Congressional Research Service
Informing the legislative debate since 1914

Clean Power Plan: Legal Background and Pending Litigation in *West Virginia v. EPA*

Updated March 8, 2017

Congressional Research Service
https://crsreports.congress.gov
R44480

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

On October 23, 2015, the U.S. Environmental Protection Agency (EPA) published its final Clean Power Plan rule (Rule) to regulate emissions of greenhouse gases (GHGs), specifically carbon dioxide (CO_2), from existing fossil fuel-fired power plants. The aim of the Rule, according to EPA, is to help protect human health and the environment from the impacts of climate change. The Clean Power Plan would require states to submit plans to achieve state-specific CO_2 goals reflecting emission performance rates or emission levels for predominantly coal- and gas-fired power plants, with a series of interim goals culminating in final goals by 2030.

The Clean Power Plan has been one of the more singularly controversial environmental regulations ever promulgated by EPA, and the controversy is reflected in the enormous multi-party litigation over the Rule ongoing in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit). Numerous petitions challenging the Clean Power Plan have been consolidated into one case, *West Virginia v. EPA*. While the litigation is still ongoing at the circuit court level, an unusual mid-litigation application to the Supreme Court resulted in a stay of the Rule, meaning that the Rule does not have legal effect at least for the duration of the litigation. On September 27, 2016, the en banc (full court) D.C. Circuit heard oral argument for the case.

This report provides legal background on the Rule, its Clean Air Act (CAA) framework under Section 111, and climate-related lawsuits that have preceded the present litigation over the Clean Power Plan. It then gives an overview of the participants in the current litigation, including two groups of Members of Congress, who have offered briefs in support of both sides. This report highlights the major events in the litigation as of the date of publication, including the Supreme Court stay and oral argument, and the likely timetable of events in the near term.

Some of the main arguments on the merits are then briefly summarized and excerpted from court filings, including

- the standard of review to apply to EPA's action;
- the scope of EPA's overall authority under CAA Section 111;
- whether Section 111 allows the Clean Power Plan's inclusion of generation-shifting, such as from coal-fired power plants to lower-emitting sources of electricity;
- the interpretation of a statutory exclusion in CAA Section 111 that cross-references CAA Section 112's regulation of hazardous air pollutants, particularly in light of the apparent enactment in 1990 of differing House and Senate amendments to the same cross-reference;
- constitutional arguments relating to federalism and separation of powers;
- record-based challenges to the achievability and reasonableness of the Rule; and
- arguments regarding rulemaking procedures.

This report concludes with a brief look at parallel litigation in the D.C. Circuit, consolidated as *North Dakota v. EPA*, which is challenging a related EPA regulation that imposes new source performance standards (NSPSs) limiting CO_2 emissions from new, modified, and reconstructed fossil fuel-fired power plants.

Contents

Legal Background of the Clean Power Plan Rule 1
Climate Litigation Under Other Provisions of the Clean Air Act 1
Clean Air Act Section 111 4
Overview of Clean Power Plan 6
General Structure 7
Timeline 8
Prior Litigation Challenging the Clean Power Plan 9
West Virginia v. EPA and Consolidated Cases 10
Participants in the Litigation 10
The Petitioners and Others Opposing the Clean Power Plan 10
The Respondents and Others Supporting the Clean Power Plan 11
Members of Congress 13
Major Events in the Litigation 14
Stay Motions and Scheduling Motions Before the Circuit Court Panel 14
Supreme Court Order Staying the Clean Power Plan Rule 14
The D.C. Circuit Court Oral Argument 15
A Selection of Arguments on the Merits 16
Standard of Review 17
Section 111(d) Scope of Authority 19
Section 112 Exclusion 21
Constitutional Issues and Canon of Constitutional Avoidance 23
Other Arguments Regarding Federal and State Roles 25
Specific Record-Based Challenges 25
Procedural Challenges 29
Selected Additional Factual and Policy Issues Briefed by Amici Curiae 30
Next Steps in *West Virginia v. EPA* 31
North Dakota v. EPA: Section 111(b) Litigation 32

