HARVARD LAW SCHOOL
Environmental Law Program
POLICY INITIATIVE

Clean Power Plan Litigation Updates

On October 23, 2015, multiple parties petitioned the D.C. Circuit Court of Appeals to review EPA's Clean Power Plan and to stay the rule pending judicial review. This document summarizes key filings and decisions in this case, named West Virginia, et al. v. EPA.

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Key Players

Who Is Challenging the Clean Power Plan? The petitioners include: twenty-seven states; coal mining companies and coal-related trade associations and unions; the American Chamber of Commerce and other trade associations; the National Rural Electric Cooperative Association along with several cooperative distribution utilities; the American Public Power Association; and a few investor-owned utilities.

Who is Defending the Clean Power Plan? Several parties have intervened in the case to support the rule, including: eighteen states; six U.S. major cities; one county; several environmental advocacy organizations; the American Lung Association; three municipal utilities; five utilities or independent power producers; and trade associations representing renewable energy and other energy technology and service companies.

Both sides are supported by numerous *amici curiae* (friends of the court).

What is EPA's Position on the Rule? The EPA defended the Clean Power Plan against legal challenges from October 23, 2015 until March 28, 2017. On that day, EPA alerted the D.C. Circuit that it planned to revisit the rule, and urged the Court to stand down on its deliberations. EPA was acting on President Trump's March 28th Executive Order, directing EPA to start this review and "if appropriate . . . publish for notice and comment proposed rules suspending, revising, or rescinding" the Clean Power Plan. On April 4, 2017, the Federal Register published EPA's brief notice of this plan. In addition, EPA Administrator Pruitt wrote the Kentucky Governor on March 30, 2017, indicating that if the stay is lifted, the agency will toll compliance deadlines for each day the stay was in effect. (Last year, we described EPA's discretion in setting new deadlines.)

Which Judges will decide? The U.S. Court of Appeals for the D.C. Circuit heard oral argument on September 27, 2016. The court granted *en banc* review, meaning all the court's active judges will decide the case (except for Chief Judge Merrick Garland, who recused himself in March 2016).

April 5, 2017

Public Health and Environmental Organizations Oppose EPA's Abeyance Request

Public health and environmental intervenors ("Environmental Intervenors") submitted a brief opposing EPA's request to hold the Clean Power Plan litigation in abeyance. They make 5 arguments for opposing EPA's abeyance request and urging the D.C. Circuit to issue a decision:

- EPA's request "flouts the terms of the order by which the Supreme Court temporarily stayed enforcement of the Rule." The Supreme Court stayed the rule only until the merits of *this* rule were decided, and the Intervenors argue that the legal justifications for that stay apply only to a *court's* review. "EPA seeks to halt judicial review, while at the same time benefitting from the Supreme Court's stay "pending … review." The Intervenors assert that EPA could indefinitely "review" the rule and avoid court oversight.
- The Administrative Procedures Act "forbid[s] agency suspensions of rules without notice and comment rulemaking and a reasoned explanation." The Environmental Intervenors cite cases holding that "rules cannot be suspended except through rulemaking." APA Section 705 and Clean Air Act Section 307(d) require a robust, transparent process. The Intervenors argue that EPA is attempting to suspend the Clean Power Plan indefinitely without first undergoing this process.
- Judicial economy suggests the Court should decide the issues before it. The Court is fully briefed, heard seven hours of oral argument, and has deliberated for six months. The agency "has not indicated whether, how, and to what degree EPA may repeal or revise the Plan;" nor can it before undergoing a full rulemaking. In any event, the Environmental Intervenors argue it is highly likely that whatever new form the Rule takes, it will raise the very same issues now pending before the Court.
- Abeyance "would severely prejudice" the Environmental Intervenors. The Environmental Intervenors note they have sought carbon limits on the power sector for almost fifteen years, all while the dangers from climate change have intensified. They quote the D.C. Circuit in *API v. EPA*, 683 F.3d. 382, 388, observing that "an agency can[not] stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking … . If that were true, a savvy agency could perpetually dodge review." The Intervenors argue that this dodging would deny them the right to defend a rule projected to confer $20 billion in climate benefits and $14-34 billion in public health benefits per year once fully implemented.
- Litigation "would in no way interfere with EPA's 'opportunity to fully review the Clean Power Plan'". The Environmental Intervenors reject EPA's argument that continued litigation over the Clean Power Plan would compromise EPA's review, noting that "agencies regularly enforce, and the Department of Justice regularly defends, existing regulations that … differ from what officials might have promulgated had they been in office at the relevant time." Moreover, the Environmental Intervenors state that they "stand ready" to defend the Clean Power Plan on their own, should the Administration choose not to defend the rule going forward.

