

LEGAL UPDATES

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Trump Executive Actions Impacting Renewable Energy

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On President Trump's first and second days in office, the new administration released a flurry of executive actions, in the form of both memorandums and executive orders, focused on the energy industry:

A memorandum titled "Temporary Withdrawal of all Areas on the Outer Continental Shelf from Offshore Wind Leasing and Review of the Federal Government's Leasing and Permitting Practices for Wind Projects," dated January 20 (which we will refer to as the Wind Memorandum), which places restrictions on offshore and onshore wind projects

An executive order titled "Declaring a National Energy Emergency," dated January 20, which declares an energy emergency in the U.S.

An executive order titled "Unleashing American Energy," dated January 20, which directs federal agencies to take actions to address the supposed national energy emergency

An executive order titled "Unleashing Alaska's Extraordinary Resource Potential," dated January 20, which opens up parts of Alaska to oil and gas production

An executive order titled "Putting America First in International Environmental Agreements," dated January 20, which withdraws the U.S. from the Paris climate agreement

A memorandum titled “Memorandum to the Heads of Departments and Agencies,” dated January 21, which clarifies the Unleashing American Energy Executive Order

Although the renewable energy industry anticipated action from the administration related to offshore wind, electric vehicles, future grants, and federal funding for renewable energy projects, as well as increased oil and gas exploration and production, the depth and breadth of the orders and directions issued earlier this week came as a surprise to some. However, the impacts of the executive actions appear to be limited thus far: privately funded onshore wind projects sited on private lands should be generally unaffected, and there should be minimal impacts on projects involving solar, battery storage, and other non-wind renewable energy sources. Here is what we know so far:

OFFSHORE WIND PROJECTS

The Wind Memorandum directs federal agencies to halt issuance of any new or renewed approvals, rights of way, permits, leases, or loans for offshore wind projects, and to conduct an assessment to consider terminating or amending any existing offshore wind energy leases. Thus, it appears that all offshore wind projects under development – and even those currently operating – are at risk of being halted in their entirety under the memorandum.

ONSHORE WIND PROJECTS

Federal Leases

The Wind Memorandum directs the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Energy, the administrator of the Environmental Protection Agency, and “the heads of all other relevant agencies” to halt issuance of any “new or renewed approvals, rights of way, permits, leases, or loans for onshore or offshore wind projects.” If agencies act as the White House has directed, neither onshore nor offshore wind projects will be able to obtain new leases on federal lands for the foreseeable future. The Wind Memorandum does suggest this moratorium is temporary and will be reevaluated pending the completion of an assessment of federal wind leasing and permitting practices. Further, the majority of wind projects are sited on private lands, and those projects will not be impacted by the federal leasing moratorium.

Federal Funding

The Wind Memorandum prohibits federal agencies from issuing any new loans for onshore or offshore wind projects. To the extent wind projects are actively seeking new federal funding, that funding will not be available in the immediate future. Most wind projects do not utilize federal loans or loan guarantees, and so privately funded wind projects will not be impacted by the federal funding freeze.

Federal Permits

The impact of the executive action on federal permits differs for various types of permits:

U.S. Fish and Wildlife Service (USFWS) Incidental Take Permits (ITPs) and Eagle Take Permits (ETPs): These permits are needed in order for a project to “take” a federally-listed endangered or threatened species. We expect USFWS will not issue any new ITPs or ETPs in light of the Wind Memorandum. However, the vast majority of wind projects do not involve a significant risk of takes of protected species. Further, developers can site projects to avoid species impacts and implement mitigation measures to further reduce potential impacts to species, such that ITPs and ETPs are unnecessary.

Federal Aviation Administration (FAA) Determinations of No Hazard to Air Navigation (DNHs): DNHs are routinely obtained for wind development. It is not clear that the FAA, a bureau within the U.S. Department of Transportation (DOT), is a target of the Wind Memorandum. Although the memorandum references “all other relevant agencies,” DOT was not a recipient of the memorandum. It is also not clear that DNHs constitute “approvals” or “permits” since they are determinations. Further, although financing parties typically require developers to obtain DNHs for all turbines and tall meteorological towers in order to provide financing, DNHs are not legally required to construct tall structures. It is possible that, in the event FAA halts issuance of DNHs, developers can find ways to provide lenders and tax equity investors with sufficient assurances regarding risks associated with tall structures in lieu of DNHs.