Figures

Figure 1. States Participating in Clean Power Plan Litigation 13

Contacts

Author Information 33

On October 23, 2015, the U.S. Environmental Protection Agency (EPA) published its final Clean Power Plan rule (CPP or Rule) to regulate emissions of greenhouse gases (GHGs), specifically carbon dioxide (CO_2), from existing fossil fuel-fired power plants.[1] The goal of the Rule, according to EPA, is to help protect human health and the environment from the impacts of climate change.[2] The CPP has been one of the more singularly controversial environmental regulations ever promulgated, and the controversy is reflected in the enormous multi-party litigation over the Rule in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit). Numerous petitions challenging the Rule have been consolidated under the caption *West Virginia v. EPA*.[3] While the litigation is still ongoing at the circuit court level, an interlocutory—that is, mid-litigation—application to the Supreme Court resulted in a stay, or pause, of the Rule.[4]

This report provides legal background on the Rule, its Clean Air Act (CAA) framework under Section 111, and some of the main climate-related lawsuits that have preceded the present litigation over the CPP. It then gives an overview of the participants in the litigation, including Members of Congress, who have offered briefs in support of both sides. This report explains the major events in the litigation as of the date of publication, including the Supreme Court stay and the D.C. Circuit oral argument, and the expected schedule of events in the near term. It then presents condensed summaries of some of the main arguments on the merits. This report concludes with a brief look at parallel litigation in the D.C. Circuit that is challenging a related EPA regulation, which limits GHG emissions from new, modified, and reconstructed power plants.

Legal Background of the Clean Power Plan Rule

Climate Litigation Under Other Provisions of the Clean Air Act

The CAA encompasses a number of program authorities, all with the general aim of protecting human health and the environment from emissions that pollute ambient air.[5] Debate over the use of the CAA to regulate GHG emissions has its origins at least as far back as 1999, when several groups filed a petition urging EPA to regulate GHG emissions from new motor vehicles and motor vehicle engines under CAA Section 202.[6] EPA denied the petition in 2003 after soliciting

[1] For more information on the CPP, *see* CRS Report R44341, *EPA's Clean Power Plan for Existing Power Plants: Frequently Asked Questions*, by James E. McCarthy et al., and CRS Report R44145, *EPA's Clean Power Plan: Highlights of the Final Rule*, by Jonathan L. Ramseur and James E. McCarthy.

[2] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Final Rule, 80 Fed. Reg. 64,661, 64,663 (October 23, 2015) (hereinafter "Clean Power Plan Final Rule").

[3] *See* docket for West Virginia, et al v. EPA, No. 15-1363 (D.C. Cir. docketed October 23, 2015). The docket is available electronically through Public Access to Court Electronic Records (PACER) site access; in addition, several websites have been maintaining compilations of major filings and orders in the case, including the Chamber of Commerce of the United States, a petitioner, at its *U.S. Chamber Litigation Center*, http://www.chamberlitigation.com/chamber-commerce-et-al-v-epa-esps-rulee; and the Environmental Defense Fund, an intervenor in support of EPA, at its *Clean Power Plan Case Resources* website at https://www.edf.org/climate/clean-power-plan-case-resources.

[4] *See infra*, "Supreme Court Order Staying the Clean Power Plan Rule."

[5] 42 U.S.C. §§7401-7628. For an overview of the CAA, *see* CRS Report RL30853, *Clean Air Act: A Summary of the Act and Its Major Requirements*, by James E. McCarthy and Claudia Copeland.

[6] International Center for Technology Assessment et al., Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions from New Motor Vehicles Under Article 202 of the Clean Air Act (October 20, 1999), *available at* https://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2001-0002-0001; CAA Section 202, 42 U.S.C. §7421. For more information, *see* CRS Report R40506, *Cars, Trucks, Aircraft, and EPA*

public comments.[7] Shortly thereafter, some of the groups were joined by 12 states and others in filing a petition for review of EPA's decision in the D.C. Circuit.[8] The D.C. Circuit, in a fractured opinion, deferred to EPA's denial of the petition.[9] On appeal, however, in its 2007 decision in *Massachusetts v. EPA*, a five-Justice majority of the Supreme Court held that EPA has statutory authority to regulate GHG emissions under CAA Section 202(a)(1), which requires the EPA Administrator to set emission standards for "any air pollutant" from motor vehicles "which in his judgment cause[s], or contribute[s] to" air pollution which "may reasonably be anticipated to endanger public health or welfare."[10] GHGs, the Court said, unambiguously fell within the broad definition of "air pollutant."[11] The Court also found that EPA had acted arbitrarily and capriciously in explaining its denial of the petition.[12]

