

IMPACT ANALYSIS

# Life In A Washing Machine

*Washington, D.C. is in spin cycle these days. Are there safe harbors for renewable energy projects, including anaerobic digestion?*

*Michael H. Levin*

**A**FTER the 2016 presidential election, former Florida Governor Jeb Bush made a comment that continues to resonate in the renewable energy and environmental spheres. President-elect Trump, he remarked, “was a chaos candidate, and he’ll be a chaos President.” Based on the Trump Administration’s first 200 days, this seems an understatement. Political existence inside the Beltway has become life in a washing machine — a dizzy swirl where up and down trade places each second.

By August 1, the new Administration issued 42 Executive Orders (EOs), 29 Presidential Memoranda, and 29 Presidential Determinations. The Memoranda included endorsements of the Keystone XL and Dakota Access fossil pipelines. The EOs included directives that the U.S. Environmental Protection Agency (EPA) review and rescind “consistent with law” the Obama-era Clean Power Plan (CPP) and Waters of the U.S. rules, suggesting only states should perform these functions. They also included actions aimed at “Reducing Regulation and Controlling Regulatory Costs” (e.g., EO 13771, Jan. 30).

Meanwhile the Administration embraced the once-moribund 1993 Congressional Review Act (CRA) to approve repeal of over a dozen final Obama-era rules that would (for example) have protected streams from mountaintop-mining pollution. It proposed to review whether EPA’s revised 2015 smog standards — estimated to avoid an additional 400,000 child asthma attacks and thousands of premature deaths each year — “overly burden affected businesses.” It asked the courts indefinitely to halt compliance with other final EPA rules while it “reconsidered” them. Its proposed budget would have cut EPA by 40 percent and virtually eliminated funding for states while shifting large duties to them — a disconnect called out even by deep-red conservatives.

Observers have questioned the durability of these EOs. (See “AD Prospects — Not as Bad as You Hear,” May 2017.) But there’s another question: What will be their real-world effects? There are devils in the details. So it’s worth a look at Administration actions that may affect anaerobic digester (AD) and other renewable energy projects.

## THE “ENERGY” EO

The poster child here has been EO 13783 (“Promoting Energy Independence and Economic Growth,” March 28), often painted as meant to “rip up by the roots” the Obama CPP. The CPP aimed to cut current carbon dioxide emissions from existing fossil-fueled electric power plants 32 percent by 2030, mainly through emissions trading regimes that would grant AD and other renewable energy generators emission avoidance credits which could be sold for power plants’ compliance. This “Energy EO” directed EPA to begin immediate CPP review looking to “suspend, revise, or rescind” it “if appropriate ... as soon as practicable ... consistent with law,” tacitly acknowledging that full-scale notice-and-comment rulemaking is required to pursue these ends.

The Energy EO also contained less publicized steps revoking other Obama actions. It:

- Sharply reduced the dollar value of public health benefits that may be attributed to reduced carbon emissions;
- Directed the Council on Environmental Quality to rescind guidance that required climate-effects assessments for federally funded construction projects;
- Ordered the Interior Department to allow new coal mining on public lands and review (again looking to “suspend, revise, or rescind”) previous actions suspending fracking on such lands or hiking laughably-low government extraction royalties;
- Created a review process meant to address *any other* past government actions “that potentially burden the development or use of domestically produced energy resources ... particular[ly] ... oil, natural gas, coal, and nuclear energy”; and





- Directed agencies to develop comprehensive energy review plans; submit reports listing 'anti-energy' actions for review; then carry out those reviews, mostly within 6 months.

#### THE "TWO FOR ONE" EO REVIEWS

The Energy EO was preceded by another, broader Order ("Reducing Regulation and Controlling Regulatory Costs," EO 13371, Jan. 30), which purported to require agency withdrawal, under annual regulation cost caps, of two past rules for each new rule issued, "unless prohibited by law." This "two for one" EO created a *permanent* review process: each year agencies were to begin withdrawal of existing rules whose projected costs will "offset" the projected costs of any new rules, so that their annual totals equal "zero new regulatory costs imposed." But it's far from clear how this will play out.

It might seem that the Energy EO

envisions *short-term* actions meant to jump-start and complement *ongoing general* two-for-one EO reviews. But even this is murky. Neither Order mentions the other. Moreover, revoked proposals — or final rules like the CPP that have not been implemented (for example, because a court enjoined them) — may not count as "offsetting" because they *have not yet* imposed any costs.

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Beyond this lies a briar patch. When are rules "required by law" and thus exempt from withdrawal? Is a general statutory directive, a statutory deadline for issuance, or a consent decree enough? To what extent is an action's specific content (not just taking some action) "required" for this exemption to apply? How do "two for one" and the "net zero" cap interact? If (say) a new

rule involves \$1 billion in estimated nationwide compliance costs, in theory *many* smaller rules might be withdrawn to "offset" it. But what if costs of the new rule and the smaller rules *each* are outweighed by their benefits? Will the costs of such rules still have to be "offset," even if they're "required by law" and can't be withdrawn? What happens if (as seems likely absent manipulation) *all* EPA rules under "two-for-one" review have health or welfare benefits that exceed their costs? What about air quality standards whose costs legally can't be considered?

The White House Office of Management and Budget (OMB) has produced two opaque documents purporting to address such questions. They mostly bump answers to future OMB case-by-case decisions.

