, 2017, President Trump announced that the United States would begin withdrawing from the Paris Climate Accord. The President cited to unfair terms of the agreement; that the United States would have borne an unequal burden in the accord. He cited to impacts on jobs and other negative economic impacts to the United States. Finally, he stated that he would take actions to seek a better deal either under the construct of the Paris Accord or under a separate/different agreement. This process is ongoing, but since the agreement was non-enforceable, this withdraw itself (compared to the Executive Order and other agency actions) has not had a direct impact on the current regulatory state. The most significant short-term impact of this action will most likely occur in the context of United States ultimate participation in the funding of the "Green Climate Fund" (whether withdrawn, reduced or redirected). At the time of this writing, no formal announcement has been made on that front.

III. Interstate Transport of Pollutants and Regional Haze

A. CSAPR Developments

On July 6, 2011, EPA finalized the Cross-State Air Pollution Rule (CSAPR), setting emissions caps for NOx and/or SO_2 in 27 states.[24] While Texas was only included for a limited, seasonal, NOx program in the original proposal published one year earlier, Texas was required to comply with both the NOx and SO_2 annual programs under the Final Rule. The rule had a January 1, 2012 compliance date. The rule has been subject to a lengthy court battle, which included a two-year stay of the rule during 2012-2013, and an initial D.C. Circuit decision to strike down the rule based on a facial challenge. Then, on April 29, 2014, the United States Supreme Court in a 6-2 decision, reversed the D.C. Circuit's initial decision and held that EPA has the authority to proceed with CSAPR as designed and implemented, except that the Court expressly recognized that its decision did not foreclose "as-applied" challenges by states and affected parties (specifically referencing circumstances that matched those experienced by Texas).[25]

Subsequent to the 2014 Supreme Court decision, various parties pursued the "as-applied" challenges to CSAPR with the D.C. Circuit – many of which were successful. In a July 18, 2015 decision (known as the *EME Homer City II* decision), the D.C. Circuit found that CSAPR's SO_2 budgets for Alabama, Georgia, South Carolina, and Texas, as well as the 2014 ozone-season NOx budgets for Florida, Maryland, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, Virginia, and West Virginia were overly burdensome.[26] However, while the Court remanded these budgets for EPA to propose new ones, it did so *without* vacating them; which means that these emissions budgets would remain in effect, as they continued to do – and largely still do today.

EPA effectively side-stepped the court's decision regarding ozone-season NOx budgets by finalizing ozone-season limits based on the 2008 ozone NAAQS in its September 7, 2016 CSAPR Update Rule.[27] The original CSAPR was based on the less burdensome 1997 ozone NAAQS. Therefore, despite the victory in the D.C. Circuit, this actually meant the reduction in allocations for certain states, including Texas.

Regarding the SO_2 and NOx annual limits, EPA was able to meet some form of agreement with all of the states subject to the D.C. Circuit's July 2015 decision, except for Texas. Rather than promulgating new limits for Texas, on November 3, 2016, EPA released its proposed rule to withdraw the federal implementation plan ("FIP") imposing CSAPR annual budgets for SO_2 and

[24] U.S. EPA, Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals; Final Rule, 76 Fed. Reg. 48,208 (August 8, 2011).
[25] *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 188 (2014).
[26] *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118 (D.C. Cir. 2015).
[27] U.S. EPA, Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016). This established new allocations for all states subject to the Ozone Season NOx limit, not just those subject to the *EME Homer City II* decision.

NOx on Texas.[28] Rather than providing new budgets as indicated in the *EME Homer City II* decision, EPA instead offered that Texas (and the other similarly positioned states) self-impose, via a state implementation plan ("SIP"), the Phase 2 SO_2 emissions budget that was rejected by the Court.[29] EPA stated that the benefit to Texas for accepting this deal would be EPA's recognition that compliance with the Phase 2 SO_2 budget would equal compliance with BART requirements. If Texas did not accept EPA's offer, it would mean that in a short period of time, EPA would pursue a FIP, conducting site-specific BART analyses on Texas' BART-eligible units (*see* discussion below).

B. BART and Regional Haze Developments in Texas and Other States

On January 15, 2009, EPA concluded that 34 states (including Texas) had failed to submit Clean Air Act SIPs properly addressing regional haze impacts on federal Class I areas.[30] EPA stated at the time that this started a two-year clock to promulgate FIPs for these states. EPA entered into a consent decree with the National Parks Conservation Association, Sierra Club, Environmental Defense Fund, and numerous other petitioners to issue FIPs (or act on submitted SIPs) for these states on specific timelines.[31] Over time, EPA implemented FIPs in various states, reached agreements with states over their SIP submissions, and made it through most of the 34 states initially identified. Some of the states with remaining issues included Louisiana, Arkansas, and Texas.