Citing the *Massachusetts v. EPA* decision, EPA issued an "endangerment" finding and a "cause or contribute" finding in December 2009.[13] These findings formed the basis for the light-duty vehicle GHG emission standards and corporate average fuel economy (CAFE) standards issued jointly by EPA and the National Highway Traffic Safety Administration (NHTSA) in 2010.[14]

In 2011, in *American Electric Power Co. v. Connecticut* ("*AEP*"), the Supreme Court unanimously held that EPA's authority to regulate GHG emissions under the CAA—including its power under Section 111(d), the basis of the CPP—displaced any common law tort or nuisance claims against power plants and other GHG emissions sources.[15] The Court in *AEP* explicitly ruled that "air pollutant" includes GHGs when applied to power plants under Section 111, as under Section 202 for motor vehicles.[16] The Court concluded that federal judges may not set limits on GHG emissions because the CAA "empower[s] EPA to set the same limits," and therefore did not allow the plaintiffs, including states, to proceed with their lawsuits against power plant operators.[17]

With GHGs being regulated under CAA Section 202, EPA proceeded with regulating GHGs under other CAA authorities for stationary sources. In particular, EPA interpreted the mobile

---

Climate Regulations, by James E. McCarthy and Richard K. Lattanzio.

[7] Control of Emissions from New Highway Vehicles and Engines; Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52,922, 52,922-33 (September 8, 2003) (citing, *inter alia*, Memorandum from Robert E. Fabricant, EPA Gen. Counsel, to Marianne L. Horinko, EPA Acting Admin., "EPA's Authority to Impose Mandatory Controls to Address Global Climate Change Under the Clean Air Act" (August 28, 2003)).

[8] *Massachusetts v. EPA*, 415 F.3d 50, 53 (D.C. Cir. 2005).

[9] *Id.* at 58-59, 61.

[10] *Massachusetts v. EPA*, 549 U.S. 497, 531 (2007) (interpreting CAA Section 202(a)(1), 42 U.S.C. §7521).

[11] *Id.* at 528-32.

[12] *Id.* at 532-35.

[13] 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 (December 15, 2009).

[14] Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010).

[15] Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 423-29 (2011). "The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue.… [T]he [CAA] 'speaks directly' to emissions of carbon dioxide from the defendants' plants." *Id.* at 424 (citations omitted).

[16] *Id.* at 424; *see also id.* at 425 ("EPA is currently engaged in a § [1]11 rulemaking to set standards for greenhouse gas emissions from fossil-fuel fired powerplants.... The Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic powerplants—the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track.").

[17] *See id.* at 429.

source GHG regulations as triggering regulations under the Prevention of Significant Deterioration (PSD) program.[18] The PSD program generally requires new or modified stationary sources that will emit threshold amounts (250 or 100 tons per year depending on the type of source) of air pollutants subject to regulation under the CAA to obtain permits and comply with emissions limitations that reflect the "best available control technology" (BACT).[19] EPA likewise sought to regulate GHGs under the Title V permit program. Title V requires permits for "major sources" with the potential to emit 100 tons per year of any air pollutant.[20] As EPA noted, GHG emissions tend to be "orders of magnitude greater" than emissions of other types of air pollutants, so the statutory thresholds would have swept in many smaller sources not previously subject to CAA permitting.[21] EPA addressed this by issuing a "tailoring rule," structured to phase in GHG permitting under the PSD and Title V programs first for "anyway" sources already subject to permitting for other air pollutants, and then to non-anyway sources meeting higher thresholds.[22]