Other parties also filed oppositions to EPA's motion, including seventeen states; Washington, DC and five other cities; Broward County, Florida; the Advanced Energy Economy; the American Wind Energy Association; the Solar Energy Industries' Association; and nine utilities.

March 28, 2017

EPA Files a Motion to Hold the Clean Power Plan Litigation in Abeyance

The same day that President Trump signed an Executive Order directing EPA to review the Clean Power Plan (and the rule addressing *new* power plants), EPA announced its "initiation of a review" and moved the D.C. Circuit to hold both cases in abeyance until 30 days following conclusion of EPA's review and any resulting rulemaking. "EPA should be afforded the opportunity to fully review the Rule and respond to the President's direction in a manner that is consistent with the terms of the Executive Order, the Clean Air Act, and the agency's inherent authority to reconsider past decisions."

EPA argues that the "Executive Order, Rule review, and potential rulemaking proceedings mark substantial new developments that warrant holding this litigation in abeyance." The agency notes that new rulemaking might moot claims at issue in the challenges; therefore, an abeyance will help the Court to avoid "unnecessary adjudication."

EPA asserts its "inherent authority to reconsider past decisions and to revise, replace, or repeal a decision to the extent permitted by law and supported by a reasoned explanation," and points to decisions by previous courts to hold cases in abeyance while rulemakings or reconsiderations proceed. (Notably, those cases involved a new rulemaking near its mandatory completion date, as pointed out by the Environmental Intervenors, or relatively short reconsideration periods.)

EPA further asserts that if litigation proceeds, its counsel will "likely be unable to represent the current Administration's position on the many substantive questions that are the subject of that nascent review." Finally, EPA argues that the Public Health and Environmental Intervenors who oppose this Motion will not be harmed by a decision to hold the proceedings in abeyance.

EPA was supported in its motion by UARG, the American Public Power Association, the National Mining Association, the Chamber of Commerce and nearly twenty other industry trade associations; twenty states; the National Rural Electric Cooperative Association and a number of electric coops; Southern Company, Entergy, Louisiana Gas & Electric; and several merchant coal generators.

March 28, 2016

EPA Files Its Reply Brief

EPA submitted a 42,000 word brief that follows the structure of petitioners' two briefs (see below). About half of EPA's brief discusses its interpretation of section 111(d) of the Clean Air Act (CAA).

EPA argues that the CAA requires it to establish the "Best System of Emission Reduction" (BSER) for regulated sources. Its interpretation of that term in the Clean Power Plan is "consistent with the statutory text and best fulfills Congress's intent to cost-effectively reduce pollution and protect public health and welfare." Moreover, this interpretation is entitled to deference by the Court under standard of review established by *Chevron*, a 1984 Supreme Court decision. EPA proceeds to make the following points about section 111(d):

- EPA "properly applied the statutory factors." EPA parses the CAA's definition of "standard of performance" and explains how the Clean Power Plan is consistent with the statute's criteria.
- Generation shifting is the "best system of emission reduction." The rule's emission reductions are premised on shifting from high-emitting to low-emitting power plants. This "generation shifting . . . fit[s] within the plain meaning of a system of emission reduction." Applying the statutory criteria, EPA argues that generation shifting is also the "best" system because it is the "most cost-effective available system for sources to meaningfully limit their voluminous CO2 emissions."
- Generation shifting is "adequately demonstrated" and results in "achievable targets." EPA points to the administrative record and asserts that generation shifting is "widely used by power plants for controlling pollution," and the amount of generation shifting assumed in the rule "follow[s] industry trends towards greater use of renewable energy and gas-fired generation, and less use of coal-fired generation." Generation shifting is uniquely suitable for power plants because they operate in a coordinated fashion.