Since the change in Administration, the course of Regional Haze discussions has shifted. EPA recently proposed approving components of Louisiana's BART submission. EPA is in the process of shifting from a proposed BART & Reasonable Progress BART FIP to a state-led SIP revision replacement. The largest and most complicated Regional Haze regulatory context yet to be resolved is in Texas.

There were multiple extensions of consent decree deadlines to promulgate a FIP for Texas. The most recent extension, by order dated December 15, 2015, modified EPA's deadline to:

- Require EPA to finalize a FIP (or approve a SIP) by December 9, 2016, for regional haze requirements not associated with BART for EGUs. This applied to the Regional Haze Reasonable Progress Rule discussed in greater detail below.

- Require EPA to finalize a FIP (or approve a SIP) by September 9, 2017, imposing BART on EGUs.

[28] U.S. EPA, Interstate Transport of Fine Particulate Matter: Revision of Federal Implementation Plan Requirements for Texas, Proposed Rule, 81 Fed. Reg. 78,954 (Nov. 10, 2016).
[29] The other states were Alabama, Georgia, and South Carolina. EPA claims in this proposed rule that these states have adopted, or are in the process of adopting, SIPs agreeing to self-impose the CSAPR trading programs on their impacted units.
[30] Class I federal lands include areas such as national parks, national wilderness areas, and national monuments.
[31] *National Parks Conservation Association v. Jackson*, No. 11-1548 (D.D.C.). Consent decree approved March 30, 2012.

The relevant Clean Air Act regional haze provisions require source-specific BART ***and*** a demonstration that there will be reasonable progress and a long-term strategy to reduce regional haze. Typically, these requirements are addressed in a single rulemaking. However, in Texas, EPA separated its regional haze rule into two separate rulemakings.

The final Texas Regional Haze Reasonable Progress Rule ("Reasonable Progress FIP") was published in the *Federal Register* on January 5, 2016.[32] An EPA FIP, it required scrubber upgrades on eight Texas EGUs and new scrubbers on seven Texas EGUs. It was immediately subject to legal challenge based on numerous concerns, including that no reasonable progress rule had ever attempted to impose source specific controls on a state's EGUs. On July 15, 2016, the U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit") found that the appropriate venue to challenge the rule was the Fifth Circuit and stayed the effectiveness of the rule during the litigation over the rule's merits.[33] On March 22, 2017, the court granted EPA's request to remand the FIP to EPA for revisions; it also upheld the stay. EPA has yet to release a revised rule under this remand.

To address BART, EPA proposed a FIP, which was published in the *Federal Register* on January 4, 2017; after the election but before the inauguration.[34] This proposed FIP would only apply to BART-eligible units with a demonstrated impact on regional haze in Class I areas. The majority of requirements and costs would be imposed on coal-fired EGUs and are associated with complying with SO_2 limits. These limits would require scrubber upgrades at four Texas EGUs and new scrubbers at twelve other EGUs. The proposed FIP also included BART limits for SO_2 emissions from natural gas units that occasionally burn oil,[35] particulate matter ("PM") emissions standards and work practice standards, and incorporated CSAPR requirements to reduce NOx emissions during the summer ozone season. The coal units subject to the SO_2 limits would also be subject to a PM BART limit of 0.030 lbs/MMBtu and work practice standards during periods of startup and shutdown.

The Proposed FIP requested comments from operators subject to a scrubber upgrade requirement regarding EPA's scrubber efficiency calculations and unit-specific comments regarding an operator's disagreement on whether the SO_2 emission limit can be achieved via an upgrade. EPA has yet to act on this proposed FIP (*see* Section III.C. below).

C. CSAPR and BART Relationship: Texas Example

[32] Approval and Promulgation of Implementation Plans; Texas and Oklahoma; Regional Haze State Implementation Plans; Interstate Visibility Transport State Implementation Plan to Address Pollution Affecting Visibility and Regional Haze; Federal Implementation Plan for Regional Haze, Final Rule, 81 Fed. Reg. 296 (Jan. 5, 2016).

[33] *Texas, et al v. U.S. Environmental Protection Agency*, No. 16-60118 (5th Cir. 2016).

[34] U.S. EPA, Promulgation of Air Quality Implementation Plans; State of Texas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan, Proposed Rule, 82 Fed. Reg. 912 (Jan. 4, 2017).

[35] The proposed limit is a fuel oil sulfur content (percent by weight) of 0.7, and it applies to Graham 2, Newman 2, Newman 3, O W Sommers 1, O W Sommers 2, Stryker Creek ST2, and Wilkes 1. Newman Units 2 and 3 are further limited to burning fuel oil for no more than 876 hours per year.