In 2014, in *Utility Air Regulatory Group v. EPA* ("*UARG*"), the Supreme Court rejected EPA's interpretation of the "triggering" provisions for the stationary source programs; it held that EPA cannot regulate a power plant solely due to its GHG emissions, striking down EPA's "tailoring" rule.[23] Justice Scalia, writing for a five-Justice majority of the Court, stated the following:

> EPA's greenhouse-gas-inclusive interpretation of the PSD and Title V triggers … [is] unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," we typically greet its announcement with a measure of skepticism.[24]

On the other hand, in a part of the decision joined by seven Justices, the Supreme Court affirmed EPA's authority under the CAA to require Best Available Control Technology (BACT) to regulate GHG emissions from power plants if the source is regulated for other air pollutants, holding EPA's interpretation of such requirements reasonable.[25] In sum, *UARG* held that EPA "may not treat greenhouse gases as a pollutant for purposes of defining a 'major emitting facility' … in the PSD context or a 'major source' in the Title V context.... EPA may, however, continue to treat greenhouse gases as a 'pollutant subject to regulation under this chapter' for purposes of requiring BACT for 'anyway' sources."[26] As a practical matter, *UARG* affirmed EPA's ability to regulate roughly 83% of U.S. stationary-source GHG emissions under PSD and Title V permitting

[18] CAA Sections 160-169, 42 U.S.C. §§7470-7479.

[19] *See generally id.* As summarized by the Supreme Court, "EPA interprets the PSD provisions to apply to sources located in areas that are designated attainment or unclassifiable for any [criteria] pollutant, regardless of whether the source emits that specific pollutant.... [E]very area of the country has been designated attainment or unclassifiable for at least one [criteria] pollutant; thus, on EPA's view, all stationary sources are potentially subject to PSD review." Util. Air Regulatory Group [UARG] v. EPA, 134 S. Ct. 2427, 2436 (2014).

[20] *See* CAA Sections 501-07, 302(j), 42 U.S.C. §§7661-7661f, 7602(j).

[21] *UARG*, 134 S. Ct. at 2436 (quoting Regulating Greenhouse Gas Emissions Under the Clean Air Act: Advance Notice of Proposed Rulemaking, 73 Fed. Reg. 44,354, 44,498-44,499 (July 30, 2008)).

[22] Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule: Final Rule, 75 Fed. Reg. 31,514, 31,523-25 (June 3, 2010) (e.g., setting, as "second step" of tailoring rule, 100,000 ton per year threshold for new sources, and soliciting comment on "third step").

[23] 134 S. Ct. at 2439-46.

[24] *Id.* at 2444 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

[25] *Id.* at 2447-49.

[26] *Id.* at 2449.

programs, and struck down its ability to regulate the additional 3% that would have been reached had the tailoring rule been upheld.[27]

Clean Air Act Section 111

In 2011, EPA finalized a settlement agreement with states and others to promulgate New Source Performance Standards (NSPSs) for GHG emissions from fossil fuel-fired power plants under Section 111(b) of the CAA, and emission guidelines covering existing power plants under Section 111(d).[28] President Obama also directed EPA to issue GHG regulations under Section 111(b) and 111(d) in a presidential memorandum issued in June 2013.[29]

As characterized by EPA,[30] Section 111 operates to address one of three "general categories of pollutants emitted from existing stationary sources," the other two being (1) "criteria" air pollutants under the National Ambient Air Quality Standards (NAAQS) program under CAA Sections 108-110;[31] and (2) "hazardous air pollutants" (HAP) under the National Emission Standards for Hazardous Air Pollutants (NESHAP) program under CAA Section 112.[32] Section 111 addresses "air pollution which may reasonably be anticipated to endanger public health or welfare."[33] Section 111 directs EPA to list categories of stationary sources that cause or contribute significantly to such air pollution; to establish NSPSs for new sources within any such category; and then to issue a "procedure" requiring states to submit plans that establish standards of performance for existing sources in a category, under certain conditions. In other words, NSPSs under Section 111(b) may trigger what EPA terms "emission guidelines" under Section 111(d). Portions of CAA Section 111 primarily relevant to the CPP litigation are excerpted below (with indentations and bracketed notations added for readability):

> (a) Definitions. For purposes of this section:
>
> (1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction [BSER] which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.
>
> …

[27] See CRS Legal Sidebar WSLG1016, *The Supreme Court's Latest Greenhouse Gas Ruling: Good News and Bad News for EPA*, by Robert Meltz. Congressional clients may contact Linda Tsang with any questions regarding this Legal Sidebar.

