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Clean Power Plan

After

DJT

Executive Order Promoting Energy Independence and Economic Growth, March 28, 2017

AHC Carbon & Innovation Workshop 7

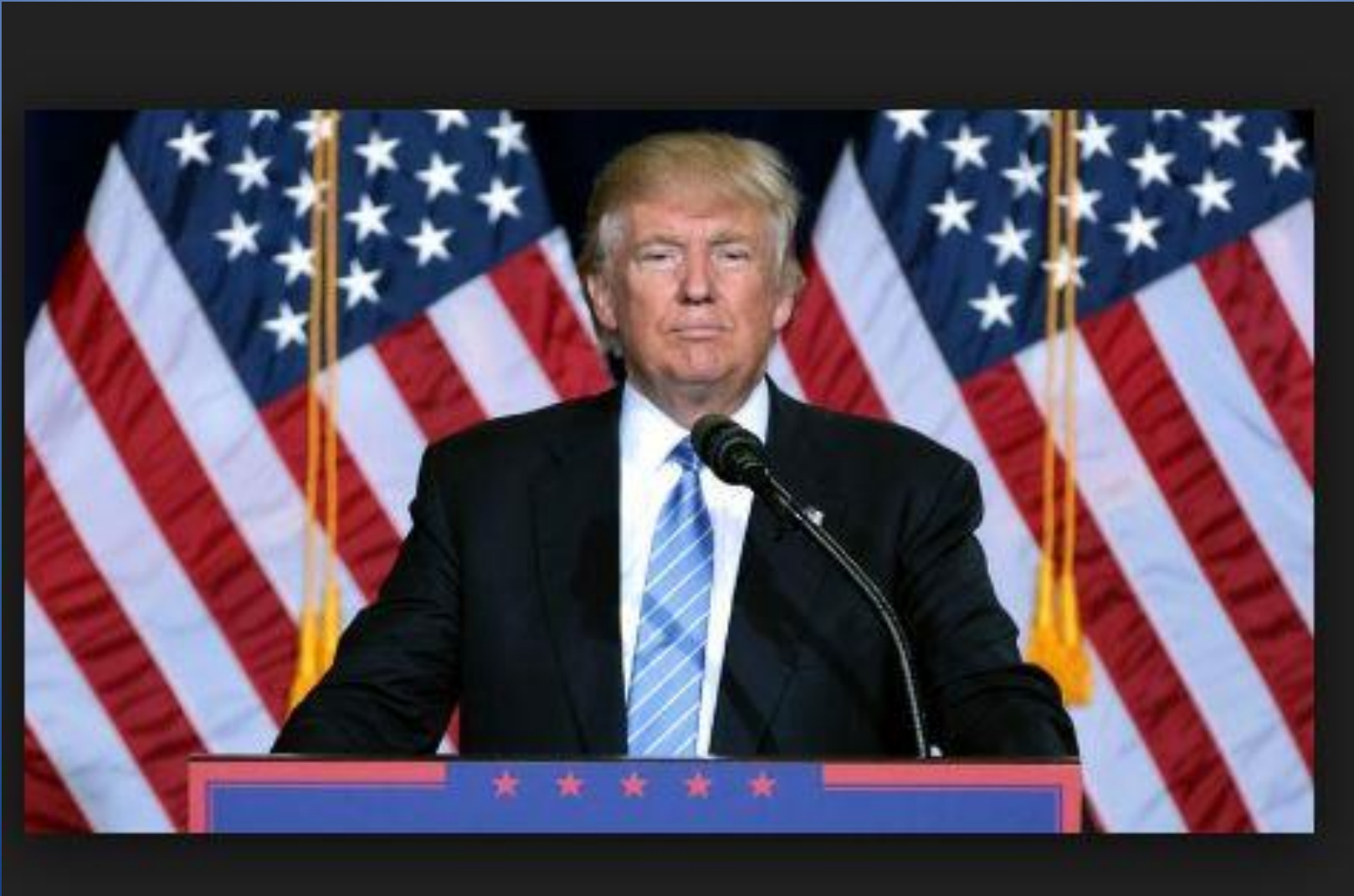
Dallas, Texas

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Louis E. Tosi

Shumaker, Loop & Kendrick, LLP

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A. Where Clean Power Plan Stands

- Clean Power Plan is still on books
- Stayed pending judicial review by U.S. Supreme Court (impact of Gorsuch)
- Oral arguments en banc complete
- Awaiting decision any time
- DOJ motion to stay the case pending reconsideration by EPA
- What next?

