



Trump moves to rollback Clean Power Plan and review the Waters of the U.S. rule

By Jeannine Anderson, News Editor

With the stroke of a pen, President Donald Trump in recent months has moved to fulfill campaign promises to roll back the Environmental Protection Agency's Clean Power Plan (CPP) final rule and revise the Waters of the United States (WOTUS) final rule.

But to a large degree, Trump's actions can be considered a starting point. The scrapping of either final rule is not likely to occur quickly or easily and the courts are expected to play a key role in determining the ultimate fates of the CPP and WOTUS final rules.

Trump in late February signed an executive order directing the EPA and the U.S. Army Corps of Engineers to consider rescinding or revising their WOTUS rule.

A month later, the president signed an executive order directing the EPA to start the process of re-evaluating the EPA's rule, issued in final form in late 2015, to reduce carbon dioxide emissions from fossil fuel-fired power plants.

The American Public Power Association expressed support for Trump's call for a reexamination of the EPA's rules regulating greenhouse gas emissions from new and existing fossil fuel-fired power plants. The Association previously voiced concerns about the WOTUS rule when it was proposed in 2014.

WOTUS rule issued in final form in May 2015

The final WOTUS rule defines which streams, wetlands and other bodies of water are protected under the Clean Water Act. The rule was issued in final form in May 2015 and published in the *Federal Register* the following month. It went into effect in August 2015 but was put on hold by a court order soon thereafter.

In October 2015, the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay on the rule, pending the resolution of numerous challenges filed against it.

Paving the way for elimination of a 'destructive and horrible rule'

In signing the executive order, Trump said the directive was "paving the way for the elimination of this very destructive and horrible rule."

Under the Clean Water Act, the EPA can regulate navigable waters, the president said, but he said that the WOTUS rule "has truly run amok."

In that rule, he said, the EPA had decided "that 'navigable waters' could mean nearly every puddle or every ditch on a farmer's land, or any place else that they decide."

The executive order directs the EPA and the Corps of Engineers, in the event that they revise the rule, to

interpret the term “navigable waters,” as defined in the Clean Water Act, in a manner consistent with the opinion of the late Justice Antonin Scalia in *Rapanos v. United States*. Scalia’s interpretation would restrict federal jurisdiction.

In *Rapanos*, Scalia argued that the Clean Water Act confers jurisdiction over only “relatively permanent bodies of water,” and “only those wetlands with a continuous surface connection” to traditional navigable waters. Four justices argued for a much more expansive view of the law, saying that it should include most wetlands.

Trump’s executive order sets forth a policy stating that “It is in the national interest to ensure that the nation’s navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the states under the Constitution.”

The order directs the EPA and Corps of Engineers to review “all orders, rules, regulations, guidelines, or policies” implementing the WOTUS rule for consistency with the newly defined policy, and says the agencies “shall rescind or revise, or publish for notice and comment proposed rules rescinding or revising, those issuances,” as appropriate.

With regard to any pending litigation over the WOTUS rule, the order directs the EPA and the Corps of Engineers to notify the attorney general of their pending administrative review “so that the attorney general may, as he deems appropriate, inform any court of such review and take such measures as he deems appropriate concerning any such litigation pending the completion of further administrative proceedings related to the rule.”

Supreme Court continues to hear arguments on jurisdiction

Without providing an explanation, the Supreme Court on April 3 said that it would continue to hear arguments over the question of which court has jurisdiction to hear the merits of a case that involves a legal challenge to WOTUS.

In an April 10 letter to President Trump, members of the Waters Advocacy Coalition expressed their “strong support” for the WOTUS executive order. The Association is a member of the coalition.

“We applaud your leadership, presidential initiative, and prompt attention to a significant regulatory barrier to a thriving economy and strong infrastructure,” the coalition members said in their letter to Trump. “We believe the EO [executive order] sets the nation on a path toward pro-growth, pro-jobs and pro-environment policies that will benefit all Americans.”

The coalition said it looks forward to working with the Trump administration “to provide much needed clarity regarding the scope of federal jurisdiction under the Clean Water Act. We also support action to withdraw and re-propose the rule, as appropriate and consistent with law, reflecting the principles of federalism and recognizing the important role of the states in protecting our nation’s waters.”

In November 2014, the Association weighed in on a proposed EPA/Army Corps of Engineers WOTUS rule.

The Association said the rule broadens the scope of Clean Water Act jurisdiction beyond the statutory limits established by Congress and the constitutional limits recognized by the Supreme Court.

The rule poses "significant, practical problems" for public power utilities, the Association said. It recommended that the agencies withdraw the proposed rule, revise it, then propose a new version.

Clean Power Plan executive order

Meanwhile, the CPP order calls for the heads of federal agencies to conduct an "immediate review" of all existing regulations, orders and policies "that potentially burden the development or use of domestically produced energy resources."