Responding to petitioners' other arguments, EPA asserts that:

- Competing amendments passed by the House and Senate in 1990 do not preclude EPA from regulating coal-fired power plants under 111(d) because EPA has regulated those sources under section 112.
- Dating back to 1975, EPA regulations have established that it establishes standards under 111(d), and states submit plans to achieve those standards. Any argument to the contrary is time-barred.
- The rule is "a textbook example of cooperative federalism" because it provides States with flexibility without compelling any State action. Petitioners ignore the distinction between pollution regulation that affects energy prices (this rule) and direct regulation of energy markets. Moreover, that States may take actions to facilitate regulated entities' compliance does not render the rule unconstitutional.
- EPA's decision to set nationally uniform performance rates, rather than state rates as it proposed, was "foreseeable." EPA invited comment on that approach, and national rates are consistent with other rules. Even if that were a procedural error, petitioners cannot establish that that there is a "substantial likelihood" that the final rule would have been significantly changed absent the error.
- In response to petitioners' record-based challenges, EPA points to specific facts and analyses in the administrative record and argues that it is entitled to an "extreme degree of deference" by the court on its record-based determinations. EPA argues that it "reasonably concluded" that implementation would not require substantial new infrastructure and "reasonably assessed" electric reliability.

February 19, 2016

Petitioners File Opening Briefs

Petitioners challenging the Clean Power Plan filed two briefs, each approximately 20,000 words in length.

Brief on "Core Legal Issues"

The brief contains four sections, with the first constituting most of the document. The petitioners argue that:

1. EPA's methodology for setting the Clean Power Plan's emission performance rates for existing power plants is prohibited by the text of the Clean Air Act (CAA) for three reasons. First, petitioners assert that the rule is "more far-reaching than any previous" EPA rule and will have "significant and transformative" effects on the U.S. economy. Pointing to recent Supreme Court decisions, they claim that such "sweeping" assertions of authority require "clear Congressional authorization." Second, petitioners focus on the word "source" in section 111 and argue that standards must be achievable at individual sources. Third, they argue that basing the stringency of the standard on shifting generation from high-emitting to low-emitting plants is inconsistent with the CAA's definition of "standard of performance."
2. A clause in section 111(d) precludes regulation of coal-fired power plants under that section because those sources are already regulated for their toxic emissions under section 112 of the CAA.
3. Section 111(d) grants authority to the States, and not to EPA, to "establish standards of performance."
4. The Clean Power Plan "commandeers" State officials in violation of the Tenth Amendment by "forcing" States to review power plant siting decisions, grant permits, and make other decisions that further implementation. The Tenth Amendment prohibits using States as "implements of [federal] regulation."

Brief on Procedural and Record-Based Issues

This brief contains five sections, with the second comprising half of the brief. The Petitioners argue that:

1. While the proposed rule was based on implementing emission reductions within each state, the final rule is premised on nationally uniform emission rates for coal and gas-fired plants. The final rule thus "bear[s] no resemblance" to the proposed rule and violates rulemaking procedures.
2. The "best system of emission reduction" that dictates the stringency of the performance rates is not "adequately demonstrated," as required by section 111. EPA "bears an enormous burden" to demonstrate that its three building blocks – improving efficiency of coal plants, shifting electricity production from coal plants to natural gas plants, and using more zero-emission plants – are "reliable," "efficient," and not "exorbitantly costly" on an individual basis and operating together. Petitioners argue that EPA did not carry its burden and did not account for electric reliability or the need to build additional infrastructure to implement the building blocks.
3. The rule "discriminates" between identical zero-emission resources based on when they were constructed. They argue that not allowing plants constructed before 2013 to generate credits that can be sold to regulated plants for compliance is "arbitrary and capricious."
4. EPA "failed to consider important aspects of the rule," which renders it "arbitrary and capricious." For example, petitioners contend that lignite-fired coal units face "unique constraints," which EPA has recognized in other rules. In the Clean Power Plan, EPA included lignite units with other coal-fired units. Petitioners also assert that EPA failed to consider electric reliability and the need to build new infrastructure to enable implementation of the rule.
5. EPA should have tailored emission goals to individual states. Petitioners discuss how five states' goals are arbitrary and capricious.