[28] *See* Settlement Agreement Between State of New York, et al., and U.S. EPA, December 23, 2010, *available at* http://www2.epa.gov/sites/production/files/2013-09/documents/boilerghgsettlement.pdf; CRS Report R41103, *Federal Agency Actions Following the Supreme Court's Climate Change Decision in Massachusetts v. EPA: A Chronology*, by Robert Meltz, p. 7 (available to congressional clients upon request). Congressional clients may contact Linda Tsang with any questions regarding this report.

[29] Presidential Memorandum to EPA, "Power Sector Carbon Pollution Standards" (June 25, 2013), *available at* https://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards.

[30] Resp't EPA's Initial Br. at 6, West Virginia v. EPA, No. 15-1363 (D.C. Cir. filed March 28, 2016) ("EPA Br."). Hereinafter all citations to briefs are to those filed in the CPP litigation, *West Virginia v. EPA*, and which are available via that case's docket, *supra* footnote 3.

[31] CAA Section 108-110, 42 U.S.C. §§7408-7410.

[32] CAA Section 112, 42 U.S.C. §7412. There can be overlap among the categories in certain ways; Section 111(b) can be used for "criteria" air pollutants, etc.

[33] CAA Section 111(b)(1)(A), 42 U.S.C. §7411(b)(1)(A).

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant....

…

(b) (1) (A) The Administrator shall … publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within one year after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance [i.e., NSPSs] for new sources within such category....

…

(d) (1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section [1]10 of this title [which provides for State Implementation Plans for NAAQS] under which each State shall submit to the Administrator a plan which

(A) establishes standards of performance for any existing source for any air pollutant

(i) for which air quality criteria have not been issued or which is not included on a list published under section [1]08(a) …

[From this point, there is dispute in the litigation regarding how subparagraph (i) continues; the House-originated amendment, which appears in both the *U.S. Code* and the *Statutes at Large*, ends subparagraph (i) with "**or emitted from a source category which is regulated under section [1]12**" while the Senate-originated amendment, which appears only in the *Statutes at Large* and not the *U.S. Code*, ends subparagraph (i) with "**or section [1]12(b)**"[34]]

but

(ii) to which a standard of performance under this section would apply if such existing source were a new source, and

(B) provides for the implementation and enforcement of such standards of performance.

Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section [1]10(c) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections [1]13 and [1]14 of this title with respect to an implementation plan....[35]

[34] For discussion of the discrepant House and Senate amendments to the cross-reference to CAA Section 112, 42 U.S.C. §7412, *see* "Section 112 Exclusion," below.

[35] Excerpted from CAA Section 111, 42 U.S.C. §7411.

An analysis by the American College of Environmental Lawyers observed that since the 1970s, EPA has promulgated emission guidelines under Section 111(d) of the CAA on seven occasions[36] (as well as six additional occasions in conjunction with the requirements of CAA Section 129,[37] which the 1990 CAA amendments added to specifically require Section 111 NSPS and emission guidelines meeting certain requirements for solid waste incinerators).[38] Air pollutants and source categories for which EPA has issued emission guidelines under Section 111(d) include, among others, methane and non-methane compounds from large landfills; acid mist from sulfuric acid production units; fluoride emissions from phosphate fertilizer plants; reduced sulfur emissions from kraft pulp mills; and fluoride emissions from primary aluminum plants.[39] In addition, EPA's 2005 Clean Air Mercury Rule (CAMR) delisted coal-fired power plants from CAA Section 112 and, instead, established a cap-and-trade system for mercury under Section 111(d);[40] the D.C. Circuit vacated CAMR in 2008 on grounds unrelated to its cap-and-trade structure.[41]

