
MEMORANDUM

TO: Interested Parties

FROM: Mr. Scott Segal

DATE: April 7, 2017

RE: Relationship Between the Paris Agreement
and the Status of the Endangerment Finding
and the Clean Power Plan

You have asked for a brief assessment of the status of U.S. participation in the Paris Agreement within the United Nations Framework Convention on Climate Change (UNFCCC) in the event that the United States alters its domestic regulatory decisions reflected in the Endangerment Finding and in the Clean Power Plan.

Paris Agreement and Domestic Regulations

In short, the Paris Agreement imposes no enforceable obligations on the United States that would require particular regulatory outcomes or strategies. While the signatories to the Paris Agreement have agreed to make efforts towards meeting "intended nationally determined contributions," or INDCs targeted toward achieving the purposes of the Agreement,¹ the Agreement is silent on what mechanism the United States or any other signatory may use to demonstrate progress towards their INDCs.² The use of the Clean Power Plan (CPP),

¹ The Paris Agreement, Art. 4, ¶ 2 (Dec. 12, 2015) ("Each Party shall prepare, communicate and maintain successive *nationally determined contributions* that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.") (emphasis added).

² This document used the term "INDC," which refers to an "Intended Nationally Determined Contribution." "INDC" references those contributions that were planned, or intended, prior to the entrance into force of the Paris Agreement on November 4, 2016. The enclosed citations, however, reference an "NDC," or a "Nationally Determined Contribution." An NDC is in almost all effects similar to the INDC, but it references the commitments following a formal conversation process after a nations' submittal of its respective instrument of ratification, accession, or approval to join the Paris Agreement. The formalized conversion between INDC and NDC took place immediately following the date upon which the Paris Agreement entered into force. Unlike INDCs, NDCs are part of an official registry held by the United Nations Framework Convention on Climate Change Secretariat. The distinction between INDC and NDC was conceived to allow a country to materially strengthen the stringency of its voluntary commitment initially conceived of in its INDC, between the negotiation process and the date of the international codification of its commitment. Almost all INDCs and NDCs for organizations party to the Paris Agreement are effectively similar in nearly all material respects.

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regulations established by the Obama Administration designed to reduce greenhouse gas (GHG) emissions from existing power plants,³ are not required under the Paris Agreement. Indeed, no regulatory regime arguably occasioned by the so-called Endangerment Finding⁴ is required under the Paris Agreement. Therefore, changes to the CPP or the Endangerment Finding do not constitute violations of the Paris Agreement.

Clean Power Plan

The President's Executive Order of March 28, 2017,⁵ called upon the Administrator of the U.S. Environmental Protection Agency (EPA) to re-examine the basis of the CPP through an appropriate administrative process. Attorneys representing EPA informed the U.S. Court of Appeals for the District of Columbia Circuit of the change in policy between the Trump and Obama Administrations regarding the appropriateness of the CPP. While supporters of the CPP are free to remind reviewing courts of the role the CPP may play in modeling perceived appropriate behavior under the Paris Agreement, the change in Administration position regarding the CPP can in no serious sense be regarded as an abrogation of the Paris Agreement.

Endangerment Finding

The Paris Agreement makes certain representations in describing its aim. One of these representations can be described as a degree of agreement regarding scientific consensus on the relationship between climate change and anthropogenic sources of GHG emissions. While some observers might contend that there is a rhetorical inconsistency between these representations in the Agreement and a reconsideration of the Endangerment Finding under the Clean Air Act (CAA), there is again no abrogation of the Agreement in any legal sense. Should the Endangerment Finding be revisited under the current Administration, it would be revisited in its context as a triggering mechanism under the CAA. But as has been established, the Paris Agreement does not require any particular regulatory outcome under the CAA or any other existing statute. Progress toward Paris goals could be made through any of a number of policies or market mechanisms outside of the CAA purview including energy efficiency, expansion of nuclear power, hydroelectric or other clean energy sources. Indeed, continued low natural gas prices and abundant supplies can contribute to forward momentum.

³ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64662 (Oct. 23, 2015), <https://www.gpo.gov/fdsys/pkg/FR-2015-10-23/pdf/2015-22842.pdf>.

⁴ Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 74 Fed. Reg. 66,496 (Dec. 15, 2009), https://www.epa.gov/sites/production/files/2016-08/documents/federal_register-epa-hq-oar-2009-0171-dec.15-09.pdf.

⁵ Promoting Energy Independence and Economic Growth, Executive Order 13783, § 4, 82 Fed. Reg. 16,093, 16,095 (Mar. 28, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-03-31/pdf/2017-06576.pdf>.

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Conclusion

While the Paris Agreement has been described as the "first comprehensive climate agreement,"⁶ it is not enforceable as to particular regulatory structures in the United States like the CPP or the Endangerment Finding. The Paris Agreement may create a rhetorical environment, perhaps even a powerful one, favorably disposed towards these regulatory structures, but it does not require them. If the United States continues to value maintaining a "seat at the table"⁷ under the Paris process, it does not need to maintain particular CAA regulatory structures to do so.

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⁶ See, e.g., British Broadcasting Corporation, Paris climate deal: US and China formally join pact, Sep. 3, 2016, <http://www.bbc.com/news/world-asia-china-37265541>.

⁷ Tillerson, Rex Wayne, Statement to the Senate, Committee on Foreign Relations, Hearing, Jan. 11, 2017, available at: CQ Roll Call via Bloomberg Government and on file with author (accessed April 6, 2017); see also, Colin Marshall, President & CEO Cloud Peak Energy, letter to The Honorable Donald J. Trump, President of the United States of America, April 6, 2017 (encouraging President Trump to pursue responsible energy policies but to "remain in the Paris Agreement").