B. The Trump Executive Order

- Directs reconsideration of all aspects of Obama climate program
- Effectively would undo U.S. plan to meet the Paris Accord

C. Elements of Executive Order

March 28, 2017

Executive Order Establishes

Section 1: Policy

- Promote clean and safe development of our nation's vast energy resources and avoiding regulatory burdens
- Ensure that the nation's electricity is affordable, reliable, safe, secure, and clean, ...produced from coal, natural gas, nuclear material, flowing water, and other domestic sources, including renewable sources.

- Executive departments and agencies immediately review existing regulations that potentially burden...domestically produced energy resources
- Agencies should take appropriate actions to promote clean air and clean water
- Environmental regulations comply with the law, are of greater benefit than cost

Section 2: Review

- The heads of agencies shall review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources.

Section 3: Rescission

- Executive Order 13653 of November 1, 2013
(preparing the U.S. for the impacts of climate change)
- Presidential memorandum of June 25, 2013
(**Power Sector Carbon Pollution Standards**)
- Presidential Memorandum of November 3, 2015
(**Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment**)

**Executive
Order (cont'd)**

- Presidential Memorandum of September 21, 2016
(Climate Change and National Security)
- Report of the Executive Office of the President of June 2013
(The President's Climate Action Plan)
- Report of the Executive Office of the President of March 2014
(Climate Action Plan Strategy to Reduce Methane Emissions)
- CEQ shall rescind **"Final Guidance for Federal Departments & Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews"**

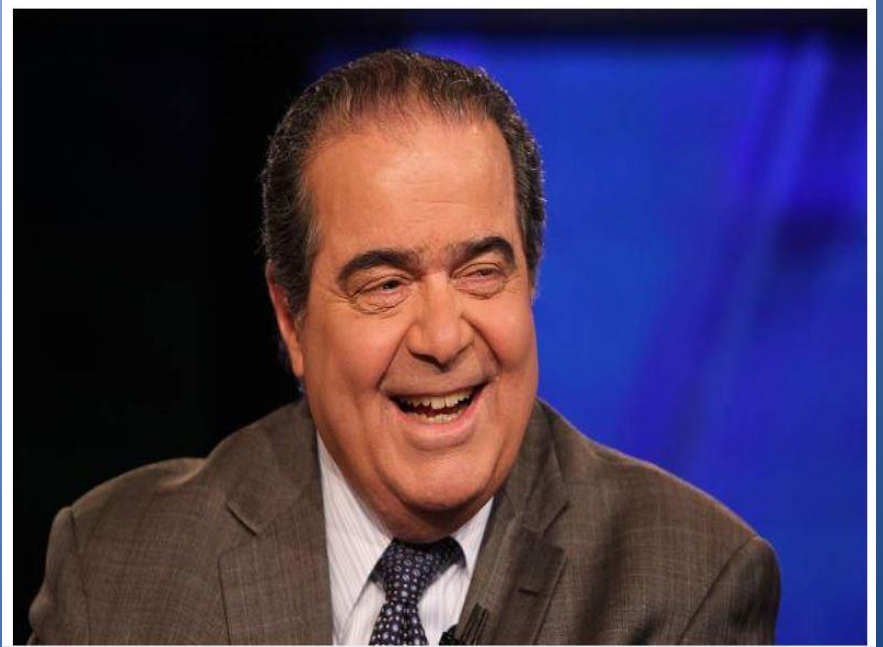
Section 4: Rescind Clean Power Plan Executive Order (cont'd)