EPA finalized Section 111(b) NSPSs for GHG emissions from new, modified, and reconstructed power plants at the same time as the Clean Power Plan.[42] As discussed below, these NSPSs, which must apply for the CPP under Section 111(d) to have effect, are also being challenged in the D.C. Circuit.[43]

Overview of Clean Power Plan

EPA published the proposed "Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units" on June 18, 2014.[44] The Agency conducted significant outreach to interested parties before the Rule's proposal.[45] EPA continued its outreach after the proposal and held several public hearings[46] and received more than 4.3 million public comments, the most ever for

[36] American College of Environmental Lawyers (ACOEL), "Memorandum for Environmental Council of the States (ECOS) Concerning Clean Air Act 111(d) Issues," February 22, 2014, 5, 8-10, http://acoel.org/file.axd?file=2014%2f4%2fACOEL+ECOS+FINAL+MEMO+and+Cover.pdf.

[37] 42 U.S.C. §7429.

[38] *See* ACOEL, footnote 36, at 5-8 (citing 40 C.F.R. Parts Cb, Ce, BBBB, DDDD, FFFF, and MMMM).

[39] *See generally id.* at 8-10 (citing, *inter alia*, 61 Fed. Reg. 9,905 (March 12, 1996); 60 Fed. Reg. 65,387 (December 19, 1995); 45 Fed. Reg. 26,294 (April 17, 1980); 44 Fed. Reg. 29,828 (May 22, 1979); 42 Fed. Reg. 12,022 (March 1, 1977)). Some of these source categories are regulated for other hazardous air pollutants under Section 112. *See, e.g.*, 40 C.F.R. Part 63 (NESHAP), subpts. S (including kraft pulp mills), BB (phosphate fertilizer plants), and AAAA (landfills).

[40] 70 Fed. Reg. 28,606 (May 18, 2005).

[41] *See generally* New Jersey v. EPA, 517 F.3d 574 (D.C. Cir. 2008). The court found that EPA's delisting of the source category from Section 112 was unlawful and that EPA was obligated to promulgate standards for mercury and other hazardous air pollutants under Section 112. *Id.* at 581-84.

[42] 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. 64,966 (October 23, 2015).

[43] *See infra*, "North Dakota v. EPA: Section 111(b) Litigation."

[44] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Proposed Rule, 70 Fed. Reg. 34,830 (June 18, 2014).

[45] Before proposal, according to Bloomberg BNA, "Senior Environmental Protection Agency officials consulted with at least 210 separate groups representing a broad range of interests in the Washington, DC, area and held more than 100 meetings and events with additional organizations across regional offices." *EPA Consulted with Hundreds of Groups on Carbon Rule for Existing Power Plants*, DAILY ENVT. REP., April 8, 2014.

[46] *See id.*

an EPA rule.[47] The CPP, as it became known, was finalized on August 3, 2015, and published in the *Federal Register* on October 23, 2015.[48]

Several Congressional Review Act (CRA) resolutions of disapproval were introduced following receipt of the CPP by Congress, including S.J.Res. 24, which was passed by the Senate on November 17, 2015,[49] and by the House on December 1, 2015.[50] President Obama vetoed S.J.Res. 24 on December 18, 2015.[51] Other resolutions and bills have been introduced both for and against EPA regulation of GHGs from power plants.[52]

The CPP is a detailed rule with many definitions and provisions not touched on here, many of which are the subject of specific challenges or defenses in the present litigation. This report provides only a basic summary as context for the following discussion of the litigation challenging the Rule. For more information on the CPP, see CRS Report R44341, *EPA's Clean Power Plan for Existing Power Plants: Frequently Asked Questions*, by James E. McCarthy et al., and CRS Report R44145, *EPA's Clean Power Plan: Highlights of the Final Rule*, by Jonathan L. Ramseur and James E. McCarthy.

