

# EPA INITIATES FORMAL REGULATORY PROCESS TO ROLL BACK CLEAN POWER PLAN

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## Environment, Land and Natural Resources / Power Alert

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On Monday, October 16, 2017, the Environmental Protection Agency ("EPA") published a Notice of Proposed Rulemaking in the Federal Register, marking the start of the formal process to repeal the Clean Power Plan ("CPP"). Interested parties will have until December 15, 2017, to comment on the proposed repeal of the CPP.

Finalized in August 2015, the CPP was the keystone to the Obama administration's initiative to reduce greenhouse gas emissions and address climate change, and provided leverage to encourage other nations to make emissions reductions commitments under the Paris Climate Accord. The controversial suite of regulations, which was challenged immediately upon publication, was promulgated under Section 111(d) [1] of the Clean Air Act. This section governs existing electric generating units ("EGUs"). The CPP regulations set a goal of a 32 percent reduction in carbon emissions from 2005 levels by 2030 achieved through the establishment of reduction levels for each state. For an overview of the CPP, see ["EPA's Clean Power Plan: Structure, Implications for the Grid, and Next Steps."](#)

The CPP required that states develop plans for compliance with the state-specific emissions targets and would have required each state to submit their plans beginning in the summer of 2016. That timeline was interrupted when the U.S. Supreme Court issued an unprecedented stay of the rule while it is being challenged in court. The rule's challengers argued EPA exceeded its Clean Air Act authority and the rule would unreasonably interfere with the electric power sector of the U.S. economy. In February 2016, the U.S. Supreme Court agreed to stay the CPP while the legal challenge made its way through the courts. The stay effectively halted the work of states that have been developing state implementation plans. For an in-depth analysis of the stay and its effects, see ["High Court Grants Stay of Clean Power Plan"](#) and ["Update on EPA's Clean Power Plan."](#)

The Trump administration has said the repeal is part of the fulfillment of its campaign promise to end the "war on coal." In support of the action, the preamble to the proposed repeal rule echoes arguments made by industry groups, such as the Utility Air Regulatory Group and the National Mining Association, and states challenging the rule in court. The Trump administration is arguing that, under the Obama administration, the EPA took an overly expansive view of its Clean Air Act authority by establishing a first of its kind requirement for compliance with overall emissions limits that effectively necessitates changes "outside the fence line" of power plants. These "outside the fence" measures included substituting increased generation from lower-emitting, existing natural gas combined-cycle units for decreased generation from higher-emitting, affected steam generating units, and increased generation from new zero-emitting renewable energy sources for decreased generation from affected fossil-fuel generating units.

In addition to a detailed legal evaluation of EPA's authority, the proposed rulemaking also contains an in-depth re-evaluation of the cost to comply with the CPP, which opponents have long argued was underestimated by the Obama administration.

The EPA questions the prior administration's interpretation of CAA Section 111(a)(1) as permitting regulation of emissions beyond the source and notes such an interpretation could have the unintended consequences of interfering with another provision that relies on Section 111 standards as a baseline. [2]

Regarding broader policy concerns, the EPA notes that critics of the rule have identified potentially serious economic and political implications arising from the CPP, which, without a "clear statement" delegating authority to take an action with such consequences, may constitute a violation of the "clear statement rule." (*citing Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (*quoting FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (holding that, under certain circumstances, interpretation having "vast 'economic and political significance'" requires clear statement from Congress assigning agency such authority))).

Critics of the move have argued that, without the CPP, the United States may be less likely to achieve its emissions reductions goals under the Paris Climate Accord and make other countries feel less obligated to meet their own. The Trump administration has vowed to withdraw from the Paris Climate Accord in 2020. For additional analysis and commentary on the potential withdrawal from the Paris Accord, please see "[United States Announces Intent to Withdraw From Paris Climate Accord: What is the Real Impact?](#)"

Even if the EPA is successful in repealing the CPP, the agency may be required to replace it with some form of regulations governing carbon dioxide emissions. The U.S. Supreme Court has previously held that CO<sub>2</sub> is a pollutant, see *Massachusetts v. EPA*, 549 U.S. 497 (2007), and under the Obama administration the EPA made an Endangerment Finding for greenhouse gas emissions. The proposed rulemaking does not propose a replacement for the CPP at this time. The action notes that EPA "has not determined the scope of any potential rule under CAA section 111(d) to regulate greenhouse gas emissions from existing EGUs, and, if it will issue such a rule, when it will do so and what form that rule will take." The agency intends to issue an Advanced Notice of Proposed Rulemaking to solicit information on systems of emission reduction "that are in accord with the legal interpretation proposed in this notice (i.e., those that are applicable at and to an individual source)" if and when it drafts a replacement for the CPP.

The full proposed rulemaking can be viewed [here](#).

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[1] 42 U.S.C. § 7411(d).

[2] See 40 C.F.R. 52.21(b)(12).

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