- Consistent with Section 1, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules
- This section applies to the following final or proposed rules:
 - Final rule “**Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,**” 80 Fed. Reg. 64661; (October 23, 2015) (Clean Power Plan)

- Final rule **“Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units,”** 80 Fed. Reg. 64509 (October 23, 2015)
- Proposed rule **“Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; Proposed Rule,”** 80 Fed. Reg. 64966 (October 23, 2015)

Section 5: Review Social Cost of Carbon, Nitrous Oxide & Methane

- **Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866** (February 2010) and 2013, 2015, and 2016 updates
- Addendum to the Technical Support Document for Social Cost of Carbon: **Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide** (August 2016)



D. What's Next?

- Executive Order has no legal effect on existing regulations (as opposed to guidance); must be changed in accordance with the Clean Air Act and Administrative Procedure Act
- DOJ immediately sought stay of case, challenging the CPP, NSPS, and others
- Lots of litigation and rulemaking

- Historically unique legal circumstance
 - Courts typically grant stays during new administration's reconsideration
 - Reagan Era example
 - However, CPP is ready for decision by the judicial panel
 - Strong opposition by environmental petitioners and certain states
 - Environmental leaning of D.C. Circuit

- Important stakes in outcome of current case
 - If D.C. Circuit affirms the CPP, several of Pruitt's rationales to repeal the CPP could be eliminated
 - If D.C. vacate plan – task for Pruitt is made easy
- U.S. Supreme Court will be final decider (CPP is stayed until U.S. Supreme Court rules on it)
- Gorsuch/Scalia replacement –and expected 5-4 outcome

E. Substantial “Rulemakings” Will be Required

- To rescind the CPP, U.S. EPA must
 - Notice intent to repeal
 - Issue statement of legal and factual reasons supporting the repeal
 - Respond to comments
 - Issue final findings and rule rescission
 - Expect future appeals by NGO and certain states
 - Thousands of comments
 - Key issues BAER; application of §111 – no authority

F. Pruitt Will Have to Navigate Treacherous Waters of Federal Rulemakings with Intense NGO Opposition (immigration example)

- Opposition by environmental groups expected to be all time high
- Multiple avenues of NGO litigation
- Increased citizen suits
- Continued public pressure and opinion through media
- Growing social concern with environmental issues
- Certain corporate opposition to repeal of CPP

G. Opinion: Watch for Resolution of This “Legal” Question, Among So Many

- How does Chevron deference apply when an agency reverses a regulation?
- Who gets discretion in facts and discretion in law – Obama/Trump?

H. Reminder: Legal Questions Under CPP

- CPP transforms an energy sector via executive action; shifts generation to natural gas & renewables; no Congressional consensus
- EPA or Federal Energy Commission – who decides the U.S. mix of electric generation?
- EPA legal support for CPP: §111(d) of CAA
 - §111(d) allows imposition of “Best System of Emission Reduction” (BSER) on existing units
 - CPP defines “system” to apply to “owners,” not particular power plants

Legal Questions Under CPP (cont'd)

- “BSER,” like other technology based standards (e.g. “BACT), was derived historically by imposing “emission limits” at the stack.
- CPP standards are not “achievable” at any plant
- Fence-Line Argument: Plan relies on three building blocks
 - On-site efficiency improvements at EGUs
 - Increase use of natural gas
 - Zero carbon energy (renewable)
 - Only efficiency improvements fall within the fence-line of a power plant