CSAPR and BART/Reasonable Progress rules are ostensibly separate regulatory programs, which are derived from distinct sections of the Clean Air Act. However, these distinct regulatory programs were linked together by EPA's 2012 finding that "the trading programs in [CSAPR] achieve greater reasonable progress towards the national goal of achieving natural visibility conditions in Class I areas than source-specific Best Available Retrofit Technology (BART) in those states covered by the Transport Rule."[36] Importantly, within states subject to CSAPR, EPA has found that CSAPR allows states/sources to demonstrate EGU BART compliance (for NOx and SO_2) so long as CSAPR is being met for those pollutants. This is known as "CSAPR is greater or equal to BART," and it provided states "an out" from promulgating unit-specific emissions limits at BART units.

Texas finds itself in a unique position, in that EPA has proposed to withdraw Texas from CSAPR in order to proceed with a BART approach. However, EPA has yet to act on the CSAPR withdrawal, as it is in the process of developing a rule to address the BART consent decree deadline. The current status of both of these rules is in flux as EPA is in the midst of settlement negotiations with the State of Texas and impacted parties in hopes of addressing both of these rules concurrently. Ultimately, an action of some kind will be taken by EPA by the September 9, 2017 consent decree deadline, even if that is simply a request for extension.

IV. Other Agency and Court Actions

A. Mercury & Air Toxics Standards Rule

The Mercury & Air Toxics Standards ("MATS") Rule was finalized in late 2011, imposing significant reductions in mercury and other hazardous air pollution ("HAP") emissions from coal-fired power plants.[37] The bulk of these limitations went into effect April 2016, which forced the shutdown of numerous coal-fired power plants. Like CSAPR, legal challenges reached the United States Supreme Court.

The Supreme Court's decision rested primarily on the interpretation of a three-word phrase in Section 112(n)(1)(A) of the Clean Air Act, which includes:

> "...The Administrator shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is **appropriate and necessary** after considering the results of the study required by this subparagraph."

[36] U.S. EPA, Regional Haze: Revisions to Provisions Governing Alternatives to Source-Specific Best Available Retrofit Technology (BART) Determinations, Limited SIP Disapprovals, and Federal Implementation Plans, 77 Fed. Reg. 33,642, 33,643 (June 7, 2012).

[37] U.S. EPA, National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial Commercial Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units; Final Rule, 77 Fed. Reg. 9,304 (Feb. 16, 2012).

On June 29, 2015, the Court in a 5-4 decision, with Justice Scalia writing the majority's decision, found that EPA interpreted this section of the Clean Air Act "unreasonably when it deemed cost irrelevant to the decision to regulate power plants."[38] The Court remanded the challenge to the D.C. Circuit, but left the rule in place while EPA developed a revised economic analysis. This supplemental economic analysis was released in April 2016,[39] which again was subject to legal challenges – on both the supplemental economic analysis and EPA's decision to deny petitions for reconsideration on various provisions of the rule.

Oral argument on these two issues was supposed to take place on May 18, 2017, but following arguments of the EPA, the D.C. Circuit agreed to an open-ended continuance of the arguments while EPA reconsiders its position on the supplement finding "in light of the recent change in administration," which could also affect EPA's stance on reconsideration petitions. EPA has not provided an exact length of time it will require to conduct this review. However, and importantly, the MATS Rule remains in effect as EPA conducts this review.

B. Ozone National Ambient Air Quality Standards

In 2015, EPA lowered the primary ozone national ambient air quality standard ("NAAQS") from 75 parts per billion ("PPB") to 70 PPB. This action was subject to legal challenge from industry and certain states, which played out over the previous two years. In April 2017, EPA sought – and the D.C. Circuit granted – a delay in the oral argument in the litigation in order to provide the EPA time to reconsider the rule.

EPA has yet to state exactly what it intends to do regarding the ozone NAAQS, but has taken other actions regarding the NAAQS. For instance, on June 6, 2017, EPA Administrator Scott Pruitt announced that EPA would be delaying, by one year, attainment designations under the 2015 ozone NAAQS (which lowered the primary standard from 75 parts per billion ("PPB") to 70 PPB). In late 2016, states – including Texas – made their nonattainment designation recommendations.

The NAAQS Rule – as instructed by the Clean Air Act – required EPA to confirm or make their own designations by October 2017. In June 2017, EPA announced that it was pushing back those designations by one year to October 2018. Administrator Pruitt cited to "insufficient information," the ability to rely on "the most recent air quality data," and EPA's review of the 2015 ozone NAAQS as the reasons for the delay.[40] On August 1, 2017, sixteen state Attorneys General filed a legal challenge against this extension and on August 3, 2017, Administrator Pruitt withdrew the delay. EPA's attainment designations are once again due in October 2017.