#### IMPACTS ON AD PROJECTS

What does this swirl mean for AD developers? Some observations:

- **Congress has yet to step in.** Congress has not acted yet on many developments, including budgets that require Senate Democrats' votes to avoid a filibuster. Republican majorities will not *overturn* Administration EOs. However, budget trade-offs — plus the lure

of delivering federal benefits to Members' districts — could produce significant modifications. In addition, Senate, House and Special Counsel investigations — plus the President's declining approval ratings and emergent Senate independence — could put Administration actions in a much smaller box. The Senate declined to endorse the House's most recent CRA repeal (of EPA's natural gas facilities methane rule; see below). Its refusal to adopt Affordable Care Act "repeal and replace" signals similar difficulties for Administration tax reform and infrastructure priorities — goals that also could affect AD.

• **The courts already have stepped in.** Environmental rollbacks are under growing legal scrutiny. Ominously for the Trump EPA, the D.C. Circuit still has not ruled on the merits of CPP litigation that was argued a year ago. Instead it put EPA's suspension of that rule on a "watch list" that requires monthly justifications, noting "an affirmative statutory obligation to regulate greenhouse gases." Meanwhile it disallowed EPA's industry-backed effort to suspend compliance with a final rule limiting methane emissions from new natural gas facilities — a result which bodes ill for attempted EPA suspensions of landfill emission and other rules. EPA, the Court said, must undertake and complete normal rulemaking if it wants to suspend or change such final rules.

• **Facts are getting in the way.** The new EPA's apparent tendency to fabricate reasons for deferring previous agency actions increasingly is under pressure. Former Republican EPA heads have published Op-Eds warning of backlash from ideologically driven rollbacks. Environmental advocates have filed numerous suits challenging those deferrals. New EPA head Pruitt was excoriated for climate denial even on Fox News, and recently walked back his proposed ozone standards review. When EPA sought public comment identifying rules for repeal, it received about 1,000 candidates from affected industries — and 30,000 comments opposing repeals. An Energy Department draft "grid reliability" study apparently meant to undermine renewables came out the other way. In August,

major analyses affirmed that human emissions are driving accelerated global warming, complicating EPA plans to "revise" the CPP and other rules. That month EPA abandoned problematic proposals to shift Renewable Fuel Standard (RFS) compliance obligations from fuel refiners to blenders.

• **Empty box?** Facts notwithstanding, the EOs described above could result in virtually *no new major affirmative rules* being issued by EPA or other executive branch agencies. This is because the complexity of "offsetting," combined with staff cuts and steps to halt agency information gathering, could make *positive* forward movement extraordinarily difficult.

In addition, the EOs are loose enough to allow *negative* movement. For example, a new EPA rule that shreds a previous one, but still involves significant costs, apparently could be "offset" by vague "plan commitments" to

withdraw rules in the future. OMB can grant unlimited waivers for such actions.

Environmental advocates have noted large Gross Domestic Product (GDP) losses that likely will flow from rollbacks, raising the extent to which "two for one" will take economic and public health benefits into account. That tussle has just begun.

• **Half-empty box?** Ironically, regulatory stasis also could *lock in* existing federal mandates that benefit AD. If rules suddenly are more difficult to issue, they should be harder to revoke through new issuances. That's particularly true of rules for (say) tax credits that are embedded in statutes like the Internal Revenue Code. This is one place budget reductions could cut the other way — agencies must prioritize "review" actions, since they won't have resources to review everything.

Importantly, none of the EOs bind *independent agencies* like the Federal Trade Commission (FTC) or the Federal Energy Regulatory Commission (FERC), which will retain authority to expand AD revenues from (say) sales of capacity. Nor do they bind *states*, including the 29 states with Renewable Portfolio Standards (RPSs) that generally require electric utilities to source increasing percentages of renewable energy from AD or other "clean energy." Some of these states have moved past RPSs. California, for example, has pur-

sued laws giving it independent power to enforce major EPA programs as they existed on January 1, 2017. Maryland has adopted a stand-alone pilot 30 percent tax credit for energy storage.

• **Box turned inside out?** Even the Energy EO could benefit AD. That Order includes "renewable sources" among the "domestically produced energy resources" to be relieved of "undue burdens on their development or use." Some 800,000 U.S. workers now are employed in AD and other nonexportable low-carbon jobs versus about 50,000 export-vulnerable coal miners, providing a potentially powerful argument about which sector's "burdens" should be "relieved." Moreover, several analyses have indicated large U.S. economic losses should the energy innovation, energy efficiency, and global competitive benefits driven by current U.S. environmental rules go away.

Such facts could support petitions that Washington pursue unfair energy trade practices, further streamline interconnection procedures, expand federal renewable energy purchases, more favorably define "avoided cost," or better compensate sources like AD for enhancing grid reliability. Denying those requests would trigger litigation seeking to secure them. The results might turn the EO on its head.

• **Tweets matter.** Two rounds of attempted immigration restrictions have been struck or substantially narrowed by courts that relied on Administration remarks indicating intent to impose "Muslim bans." Similar results could flow from Presidential statements that climate change is a "Chinese hoax" or EPA will be turned "from a job killer to a job creator."

• **Go for certainty.** Uncertainty is the ultimate project killer. It seems to have erupted in every direction since January 20. Still, federal tax benefits and the federal RFS are unlikely to be disrupted. Meanwhile courts and key states are acting to plug uncertainty gaps.

The washing machine may remain stuck at "spin" for a while. But it's been estimated that over a trillion dollars of renewable energy investment is looking for a home. It will find properly structured projects. ■

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Links to further reading on "Life In A Washing Machine" in online version of this article, including:

- "List of executive actions by Donald Trump"
- "Weekly compilation of Trump Administration actions," Amy Siskind
- "Tracking Trump's Agenda, Step by Step," *New York Times (NYT)*
- U.S. Small Business Administration, "Regulatory Reform" (listing, e.g., CRA actions and results of SBA regional roundtables to identify rules for reform under EOs 13771 and 13777)
- "A Lesson Trump and the EPA Should Heed," William D. Ruckelshaus, *NYT*