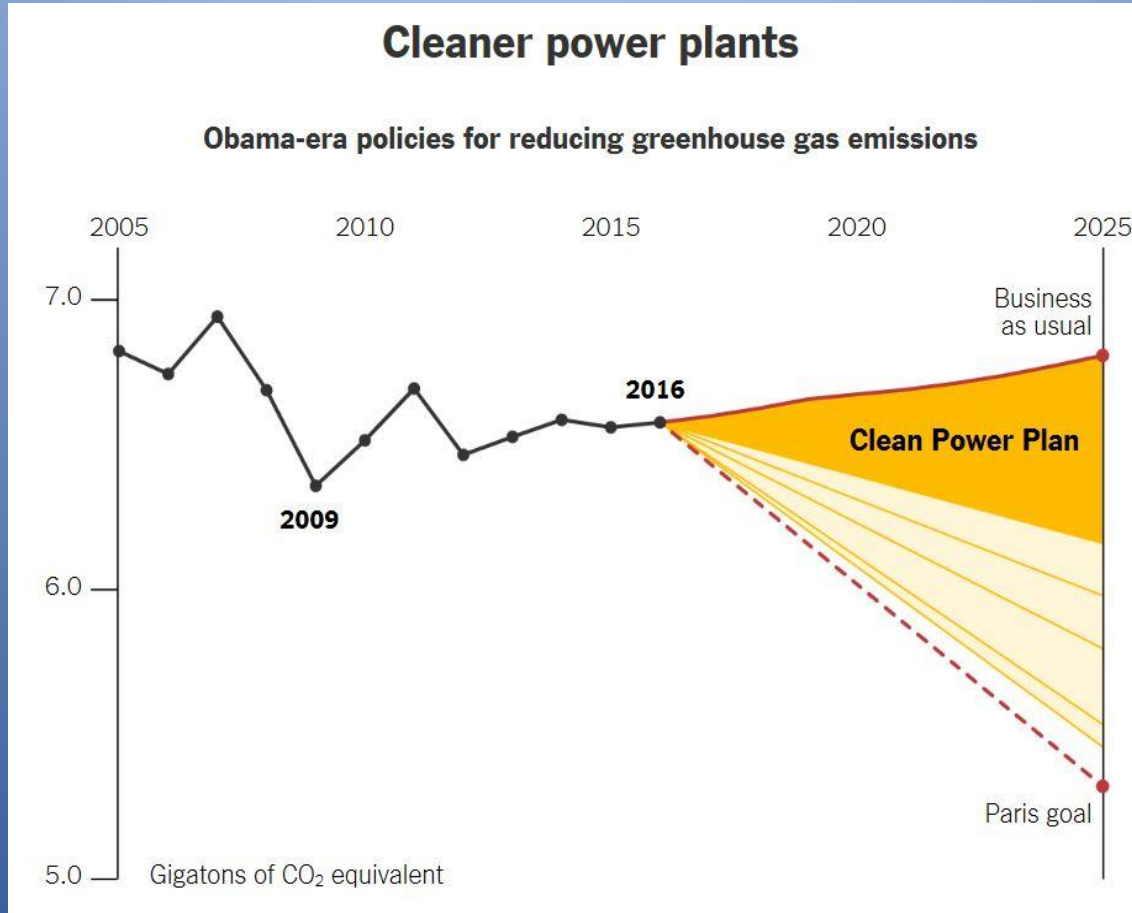
Legal Questions Under CPP (cont'd)

- Power plants already regulated under §111(d)
- Federalism: U.S. EPA is forcing states to implement what amounts to a national energy policy
- Congress did not intend the CAA as statutory authority for national energy policy