U.S. Army Corps of Engineers (Corps) Nationwide Permits (NWP): NWPs are routinely used by wind projects for any impacts to waters of the United States under Section 404 of the Clean Water Act. Coverage is automatic under these already-issued, non-project-specific general permits. The only time a federal approval is needed for NWPs is when a Preconstruction Notification (PCN) must be submitted, in which case the Corps would issue a verification. However, if the Corps decides to halt issuance of PCN verifications as a result of Trump’s directives, PCNs will be automatically approved where the Corps does not issue a verification within 45 days. It is not even clear that the Corps is a target of the Wind Memorandum. In spite of the “all other relevant agencies” reference in the memorandum, the Corps was not a recipient of the memorandum. Further, a very small percentage of wind projects involve impacts that need a PCN (and thus a Corps verification), and

many wind projects do not involve any impacts to waters of the U.S. at all. Projects under development that do involve impacts to waters of the U.S. can often be modified to avoid waters of the U.S. by boring under the waters or tweaking project design.

National Environmental Policy Act (NEPA) Findings of No Significant Impact (FONSI)s and Environmental Impact Statements (EISs): NEPA is triggered when projects involve major federal actions, which for wind projects is typically limited to siting on federal lands or utilization of federal funding. When NEPA applies, the ultimate result is a FONSI or EIS issued by the relevant federal agency taking the major federal action. The Wind Memorandum may be construed as directing a freeze on NEPA FONSI and EIS issuance. However, arguably, FONSI and EISs are findings and statements, not “approvals” or “permits.” Further, most wind projects do not involve federal funding or federal lands and thus do not trigger NEPA, rendering it a non-issue.

Federal Energy Regulatory Commission (FERC) Approvals: The Wind Memorandum was not directly addressed to FERC, but the memorandum contains directions to “all other relevant agencies” which could include FERC. FERC, however, does not issue the types of “approvals, rights of way, permits, leases or loans” specified in the Wind Memorandum. The FERC authorizations that are needed for a wind project to sell electricity, capacity, and ancillary services, such as a market-based rate (MBR) tariff, are accepted by FERC to become effective, which according to 18 C.F.R. § 35.4, does not constitute approval of the MBR tariff. Moreover, an MBR application that FERC does not act on within 60 days goes into effect automatically by operation of law. To obtain Exempt Wholesale Generator (EWG) status or Qualifying Facility (QF) status, a wind project must submit a self-certification to FERC, but affirmative action from FERC is not needed for EWG or QF status to become effective. Although FERC can reject MBR, EWG, or QF filings, issuing such rejections or freezing actions on wind projects in general seems unlikely unless the administration provides more specific guidance to FERC on the application of the Wind Memorandum in this context.

A number of other types of federal filings, notices, plans, and the like are sometimes required for wind projects – for instance, Agricultural Foreign Investment Disclosure Act filings, and preparation of Spill Prevention, Control, and Countermeasure Plans. These items do not require any affirmative federal action and so should be entirely unaffected by the Wind Memorandum and the executive orders. Although wind projects present a number of other opportunities for federal agency input – including input from the National Telecommunications and Information Administration (NTIA)

which issues concurrence letters for wind projects, and the Department of Defense (DofD) which provides input as part of its Siting Clearinghouse process – seeking this input is not legally required, and developers also are not legally required to implement any NTIA or DofD recommendations or requests resulting from the consultation. Finally, the Federal Communications Commission issues licenses to operate radio communication systems, but not many wind projects have these types of systems and projects can be designed to avoid the need for these.

Onshore wind development projects that have already secured all federal permits required under the law to construct and operate are unlikely to be impacted in any way by the Wind Memorandum, as the memorandum appears to direct agencies only to halt issuance of new permits or renewals of existing permits. Further, there is no clear threat in any of the other executive orders that already-issued permits will be rescinded or terminated for any renewable energy projects, onshore wind included. The Unleashing American Energy Executive Order directs federal agency heads to “develop and begin implementing action plans to suspend, revise, or rescind all agency actions” and “review all existing regulations, orders, guidance documents, policies, settlements, consent orders, and any other agency actions,” where such actions “impose an undue burden on the identification, development, or use of domestic energy resources – with particular attention to oil, natural gas, coal, hydropower, biofuels, critical mineral, and nuclear energy resources.” The focus of this directive appears to be limited to agency actions that restrict or place burdens on non-renewable energy sources only, which should not impact renewable energy.

State Permits

State permits that are issued pursuant to federal laws, such as the Clean Air Act and Clean Water Act, should not be impacted by the executive actions. The Wind Memorandum is very clearly limited to federal approvals only, and it is directed solely to federal agencies. Further, as mentioned above, the “suspend” and “rescind” language in the Unleashing American Energy Executive Order does not appear to target renewable energy projects.

