

President Trump's [Executive Order](#) on climate policy is an invitation to bad policymaking and legal uncertainty. The big-ticket item targeted by the Order, of course, is the Obama Administration's Clean Power Plan and related rules on carbon dioxide emissions from power plants. The EO has limited immediate legal impact: none of the major rules can be rescinded or revised without following the process required by the Administrative Procedure Act, although a number of non-legally binding federal agency guidance documents, memoranda, etc. have been swept away. Aside from the call to review (and, one presumes, revoke) the Clean Power Plan, I think one of the EO's negative consequences going forward will be even greater uncertainty, both for agencies in implementing environmental laws and for everyone, including regulated industries, that is subject to agency decisions. The Order removes the sort of guidance and coordination across federal agencies that is designed to promote a coherent policy on climate issues, and it will leave agencies without the tools needed to comply in a consistent manner with regulatory cost-benefit analysis requirements or with NEPA, which requires a rigorous assessment of the environmental impacts of major agency actions.

The EO strikes me as being cautiously drafted—deliberate and clear in its effort to undermine eight years' worth of climate policy, but written largely within the confines of administrative law, which requires a process of reasoned agency decision-making. This means that rescinding Obama-era regulations like the Clean Power Plan and the Interior Department's regulation of hydraulic fracturing on public and Native American lands will take a fair amount of time; it also seems to recognize that the law requires that any decision to undo those rules must be rational.

Because agency decisions to walk back climate regulations must be justified by a minimum standard—the “arbitrary and capricious” test of the Administrative Procedure Act—the Trump Administration will need to try and fundamentally change the terms of the debate, and construct its own set of criteria as to what evidence is relevant in supporting the policy change. This goes to the root of what the EO tries to accomplish, and why it may lead to legally problematic results.

The EO targets nearly every Obama-era policy, memo, guidance document, and regulation and piece of policy related to climate change—but does so within the framework of the Trump Administration's approach to energy policy, and specifically the promotion of fossil fuel extraction and use. Section 1 of the Order addresses “policy.” The word “climate” does not appear anywhere in this section. Rather, the thrust of the policy is defined here solely in terms of promoting the development of U.S. energy resources. The key element of this is in Section 1(c)—it is worded not based on what is necessary or beneficial for public health or the environment, but instead on whether agency regulations “unduly burden” energy

development:

(c) Accordingly, it is the policy of the United States that executive departments and agencies (agencies) immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that *unduly burden* the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law. (emphasis added)

The EO does not define what constitutes an “undue burden” on domestic energy development. It does state a policy that environmental regulations should have “greater benefit than cost” and that the “best available peer-reviewed science and economics” should be used in developing them. A natural reading of the phrase “undue burden” would suggest that it means a situation where the cost borne by those engaging in energy development in complying with a regulation is disproportionately large in comparison to the public benefit from the regulation.

Of course, major Obama-era regulations have already gone through and passed this sort of cost-benefit analysis, required by Executive Orders put in place by Ronald Reagan and reaffirmed (in essence) by every subsequent President up to Obama. What the Trump Executive Order seeks to do, then, is redefine what counts as a cost or a benefit in making that calculation.

Section 5 of the EO wipes out the Obama Administration's effort to set a federal social cost of carbon to guide these sorts of cost-benefit analyses. The Order disbands the Interagency Working Group on Social Cost of Greenhouse Gases, and immediately withdraws the key documents that the group had worked on. However, Section 5(a) of the EO still calls on agencies to use “estimates of costs and benefits in their regulatory analyses that are based on the best available science and economics.” With no coherent statement as to what the estimated costs of climate change are (or the benefits of avoiding it), agencies are left on their own: bound to use the “best available science and economics,” and bound by general [federal government guidance](#) on how to consider discount rates associated with regulatory costs and benefits ([an issue with incredible importance for long-term impacts like climate change](#)), but with no consistent way to apply these mandates. As a result, it seems likely that this will lead to further uncertainty and litigation.

The same sort of problems come up elsewhere in the EO. Section 3(c) of the Order rescinds

the White House Council on Environmental Quality's guidance document for agencies on how to consider GHG emissions and climate change impacts in environmental assessments and environmental impact statements under NEPA. Although the CEQ's guidance was not legally binding on agencies, getting rid of it only creates further uncertainty. Agencies cannot simply ignore climate-related impacts without running the risk of litigation; they are environmental impacts, and NEPA documents that fail to consider important pieces of the puzzle will likely have a difficult time surviving review by the courts.

Much more ink will be spilled on the implications of the Executive Order in the coming days. It is full of symbolic swipes at the climate policy efforts of the Obama Administration, but will also hinder agencies' efforts at making informed, rational decisions about what policies to pursue—something that is likely to lead to greater uncertainty and bad policy.