I. Will CO2 Reductions Stop if CPP is Reversed?

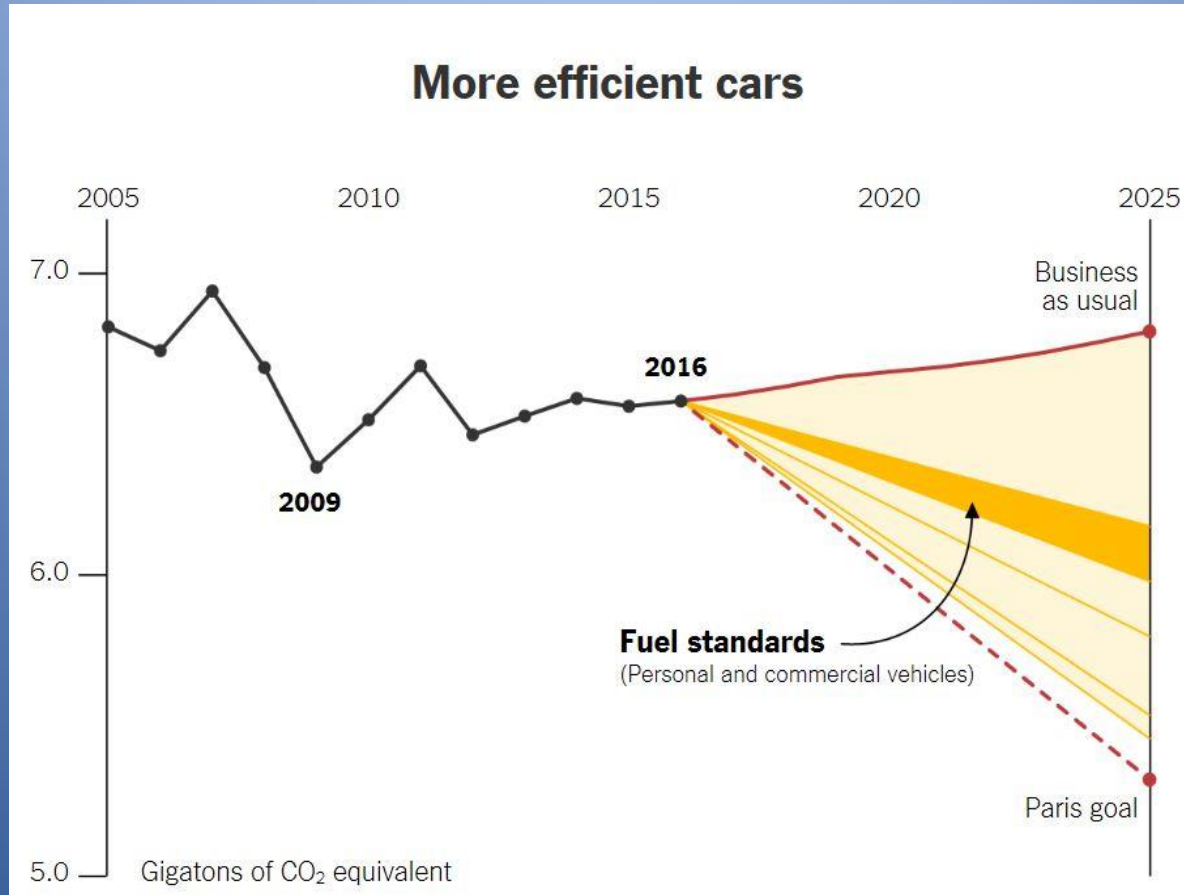
- No, but the “pace” will change
- Several social/political factors will encourage alternatives
- States maintaining energy portfolio laws
- Trending lower costs for solar/wind/battery technology
- Historically low cost for natural gas, as or more competitive as coal
- Difficult state regulatory burdens; regulated v. non-regulated
- Social awareness and preferences for “environmental” values
- Changing corporate values (GE position on CPP)
- Think of Tesla v. GM and Ford

