

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Environmental **LAW**

Trump reverses past climate change policies with energy independence order

On March 28, President Donald Trump signed an executive order to dramatically shift course from the climate change focus of the Obama administration. The order has several components which will affect United States Environmental Protection Agency (EPA) climate regulations along with energy production activities. A key aspect is the revocation of the Clean Power Plan rule issued by EPA.

As previously reported on in this column, on Aug. 3, 2015, the EPA issued the Clean Power Plan rule that sets the first limits on carbon emissions from power plants in the country. Although issued with celebration by the Obama Administration and various environmental groups, the rule issued under the Clean Air Act has generated significant opposition from the states, the power industry and business. The previous administration used the rule in conjunction with the Paris Climate Summit to demonstrate its green focus and steps to address climate change concerns. Trump's order requires the EPA to review and repeal, or revise, the Clean Power Plan.

The rule seeks to achieve a 32% reduction in emissions from 2005 levels by 2030. The goal is to reduce carbon dioxide in the power industry, which would be accomplished by reducing coal's share of the electric production portfolio. Coal presently provides about 39% of the country's power. However, EPA predicts that it will supply 27% based on the rule and market forces, including competition from natural gas.

At the moment, the rule is being challenged by various parties, including the coal industry, power providers, business groups and states. The legal challenges pertain to significant legal questions about whether



By **GEORGE S. VAN NEST**
Daily Record
Columnist

federalism under existing Clean Air Act programs, because EPA generally sets emission limits and allows states to meet them, but the rule instead requires states to meet a national model. Another concern is whether EPA has double-regulated existing power plants, which is prohibited under the Clean Air Act.

After the rule was finalized, West Virginia and 25 states filed suit challenging the Clean Power Plan. Other cases have been filed by the U.S. Chamber of Commerce and more than a dozen industry groups. Conversely, 18 states, including New York and California, have sought to intervene in the cases in support of the EPA's rule. Implementation of the rule was stayed by the U.S. Supreme Court in February 2016. The case has been argued before the full D.C. Circuit of Appeals and a decision is pending.

Aside from directing EPA to review, repeal or revise the rule, it appears likely that the Trump administration will direct the Department of Justice to refrain from defending the rule in the pending court challenges.

The executive order also included a few

EPA has the constitutional authority and statutory basis under the Clean Air Act to issue the rule, and that EPA is going from regulating single emission sources (i.e., plants and smokestacks) to a sweeping re-design of the U.S. energy system. Opponents have pointed out that the rule appears to conflict with principles of

other shifts in direction from the prior administration. The order directs federal agencies to eliminate the use of the social cost of carbon as a consideration in federal agency action and funding decisions.

The order also eliminates a temporary halt on new coal leases on federal lands imposed by the Obama administration. The Department of Interior had been directed to refrain from issuing coal leases until environmental review of the estimated impacts of the leases on global warming were conducted.

The past administration also banned methane gas emissions from oil and gas wells on federal lands. The order eliminates that prohibition, so that coal, oil and gas production can proceed on federal land in an effort to grow domestic energy production. In announcing the order, the president's spokesman noted that the administration believes that "[t]his order will keep energy and electricity affordable, reliable and clean in order to boost economic growth and job creation."

On March 30, EPA Administrator Scott Pruitt wrote to state governors saying that, based on the president's order and Supreme Court stay, "[i]t is the policy of the Environmental Protection Agency (EPA) that States have no obligation to spend resources to comply with a Rule that has been stayed by the Supreme Court of the United States." Further that "[t]he days of coercive federalism are over;" and that the EPA would work with "your state experts and local communities as we develop a path forward to improve our environment and bolster the economy in a matter that is respectful of and consistent with the rule of law."

While the executive order is a significant

Continued on next page

Continued from previous page

step forward for the Trump administration to address energy production and independence, there are still important aspects of the Obama administration's climate legacy left unaddressed. First, the EPA's endangerment finding on carbon dioxide that was issued in 2009 following the Massachusetts v. US EPA

decision remains in place for the time being. Additionally, the Trump administration has yet to withdraw from the Paris Climate Treaty. However, the order leaves little question that the Trump administration is intent on removing expansive EPA regulations that opponents believe will impact development and use of America's energy resources, and increase consumer energy expenses.

George S. Van Nest is a Partner in Underberg & Kessler LLP's Litigation Practice Group and chair of the firm's Environmental Practice Group. He focuses his practice in the areas of environmental law, construction and commercial litigation.