The order "will eliminate federal overreach," the president said in a speech at EPA headquarters in Washington, D.C., where he shared a stage with members of his cabinet and coal miners.

Among those attending the CPP executive order signing was Sue Kelly, president and CEO of the Association.

In a statement released shortly after the order was signed, the Association said it "supports President Trump's executive order calling for a reexamination of the Environmental Protection Agency's rules regulating greenhouse gas emissions from new and existing fossil fuel-fired power plants."

"Few disagree that these rules envisioned broad and transformative changes to the electricity industry. As the voice of utilities that are units of state and local government, the Association firmly believes that states should maintain the authority to plan and implement generation and energy policies that are suitable for their circumstances."

The Association noted that the public power sector "has previously voiced its legal objection to the rule for requiring utilities to fundamentally alter the way they generate electricity," adding, "In some cases, utilities would have been forced to abandon functional power plants while continuing to pay them off."

The Association also said the nation's transition to energy independence needs to be realized "in a manner that ensures a more diverse energy portfolio while still appropriately balancing affordability, reliability, and sustainability."

Public power utilities "will continue their substantial progress in reducing greenhouse gas emissions through greater use of non- and low-emitting sources of electricity generation, such as hydropower and other renewables, nuclear, and natural gas, and the implementation of affordable, common-sense energy efficiency and conservation programs," the Association concluded in the statement.

DOJ asks federal court to hold off on CPP litigation

Following fast on the heels of the CPP executive order, the Department of Justice asked a federal appeals court to put a hold on all litigation pending before it over the EPA rule.

In a March 28 document filed with the U.S. Court of Appeals for the District of Columbia Circuit, Deputy Assistant Attorney General Bruce Gelber asked the court to "hold in abeyance," or suspend, its review of a prominent court case challenging the CPP. The EPA in the document also outlined its intent to review the CPP in the context of the EO's new policy.

Two days later, EPA Administrator Scott Pruitt sent a letter to state governors reminding them that, at least for the near future, they do not need to take any action to comply with the plan.

In a March 30 letter, Pruitt reminded governors that the U.S. Supreme Court imposed a stay on the CPP on Feb. 9, 2016. It is the EPA's policy that "states have no obligation to spend resources to comply with a rule that has been stayed by the Supreme Court," he said.

"To the extent any deadlines become relevant in the future, case law and past practice of the EPA supports the application of day-to-day tolling," he added, suggesting it is the Trump administration's view that if the stay is lifted in the future, the rule's compliance deadlines would be extended by the same number of days the stay was in effect.

EPA withdraws proposals on federal plan, trading rules

In a notice published in the April 3 *Federal Register*, the EPA said it was withdrawing proposed rules it issued in 2015 in conjunction with the CPP, namely, the rules setting federal plan requirements, creating model trading rules, and adding design details to the Clean Energy Incentive Program.

The EPA explained that it was withdrawing the proposed rules in light of Trump's March 28 CPP executive order and also because: 1) the Clean Air Act does not require the agency to finalize the rules, and 2) the Supreme Court stay removes any time pressure to meet approaching compliance deadlines.

On Oct. 23, 2015, the EPA published its final CO₂ rule for existing power plants under Section 111(d) of the Clean Air Act. The rule was entitled Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, and is also known as the Clean Power Plan.

On the same date, in connection with the final rule, the EPA published other proposed rules, including a proposal regarding a federal plan and another on model trading rules. In June 2016, the EPA published proposed details of the Clean Energy Incentive Program, an optional program that states could use to encourage early emission reduction projects under the Clean Power Plan.

"The EPA never finalized the October 2015 proposed rule or the CEIP proposed rule, and is not doing so today," the agency said in its April 3 *Federal Register* notice. "Instead, it is withdrawing them both."

The agency said that withdrawing the Clean Power Plan-related proposals gives the EPA time to re-evaluate these proposals "and, if appropriate, put out re-proposals or new proposals to ensure that the public is commenting on EPA's most up-to-date thinking on these issues."

The EPA noted that it is possible that the Clean Power Plan as promulgated in 2015 "will be rescinded and that new emission guidelines, if any, for existing EGUs [electric generating units] will be different from the CPP."

Oral arguments postponed

On March 30, the D.C. Circuit postponed oral arguments that had been scheduled for April 17 on litigation over the EPA's CO2 regulations for new, modified or reconstructed power plants. The court said it was postponing the arguments in the case, *North Dakota v. EPA*, "upon consideration of respondents' notice of Executive Order, EPA review of rule and forthcoming rulemaking, and motion to hold cases in abeyance."

The court ordered that the oral argument date be removed from the D.C. Circuit's calendar "pending disposition of the motion to hold cases in abeyance."

There is an extensive notice and comment process required by the Administrative Procedures Act that federal agencies must follow before the CPP and WOTUS final rules can be revised or rescinded.