J. Some Energy “Mix” Projections Impacted by the Executive Order



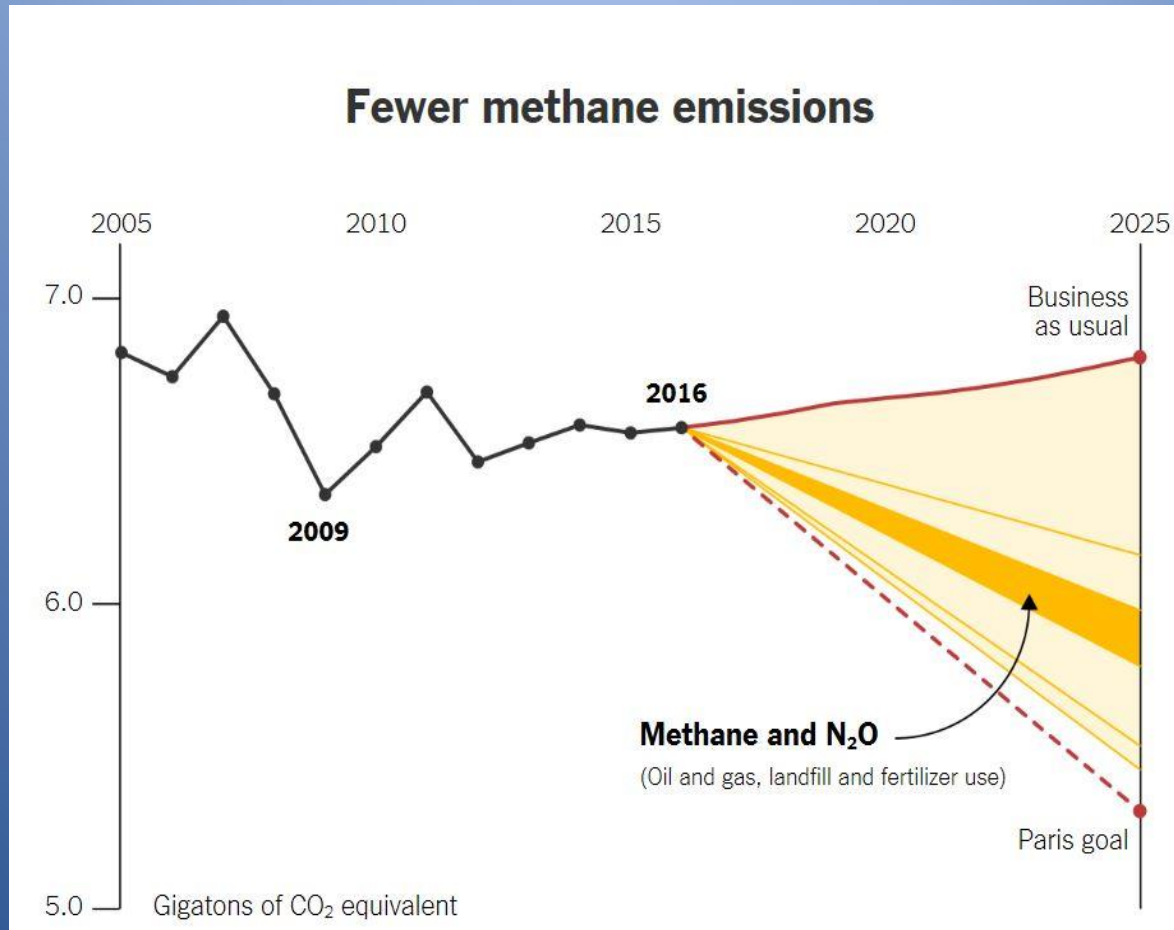
If implemented to its fullest extent, the plan would have reduced carbon emissions by nearly 650 megatons by 2025 – just under halfway to the Paris pledge, according to an analysis by Climate Interactive.

NYTimes, Order Pushes the U.S. Climate Pledge Further Out of Reach, Nadja Popovich, March 28, 2017