February 9, 2016

Supreme Court Grants Stay Requests

On January 21, 2016, the D.C. Circuit denied requests to stay the rule pending judicial review. On January 27, five sets of challengers representing twenty-seven states and various industry petitioners filed applications with Chief Justice John Roberts for immediate stay of the Clean Power Plan. Challengers directed their requests to Chief Justice Roberts because he hears all stay requests from cases before the D.C. Circuit. The applications, and EPA's response, raised many of the arguments that are summarized below.

On February 9, just one day after the final briefs were filed, a divided Supreme Court issued five identical, single-paragraph orders granting the stay requests. The stay prevents EPA from enforcing the Clean Power Plan, but has no effects on state planning efforts. The Court's orders tell us three things about the stay:

1. Chief Justice Roberts referred the requests to the entire Court. The Court's rules allow the Circuit Justice, which in this instance was the Chief Justice, to issue a stay immediately, prior to asking other Justices. Chief Justice Roberts chose to confer with his colleagues, rather than take action on his own.
2. The stay will only be lifted once the D.C. Circuit decides the case and either the Supreme Court denies petitions for review or the Supreme Court decides the case.
3. Four Justices – Breyer, Ginsburg, Kagan, and Sotomayor – would have denied the stay applications.

The Court did not explain its reasons for granting the stay. Nor did any of the four dissenting Justices outline why they would have denied the applications. However, in prior stay decisions the Court has articulated how it evaluates stay requests. To grant the request, the Court or a Circuit Justice must conclude that there is 1) a reasonable probability that the Court will ultimately grant review; 2) a "fair prospect" that the Court will agree with the challengers on the merits; and 3) that the challengers will suffer irreparable harm if a stay is denied.

Because the Court's orders did not include any explanation, we do not know if the Justices evaluated these factors, let alone how they weighed each one. While there is no evidence that the Court deviated from its test, the Court typically considers these factors when asked to stay a lower court decision or an injunction issued by a lower court. In this case, challengers asked the Court to stay a final agency action. The Court has never before stayed an agency rule prior to it being reviewed by any court, making the stay unprecedented.

Despite the lack of explanation from the Court, many are speculating about the implications for the Court's ultimate decision, assuming it chooses to grant review of the D.C. Circuit's decision. Such speculation is premised on an understanding of the Court's "fair prospect" standard. The Court has said little about that standard in prior decisions, but we do know that:

- When evaluating a stay request, the D.C. Circuit typically evaluates whether the challengers have a "likelihood" of ultimate success. In this case, challengers asked the Court to use its "fair prospect" standard of review, while EPA urged the Court to use the more stringent "likelihood" standard.
- Prior opinions written by a Circuit Judge have explained that the "fair prospect" standard asks the Justice to determine how a majority of the Court will vote on the merits, and not what that particular Justice thinks of the merits.

Regardless of how the Court interpreted the "fair prospect" standard in this instance, assuming it used it at all, a different Supreme Court will ultimately have an opportunity to hear the merits of this case. Justice Scalia's passing, just days after the Court issued the stay, leaves the Court split on the stay. If the Court is split on the merits as well, the D.C. Circuit's decision will control. Oral argument at that court is scheduled for June 2, 2016, and a decision could be released as early as late summer or fall.

December 8, 2015

Clean Power Plan Supporters Oppose Stay Requests

As detailed below, in November, challengers filed motions to stay the rule pending judicial review. EPA responded on December 3. On December 8, parties supporting EPA filed motions in opposition.

Who filed motions opposing a stay? Motions were filed by: 1) states, cities, and one county; 2) Advanced Energy Economy and wind and solar trade associations; 3) environmental advocacy organizations and the American Lung Association; and 4) power companies.

What arguments do intervenors put forward? The motions generally amplify EPA's arguments with relevant facts and examples from intervenors' experiences. This summary highlights key points of emphasis.

