

UPDATE ON EPA'S CLEAN POWER PLAN

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Energy Alert

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Late last month, the United States Environmental Protection Agency ("EPA") submitted briefs to the United States Court of Appeals for the District of Columbia in support of its Clean Power Plan ("CPP") rule. The agency's briefs were filed in response to a challenge against the rule brought by industry groups and states ("Petitioners"). Amici curiae briefs on both sides of the issue were also filed by several cities, states, advocacy groups, and companies. The D.C. Circuit will hear oral arguments on the legality of the CPP in June. [1] In February, the United States Supreme Court stayed the implementation of the CPP until the resolution of these legal challenges. [2]

Since the stay of the CPP, states have operated under uncertainty and have taken different approaches to planning for the potential implementation or invalidation of the rule.

This alert provides a timeline of the events leading to the current status of the CPP, a summary of the different legal arguments in front of the D.C. Circuit, and a brief overview of different state approaches and strategies to plan for the potential implementation of the CPP.

CPP LITIGATION TIMELINE

- June 2014 – EPA issued the proposed CPP. [3] Before the CPP was finalized, the Petitioners challenged the CPP. All legal challenges were consolidated for review at the D.C. Circuit. The D.C. Circuit rejected these challenges to the proposed rule as premature. [4]
- August 2015 – EPA announced the final rule.
- October 2015 – The final rule was published in the Federal Register. [5] The Petitioners brought suit against EPA and asked the D.C. Circuit to issue a stay on the implementation of the rule until the resolution of legal challenges.
- January 2016 – The D.C. Circuit declined to stay the CPP. [6] The Petitioners appealed this decision to the United States Supreme Court.
- February 2016 – The Supreme Court granted the Petitioners' application to stay the implementation of the CPP during the pending litigation on the merits of the rule in the D.C. Circuit. [7]
- February and March 2016 – Briefs were filed in the D.C. Circuit Court regarding the merits of the CPP.
- June 2016 – The D.C. Circuit court expects to hear oral argument regarding the rule on June 2, 2016.
- Summer 2016 – The D.C. Circuit is expected to issue its opinion. The losing party is expected seek certiorari to the Supreme Court. If the losing party appeals as expected, the stay will continue until the Supreme Court either denies certiorari or issues an opinion. If the Supreme Court does not grant certiorari, the stay will automatically be lifted. The losing party also could decide to request en banc

review at the D.C. Circuit, delaying an appeal to the Supreme Court and further prolonging the stay of the CPP.

- 2017-2018 – The Supreme Court is expected to issue a decision either upholding the rule, vacating the rule, or remanding portions of it to EPA.

Prior to the stay issued by the Supreme Court, states were subject to the following deadlines under the CPP:

- September 2016 – Initial state implementation plans due to EPA.
- September 2018 – Final state implementation plans due to EPA.
- 2022 – Beginning of the compliance period.
- 2030 – States are required to satisfy the final requirements of the rule.

If the CPP is upheld it is unclear whether the deadlines will be postponed, and, if so, by how long.

SUMMARY OF LEGAL ARGUMENTS BEFORE THE D.C. CIRCUIT

In the briefs recently filed on the merits of the CPP, the Petitioners primarily assert that the rule exceeds the scope of EPA's regulatory authority under Section 111(d) of the Clean Air Act ("CAA"). Section 111(d) is a little-used provision of the CAA that directs EPA to develop emission standards for certain existing stationary sources where standards have been established for similar new sources but air quality criteria have not been established for that pollutant (in this case, CO₂). According to the Petitioners, because the CPP would transform the United States' energy system, EPA must demonstrate that the CAA contains a clear statement "compelling the agency's reading of Section 111(d)." [8] Citing a footnote from Justice Ginsburg's opinion in *American Electric Power v. Connecticut*, the Petitioners assert that, because power plants are regulated under Section 112 of the CAA, they cannot be regulated again for a different pollutant under Section 111(d). [9] Additionally, the Petitioners contend that EPA's longstanding interpretation of the rule has been to set emission rates that can be achieved by individual sources, rather than the entire electricity market in the aggregate.

According to the 166 state and local business associations that submitted an amici brief in support of the Petitioners, EPA misapplied Section 111(d) by imposing state-by-state production limitations on fossil-fuel electricity generators, rather than setting emission guidelines for stationary sources. [10] Amici assert that the rule will threaten businesses and raise the cost of operations throughout the entire economy.

In support of the rule, EPA asserts that it properly applied Section 111(d) and that the CPP is premised on flexible and cost-effective emission-reduction measures that are already widely employed by power plants. [11] According to EPA, Section 111(d) is ambiguous, and therefore the court should defer to its reasonable interpretation of the statute under *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). EPA asserts that the effect the CPP could have on the power industry is indirect and similar to other pollution limits created under the CAA. [12] EPA's brief asserts that the CPP limits emissions, but does not regulate any aspect of energy generation, distribution, or sale.