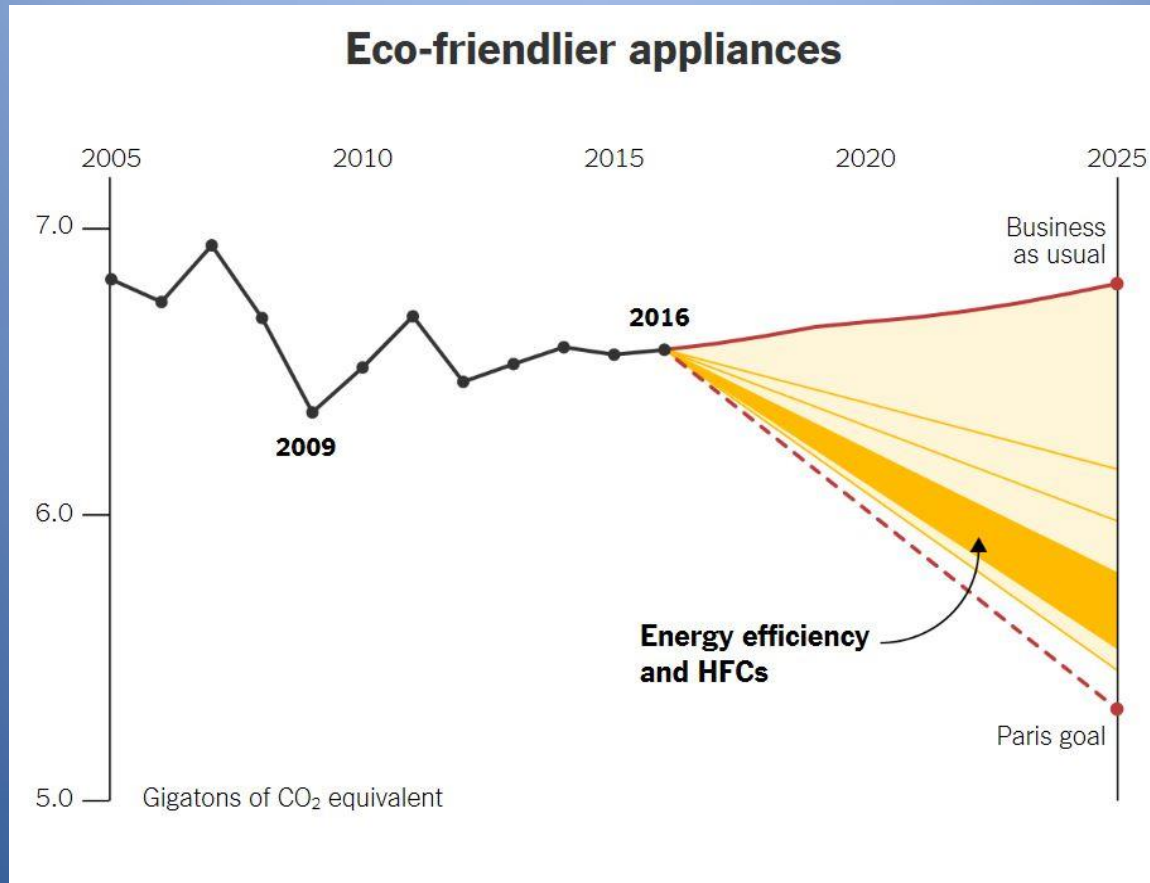


Arguing that Obama-era rules burden American automakers, Mr. Trump instructed E.P.A. administrator Scott Pruitt to reopen a review of fuel standards earlier this month. Fuel economy targets are locked in through 2021, but Mr. Pruitt could weaken rules for vehicles manufactured between 2002 and 2025.