1. The Clean Power Plan is lawful: The States assert that "the Rule respects, rather than interferes with, state sovereignty." They point out that "any measures taken by power plants to comply with the Rule . . . will remain subject to the States' regulatory oversight of the energy sector." The power companies contest petitioners' arguments that EPA's inclusion of trading is illegal, noting the industry has long supported trading under the Clean Air Act and has relied on trading for decades as a strategy for shifting dispatch from higher- to lower-emitting units.

2. A stay will not cause irreparable harm: The trade associations argue that, contrary to challengers' assertions, any "near-term plant retirement" would not be caused by the Rule but "would be a voluntary, forward-looking business decision." The power companies similarly challenge assertions by some of their peers about imminent retirements if the court denies a stay, claiming that "[n]o [company] would retire a financially viable source in the near term merely because its retirement was predicted by an EPA model." The trade associations also counter petitioners' projections that they must immediately begin planning the development of new infrastructure to comply with the rule. They point out that half of all new capacity added to the grid from 2012 to 2014 is renewable and claim that infrastructure "already in development can accommodate any generation changes associated with the Rule." In addition, regardless of whether the Clean Power Plan is ultimately upheld, the power companies argue that "it would be unreasonable and imprudent not to address . . . the possibility of future carbon regulations in major investment decisions and contracts." They note that the industry regularly manages regulatory uncertainty, and a stay does not save utility companies from having to consider CO_2.

3. A stay is not in the public interest: The states aver that they "have faced significant harms and costs from climate change for many years." A stay would postpone emission reductions and "disrupt state programs set to coordinate with compliance planning for the Rule." The trade associations claim that a "stay of the Rule would chill the continued growth of the $200 billion advanced energy market . . . by introducing uncertainty among investors [who] rely on policy certainty in deciding whether to finance advanced energy projects."

What happens next? Petitioners' replies are due on December 23.

December 3, 2015

EPA Opposes Stay Requests

In November, parties filed several motions to stay the rule pending judicial review. On December 3, the U.S. Department of Justice responded to the stay requests on behalf of EPA.

What issues did EPA address in its response? EPA's opposition to the motions explain why none of the four requirements for granting a stay are fulfilled here: 1) the challengers are not more likely than not to win their challenge of the rule; 2) they will not suffer irreparable harm if the rule proceeds; 3) the public will be harmed by a stay; and 4) the public interest is served by rejecting the stay of a rule that is a critical component of any climate mitigation strategy. EPA's motion primarily addresses the first two points.

What did EPA argue about the legality of the Clean Power Plan?

1. The Clean Power Plan "represents a direct and straightforward application" of Section 111(d): EPA's core argument is that "Congress did not require that EPA, in determining the 'best system of emission reduction' [under section 111(d) of the Clean Air Act] for the largest CO2 sources, disregard the proven strategies these sources are *already* effectively employing." To the contrary, inclusion of measures that shift power generation to cleaner sources in the "best system of emission reduction" is consistent with the section's "broad language." Moreover, "Congress' focus on the 'system'. . . reinforces the broad scope" of pollution reduction measures that EPA may consider. Congress' word choice in that section is "logical" because it allows EPA to "address[] threats posed by a potentially wide range of pollutants not addressed elsewhere in the Act."
2. EPA is not "intrud[ing] on areas of regulation reserved to the states": EPA distinguishes between direct regulation of energy markets and regulation, like the Clean Power Plan and other pollution abatement regimes, which have an indirect, permissible effect on energy markets only. It emphasizes that the rule provides "flexibility" and "does not require states or sources to employ" any particular measure. While sources may spend money to comply, "costs for compliance with emission standards are regularly incorporated into power prices without usurping a state's authority over its energy market."
3. EPA also dismisses the constitutional claims and argues that it has "reasonably reconciled" two versions of 111(d), both passed by Congress in 1990, that challengers contend prevent EPA from regulating coal-fired power plants under this section.

How did EPA respond to claims that a stay prevents "irreparable harm" to industry and states?