OTHER TYPES OF RENEWABLE ENERGY PROJECTS

Solar and battery storage projects, as well as other non-wind renewable energy sources, are not currently impacted by any of the executive actions. The Wind Memorandum is explicitly limited to wind projects. Although the three executive orders appear to be intended to increase oil and gas production, they do not mention renewable energy or any specific renewable energy source directly. The Unleashing American Energy Executive Order directs federal agencies to consider taking actions to support the “unleashing” of affordable and reliable energy and natural resources, but this language is too broad under any reading to suggest impacts to non-wind energy sources.

In response to the Wind Memorandum, the Secretary of the Interior released Order no. 3415 on January 20, temporarily prohibiting Department of the Interior (DOI) bureaus and offices from issuing “any onshore or offshore renewable energy authorization, including but not limited to a lease, amendment to a lease, right of way, amendment to a right of way, contract, or any other agreement required to allow for renewable energy development” – thus not limiting the directive to wind – but the ability of DOI to expand the scope of its order in this way is questionable, and there is no indication that any other federal agencies will follow suit. Aside from DOI funding and leasing, the only impact of the DOI freeze on actions for renewable energy projects is the halting of issuance of USFWS ITPs/ETPs and NEPA determinations where DOI is the lead agency, both discussed above.

ADDITIONAL CONSIDERATIONS

Inflation Reduction Act (IRA) Credits

Thus far, the IRA tax credits are not impacted by the executive actions. The Unleashing American Energy Executive Order mandates the repeal of a number of prior executive orders, including Executive Order 14082, Implementation of the Energy and Infrastructure Provisions of the Inflation Reduction Act of 2022, and orders all agencies to immediately pause the disbursement of funds appropriated through the IRA. Confusion over the reach of the January 20 order led to the White House releasing the Memorandum to the Heads of Departments and Agencies, which clarified that the halting on disbursement of IRA funds was limited only to funds associated with the Green New Deal – thus excluding IRA tax credits from the reach of the pause. Tax credits, under the law, can be revoked only by an act of Congress.

A potential wrinkle was introduced this week by Russ Vought, the nominee for director of the Office of Management and Budget, who testified that the Trump administration may try to utilize the concept of impoundment to withhold IRA tax credits. Impoundment occurs when an executive branch action or inaction results in a delay or refusal to spend appropriated funds. The use of impoundment is currently limited by the Impoundment Control Act, which Trump has voiced an intent to challenge. However, this possible route to block use of IRA credits is purely theoretical at this point, and swift legal challenges would be inevitable. There is currently no change in the availability of IRA tax credits under any of the executive actions rolled out this week.

Alaska Drilling

The Unleashing Alaska’s Extraordinary Resource Potential Executive Order withdraws Secretarial Order 3401 dated June 1, 2021, the Comprehensive Analysis and Temporary Halt on All Activities in the Arctic National Wildlife Refuge Relating to the Coastal Plain Oil and Gas Leasing Program. The executive order also allows for oil and gas leases within the Arctic National Wildlife Refuge. In doing so, the order reopens previously closed areas in the state for oil and gas drilling and mining.

Rollback of Other Energy Programs

The Unleashing American Energy Executive Order revokes a long list of executive orders issued by President Biden during his presidency that focused on renewable energy, climate change, and environmental protection, a move that did not come as a surprise.

That same executive order also terminates the disbursement of funds for electric vehicle (EV) charging stations and discusses the intention to eliminate the EV “mandate.” Although Trump has previously indicated he intends to put an end to the \$7,500 federal tax credit for the purchase of new EVs, none of the executive actions issued this week do that and so the new EV purchase credit is still intact.

Finally, in another move that was also expected, under the White House’s Putting America First in International Environmental Agreements Executive Order issued January 20, Trump pulled the U.S. out of the Paris Agreement under the United Nations Framework Convention on Climate Change, a legally binding international treaty on climate change.

CONCLUSION

Although an initial reading of all of the energy-related executive actions issued this week may cause concerns for some renewable energy parties, we will continue to gain clarity on some of the uncertainties as federal agencies and regulators begin implementing the executive actions. Further, the majority of renewable energy projects – both those that are already operating and those in the early development stages – will not be impacted by the executive actions. Solar and battery projects are currently in the clear, and privately funded onshore wind projects sited on private lands with minimal federal permitting needs will not be significantly affected. For those onshore wind projects currently in development that involve some federal permitting, there is considerable opportunity to implement workarounds in the short term to eliminate the need for federal permits. If needed in the longer term, projects can be designed in ways to avoid or minimize the need for federal involvement and federal permits.

CONTACT US

The impact of these energy-related executive actions is a rapidly developing area that we are monitoring extremely closely. Reach out to the Husch Blackwell Energy and Natural Resources team if you have any questions or to request updates.