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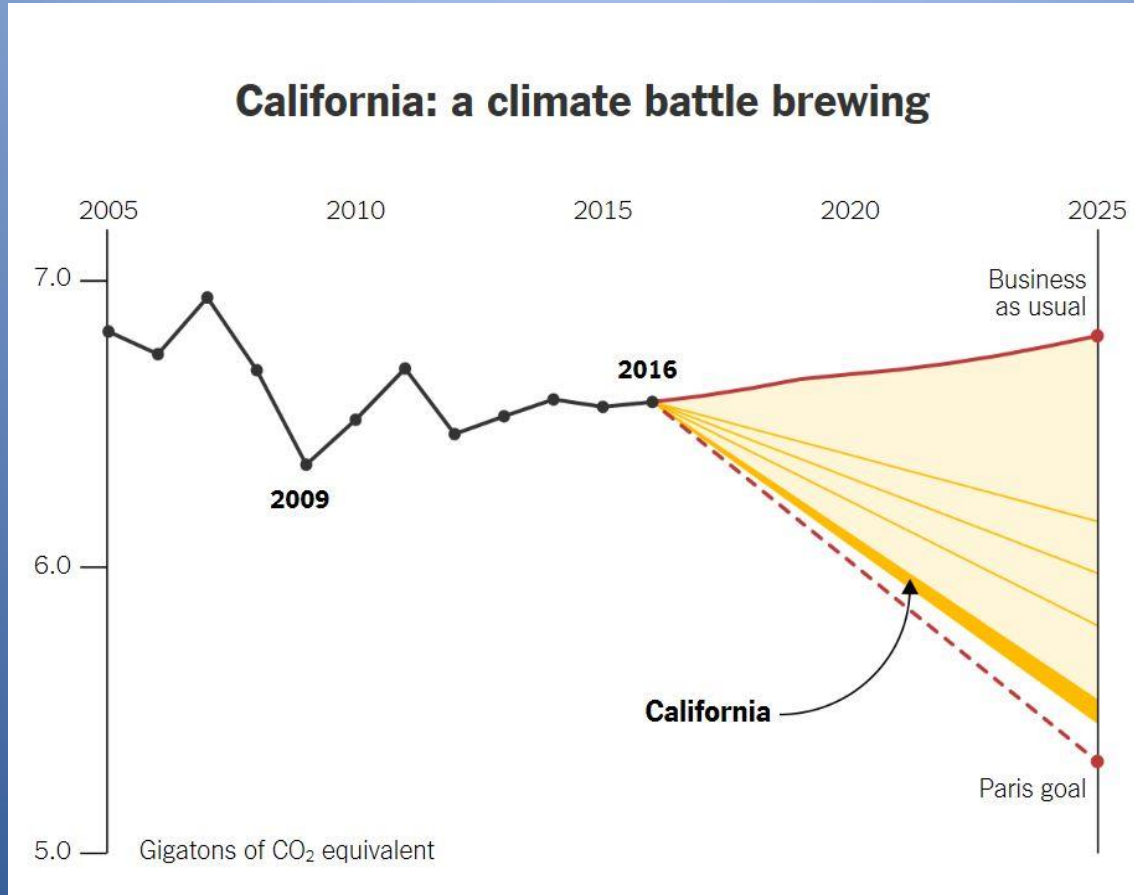


The E.P.A. announced it was withdrawing a rule that required existing oil and gas well operators to provide information about methane emissions.



The Trump White House issued a freeze on all new or pending regulations, which put on hold several Obama-era energy-efficiency standards.

NYTimes, Order Pushes the U.S. Climate Pledge Further Out of Reach, Nadja Popovich, March 28, 2017



But California may be on a collision course with the Trump administration over its vehicle standards.

NYTimes, Order Pushes the U.S. Climate Pledge Further Out of Reach, Nadja Popovich, March 28, 2017



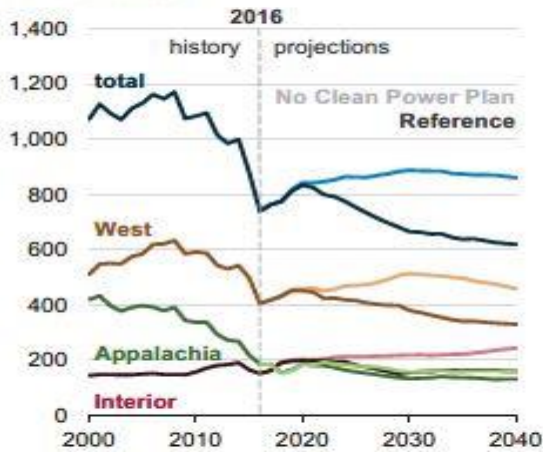
Electricity

As demand grows modestly, the primary driver for new capacity in the Reference case is the retirement of older, less efficient fossil fuel units—largely spurred by the Clean Power Plan (CPP)—and the near-term availability of renewable energy tax credits. Even if the CPP is not implemented, low natural gas prices and the tax credits result in natural gas and renewables as the primary sources of new generation capacity. The future generation mix is sensitive to the price of natural gas and the growth in electricity demand.



Coal production decreases—

Coal production
million short tons



Coal consumption in electric power sector
million short tons



U.S. Energy Information Administration

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