1. State planning is not irreparable harm: EPA argues that developing a compliance plan prior to judicial review of a rule is "neither exceptional nor extraordinary, but rather is an inherent and foreseeable consequence of cooperative federalism under the Clean Air Act." EPA notes that states have designed plans of "comparable complexity" and under tighter deadlines for other Clean Air Act programs. If the court grants a stay on this basis it would "open the door to treating virtually any agency action requiring state implementation as causing irreparable harm."
2. Industry's potential economic losses do not constitute irreparable harm: EPA points to case law holding that economic losses can only justify a stay if they are "imminent and substantial" and can be prevented by a stay. EPA argues that industry's claims about plant and mine closures fail to meet this threshold because they are "purely speculative." Specific consequences of the rule are unknowable because state plans, which have not yet been filed, will dictate requirements for particular plants. Even if movants take some actions during litigation in anticipation of compliance obligations, they "have not demonstrated that such [actions] are required by the Rule or that a stay would prevent such" actions. EPA notes that many recent plant and mine closures are due to "underlying economic conditions that have spurred the nationwide shift, for more than fifteen years, away from coal-fired generation."

What happens next? Intervenors in support of EPA will file their oppositions to a stay on December 8

November 6, 2015

Parties File Motions to Stay the Clean Power Plan

On October 23, 2015, multiple parties petitioned the D.C. Circuit Court of Appeals to review EPA's Clean Power Plan. The court has consolidated the petitions into a single docket (named "The State of West Virginia, et al., v. EPA") and will set a briefing schedule. In addition, parties have filed nine motions to stay the Clean Power Plan pending judicial review. If the court grants a stay, deadlines in the rule will be suspended at least until the D.C. Circuit issues its decision about the legality of the rule.

Who filed Motions for a Stay? 1) Twenty-four states led by West Virginia; 2) Murray Energy and coal-related trade associations; 3) various investor-owned utilities and cooperative utilities, utility lobbying groups, and two unions; 4) the American Chamber of Commerce and other trade associations; 5) the State of Oklahoma; 6) the State of North Dakota; 7) Mississippi environmental regulators; 8) Basin Electric; and 9) Peabody Energy.

Is the D.C. Circuit likely to grant a stay? The D.C. Circuit has denied stay requests in most recent challenges to rules promulgated by EPA under the Clean Air Act. However, each case is unique and the court will decide based on the arguments and evidence put forward by the parties in this case.

What factors will the court consider? Parties requesting a stay must demonstrate the following:

1. That they are likely to win their challenge: Petitioners rely primarily on three arguments: that the Clean Air Act forbids regulation of coal-fired power plants under section 111(d) because they are already regulated under section 112 for their toxic pollution; that EPA's methodology for setting the stringency of the Clean Power Plan is not permitted by the text of the statute; and that the rule impermissibly expands EPA's authority into electricity regulation.
2. That they will be irreparably injured absent a stay: States claim that they will expend considerable resources planning for compliance, and that implementation will displace long-standing state policies. Oklahoma contends that the rule "inflicts per se irreparable injury on the State" by commandeering the state and thereby interfering with its sovereign status. Coal interests assert that utilities will shut down coal-fired plants to comply, which will affect coal companies and employees. Utilities and the Chamber of Commerce argue that planning must begin immediately, and actions taken while the rule is before the court cannot be undone. Utilities point to compliance costs associated with EPA's mercury rule that was invalidated by the Supreme Court in 2015. The Chamber adds that local governments may reduce services to respond to lower tax revenues due to plant and mine closures. The Supreme Court has held that speculative injury is not sufficient, nor are costs alone a basis for irreparable harm.
3. That the public interest favors a stay: States argue that the effects of the rule, particularly retirements of coal-fired power plants, weigh in favor of delaying the rule until courts decide its legality. Industry points to the costs and local harms described in the previous section.
4. A stay will not injure other parties: Petitioners claim that the rule will have little effect on global greenhouse gas emissions, and therefore delaying its implementation will not have significantly negative environmental effects. They also note that EPA missed its own deadline for issuing the rule, which demonstrates that a delay will not have any material effect.

What happens next? EPA's response is due on December 3. Other parties defending EPA's rule, which will includes 18 states, generators, utilities, advocacy organizations, and trade associations must file responses by December 8. The D.C. Circuit is likely to decide whether or not to grant the stay in early 2016.