In support of EPA, several tech companies ("Tech Amici") submitted a brief arguing that the CPP is consistent with current trends in the market. According to the Tech Amici, the implementation of the CPP would help them and many other companies power their operations in a way that is consistent with their environmental

commitments and business needs. [13] In addition, an investor-owned energy company that would be subject to regulation under the CPP also submitted an amicus curiae brief in support of EPA, asserting that the CPP is consistent with current trends and that the rule's potential effect on power plants can be successfully managed if the CPP continues to allow for flexible compliance mechanisms. [14]

Observers predict that the legality of the CPP will ultimately be decided by the Supreme Court. With the death of the Justice Antonin Scalia, the composition of the Court has changed since it ordered the stay, and commentators now think the fate of the CPP depends on when a new Supreme Court Justice is confirmed. [15]

DIFFERING STATE AND INDUSTRY APPROACHES

In the midst of the uncertainty surrounding the legality of the CPP, states have differed in their approaches to planning for the potential implementation of the rule. Some states have continued to plan as if the CPP were in effect, while other states have suspended any CPP-related planning activities. [16]

The states that have continued with their planning are doing so for a variety of reasons. For some, planning continues because they would have had little difficulty meeting their CPP goals thanks to robust renewable portfolio standards or participation in active carbon trading regimes. Others continue their efforts for political or policy reasons, even if meeting their CPP standards means an expensive shift in electric base load. States that continue working on their state implementation plans include Pennsylvania, Virginia, Minnesota, Illinois, Louisiana, Colorado, Idaho, Oregon Washington State, California, and most of the northeastern states that are part of the Regional Greenhouse Gas Initiative. [17] In Washington, for example, Governor Jay Inslee expressed that the state would continue to plan for the CPP by submitting a state implementation plan to EPA or seeking an extension under the rule; [18] the state is also moving forward with its proposed state-level rule to limit emissions from all large industrial sources. Similarly, New York plans to move ahead with its own actions to reduce carbon emissions, including the state's requirement that 50 percent of its electricity come from renewable sources by 2030, and Minnesota continues to examine emissions trading coordination with its neighboring states as it drafts its compliance plan. EPA intends to continue work with states that choose to continue planning under the CPP. [19]

In contrast, other states that had steep emissions cuts under the CPP or are heavily dependent on coal economies, have halted work on their implementation plans and introduced or enacted legislation barring work on or implementation of a state plan until legal issues are resolved. This includes New Jersey, West Virginia, North Carolina, Indiana, Kentucky, Georgia, Alabama, Mississippi, Arkansas, Michigan, Wisconsin, North and South Dakota, Nebraska, Kansas, Oklahoma, Texas, Montana, Nevada and Utah. [20] For example, Wyoming enacted legislation that prohibits the expenditure of state money to produce a state implementation plan while the stay issued by the Supreme Court remains in force and effect; Kansas passed a similar bill blocking state agencies from working on a plan. Similarly, West Virginia, which is leading the multistate challenge against the CPP, will not submit an implementation plan if the rule remains the subject of active proceedings. Likewise, upon news of the stay, Montana suspended the work of a panel appointed to address the CPP. [21] Under the CPP, Montana faced the steepest carbon dioxide cuts of any state. Even in states where "business as usual" would still mean meeting the CPP requirements, such as Michigan and Nevada, environmental agencies have suspended work on compliance plans until they receive further direction from the courts.

Reactions from utilities and power cooperatives have remained more measured. For many, the stay did not change much in their long-term strategies, which are shaped by larger trends such as coal retirements, cheap natural gas, environmental regulations, cheaper renewables, and new business models. For example, one Midwest utility, for which coal accounts for 60 percent of the utility's 32,000 megawatts of generation capacity, had projected a significant drop in the coal units' production—45 percent by 2026—which was based on projections of natural gas prices, electricity market prices, and customer demand, as well as regulatory issues apart from concerns relating to the CPP. [22] Cooperatives and public power representatives have expressed relief for more time to shift their power loads, even as they continue to participate in their states' planning processes.

If the CPP is upheld, those states that do not submit state implementation plans by the applicable regulatory deadlines (which may ultimately be extended from those in the stayed rule) will be subject to a federal implementation plan. [23] The federal implementation plan proposes a cap-and-trade program under which EPA would establish either rate-based [24] or mass-based emission limits. EPA proposed the federal implementation plan in October 2015, and it was scheduled to be finalized in June. [25] While publishing the federal implementation plan final rule would likely violate the Supreme Court's stay, it is possible that EPA will soon engage stakeholders regarding the directions it may go with the model rule, perhaps with the issuance of a white paper or webinar forecasting significant revisions to the draft model rule.