[38] *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

[39] U.S. EPA, Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units, Final Rule, 81 Fed. Reg. 24419 (Apr. 25, 2016).

[40] Letter from EPA Administrator Pruitt to Governor Doug Ducey, Arizona, June 6, 2017.

C. Coal Combustion Residuals Rule

Although not an air quality rule, another federal rule of significance to the electric generation fleet that relates to the by-products/co-products of air emission control systems, is the "Coal Combustion Residuals Rule" (the "CCR Rule"). On December 19, 2014, EPA finalized its CCR Rule to impose a new series of standards to regulate the handling and disposal of coal combustion residuals.[41] The rule outlined a series of standards, with varying due dates over subsequent years, based on non-hazardous ("Subtitle D") provisions of the Resource Conservation and Recovery Act ("RCRA"). Importantly, though, these standards did not recognize, nor allow for, states to implement their own state-led programs. This changed on December 16, 2016 when President Obama signed the Water Infrastructure Investment for the Nation Act (the "WIIN Act"), which included a subtitle providing EPA authority to approve state programs addressing CCR units through either permit programs or other state systems of prior authorization (e.g., registration programs).

The Act requires EPA to approve state CCR permitting programs, or "other system[s] of prior approval" that are at least as protective as those found in the federal CCR Rule, codified in 40 CFR §257. The WIIN Act gives EPA authority to implement a federal permitting program in nonparticipating states. Under the WIIN Act, EPA must review state programs at least every twelve years; within three years after changing the applicable federal requirements; one year after a "significant release" in a state; or by request of a state asserting adverse impacts due to a release or potential release in another state with an approved program. The WIIN Act grants EPA authority to commence judicial or administrative enforcement actions under certain circumstances. Before commencing such an action, EPA must give notice to the state with the allegedly non-compliant unit. Under the WIIN Act, CCR units will be considered sanitary landfills if the unit is operating in accordance with 40 CFR §257 or a state or federal permit. EPA's process for reviewing and approving state CCR permit submissions will be subject to a notice and comment period; however, it is not clear if this process will be defined via an EPA rulemaking.

The WIIN Act does not reverse or revoke the existing federal CCR rule codified in 40 CFR §257; those requirements remain in effect if/until a state-led program is created and approved by EPA. The requirements that are already in effect for landfills (e.g. fugitive dust control plans, inspections, run-on and run-off control system plans, closure and post-closure plans) and ponds (e.g. fugitive dust control plans, liner requirement compliance, engineering review of hazard potential, hydrologic and hydraulic capacity analyses and initial flood control system plans) remain in effect. Further, the deadlines to determine whether groundwater monitoring systems meet the rule's requirements for landfills (outlined in 40 CFR §257) or the groundwater monitoring systems have been installed for ponds remains October 2017.

[41] U.S. EPA, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, Final Rule, 80 Fed. Reg. 21,302 (Apr. 17, 2015).

Multiple states are in the process of developing their own state-led program, though this will take some time. Therefore, even with options for states to take over implementation, parties began filing Petitions for Reconsideration of the rule, starting in April 2017. A Petition for Reconsideration filed on behalf of a large group of companies and interested parties in the CCR industry highlighted some revisions that need to occur in the rule and requested an extension of approaching deadlines in the rule. These extensions would provide time for states to develop their own programs.

D. DOE Electrical Grid Study and Other Actions

On April 14, 2017, Energy Secretary Rick Perry ordered a study of the United States electrical grid to examine whether policies that favor wind and solar energy are accelerating the retirement of coal and nuclear plants critical to ensuring steady, reliable power supplies. Secretary Perry has provided for a 60-day review to complete this analysis. Secretary Perry highlights concerns about the "erosion" of resources providing baseload power. Secretary Perry's memorandum further notes concerns regarding the diminishing diversity of the nation's electric generation mix and what it could mean for baseload power and grid resiliency.

The Trump Administration's Unified Agenda indicates that numerous DOE efficiency standards are up for review, including those for manufactured housing, residential clothes washers, fans, blowers, heat pumps and air conditioners.

V. Conclusion

The Obama Administration had eight years to promulgate new environmental rules, many of which were subject to years of litigation. The new presidential administration has only been in power for roughly half a year, with Agency heads being in power even less time than that. A broad agenda of rolling back regulations has just begun to be implemented, and it will likely be some time – potentially years assuming actions will be subject to legal challenge – before the dust settles. Until that time, there continues to be an evolving regulatory landscape, but unlike the years under the Obama Administration, it appears clear that this evolution will be towards a less burdensome and perhaps more certain regulatory state.