Possible EPA actions on the federal implementation plan and the D.C. Circuit's decision will be the first steps to determining the fate of the CPP. We will continue to monitor and analyze developments both within the courts and along agency lines for interested stakeholders.

Notes:

[1] For an in-depth discussion of the CPP's implications see R. Timothy Weston, Alyssa A. Moir, Daniel C. Kelly-Stallings, Michael L. O'Neill, and Molly Suda, *EPA's Clean Power Plan: Structure, Implications for the Grid, and Next Steps* (August 13, 2015), available at <http://www.klgates.com/epas-clean-power-plan-structure-implications-for-the-grid-and-next-steps-08-13-2014/>.

[2] To read more about the Supreme Court's stay of the CPP see David J. Raphael, Alyssa A. Moir, Ankur K. Tohan, Alyssa M. Fritz, and Brigid R. Landy, *High Court Grants Stay of Clean Power Plan*, (Feb. 11, 2016), available at <http://www.klgates.com/high-court-grants-stay-of-clean-power-plan-02-11-2016/>.

[3] 79 Fed. Reg. 34829 (June 18, 2014).

[4] *In re Murray Energy Corp.*, No. 14-1112 (D.C. Cir. June 9, 2015).

[5] *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64661 (October 23, 2015).

[6] *State of West Virginia v. Environmental Protection Agency*, No. 15-1363 (D.C. Cir. Jan. 21, 2016).

[7] Order, *State of West Virginia v. Environmental Protection Agency*, No. 15A773 (Feb. 9, 2016).

[8] Opening Brief of Pet'rs at 23.

[9] *American Elec. Power Co. v. Connecticut*, 564 U.S. ---- (Docket No. 10-174). That footnote, as cited by the Petitioners in their brief, reads "'EPA may not employ [Section 111(d)] if existing stationary sources of the pollutant in question are regulated under ... [Section 112].'"

[10] Br. of Amici Curiae of 166 State and Local Business Associations at 12. Several other businesses, advocacy groups, and members of Congress submitted amicus briefs in favor of the Petitioners.

[11] Br. of Resp't at 21.

[12] Br. of Resp't at 26.

[13] Br. of Tech Amici, in support of Resp't at 2-3. Several other companies, states, advocacy groups, and former EPA administrators submitted amicus curiae briefs in support of EPA.

[14] Br. of Amici Curiae at 3.

[15] *Clean Power Plan Hub: Rebalancing the Supreme Court*, E&E Publishing, LLC.

[16] States that support EPA and continue to plan under the CPP are California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, Massachusetts, and Virginia. States that have suspended planning under the CPP include Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, Wyoming, and Nevada.

[17] Note that some states, such as Louisiana and Colorado, continue with their plans even as they participate in the lawsuit challenging the CPP.

[18] *Statement from Washington Gov. Jay Inslee on the U.S. Supreme Court's Ruling Staying the EPA's Clean Power Plan* (Feb. 10, 2016) <http://www.governor.wa.gov/news-media/statement-washington-gov-jay-inslee-us-supreme-court%E2%80%99s-ruling-staying-epa%E2%80%99s-clean-power>.

[19] The White House, *Press Secretary Josh Earnest on the Supreme Court's Decision to Stay the Clean Power Plan*, <https://www.whitehouse.gov/the-press-office/2016/02/09/press-secretary-josh-earnest-supreme-courts-decision-stay-clean-power>.

[20] States still assessing whether to proceed include Arizona, New Mexico, Iowa, Missouri, Ohio, Tennessee, South Carolina, and Florida. Vermont, Alaska, and Hawaii are exempt from the CPP.

[21] *Bullock Suspends Panel Work Following Court Decision Blocking the Clean Power Plan*, Flathead Beacon, Feb. 9, 2016, <http://flatheadbeacon.com/2016/02/09/montanas-fox-hails-decision-blocking-clean-power-plan/>.

[22] *Clean Power Plan Hub: For many utilities, court action "doesn't really change anything"*, E&E Publishing, Feb. 11, 2016.

[23] *FACT SHEET: Clean Power Plan: Proposed Federal Plan*, EPA, <https://www.epa.gov/cleanpowerplan/fact-sheet-clean-power-plan-proposed-federal-plan>.

[24] A rate-based limit is expressed in pounds of carbon emissions per megawatt of power generated by existing power plants. A mass-based limit is expressed in total tons of carbon emission produced by existing power plants in the state.

[25] See 80 Fed. Reg. 64966 (Oct. 23, 2015).

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