General Structure

Applying CAA Section 111, EPA determined the "best system of emission reduction" (BSER) for affected electric generating units based on three components, or as EPA calls them, "building blocks":

1. heat rate (i.e., efficiency) improvements at affected power plants,
2. generation shifts among affected power plants (particularly from coal generation to natural gas combined cycle generation), and
3. increased use of renewable energy for electricity generation.[53]

EPA then used the BSER to derive national emission performance rates for each of the two subcategories of power plants affected by the Rule:

1. fossil fuel-fired electric steam generating units, of which coal generation accounts for 94%—oil and natural gas contribute the remainder—and

[47] More than 34,000 public submissions on the proposal can be viewed at http://www.regulations.gov/#!docketDetail;D=EPA-HQ-OAR-2013-0602. An interactive map allowing users to search for comments by state officials can be found at http://bipartisanpolicy.org/energy-map/.

[48] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Final Rule, 80 Fed. Reg. 64,661, 64,663 (October 23, 2015).

[49] See 161 Cong. Rec. S7965 (daily ed. November 16, 2015); U.S. Senate, Roll Call Votes, 114th Congress—1st Session, Vote Summary on the Joint Resolution (S.J. Res. 24), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=114&session=1&vote=00306.

[50] Final Vote Results for Roll Call 650, S.J.Res. 24, http://clerk.house.gov/evs/2015/roll650.xml.

[51] White House, "Memorandum of Disapproval on S.J.Res. 24," press release, December 18, 2015, https://www.whitehouse.gov/the-press-office/2015/12/19/memorandum-disapproval-sj-res-24. Other CRA resolutions in the 114th Congress to disapprove the CPP included H.J.Res. 67, and H.J.Res. 72, which was ordered to be reported by House Committee on Energy and Commerce on November 18, 2015.

[52] For more information on congressional responses to the CPP, see Alissa Dolan, Congressional Review, in CRS Report R44341, *EPA's Clean Power Plan for Existing Power Plants: Frequently Asked Questions*, by James E. McCarthy et al.

[53] Clean Power Plan Final Rule, *supra* footnote 2, 80 Fed. Reg. at 64,666-67, 64,717-811.

2. natural gas combined cycle (NGCC) units.[54]

Then, EPA calculated state-specific targets by applying the national rates to each state's baseline generation mix.[55]

States could reach their targets without needing to "comply" with the assumptions in the "building blocks" or the subcategory-specific rates, which are not themselves binding. In general, policies to reach the state-specific targets set by EPA would be determined by state plans.[56] States could use an emission-standards approach or a "state measures" approach and, under the latter, could submit multi-state plans or use a variety of other policies or programs.[57] In addition, state plans could measure compliance using an emission rate target, measured in pounds of CO_2 per megawatt-hour (MWh) of electricity, or a mass-based target, measured in tons of CO_2.[58] The CPP also requires state plans to include certain other components and considerations, such as electric reliability.[59]

EPA cannot legally compel a state to submit a Section 111(d) plan. Rather, if a state fails to submit a satisfactory plan by EPA's deadline, CAA Section 111(d) authorizes EPA to prescribe a federal plan for the state.[60] This authority is the same, Section 111(d) says, as EPA's authority to prescribe a federal implementation plan when a state fails to submit a state implementation plan to achieve the NAAQS.[61] EPA published a proposed federal plan for existing power plants, along with models for state plans, at the same time it published the final CPP.[62]

Timeline

The CPP, as promulgated, set a deadline of September 6, 2016, for each state to submit an implementation plan to EPA (or face EPA imposition of a federal plan on sources in the state).[63] In lieu of a completed plan, the CPP authorized a state to make an initial submittal by that date and request up to two additional years to complete its submission.[64] In light of the stay issued in conjunction with the pending litigation challenging the rule, these near-term deadlines lack legal effect. If the Rule is ultimately upheld, then new initial compliance deadlines would have to be set thereafter.[65]

---

[54] *Id.* at 64,667, 64,811-20.

[55] *Id.* at 64,667, 64,820-26.

[56] *Id.* at 64,667-72, 64,707-09, 64,826-912, 64,941-64 (adding 40 C.F.R. Part 60, Subpart UUUU).

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] CAA Section 111(d), 42 U.S.C. §7411(d) (referencing CAA Section 110(c), 42 U.S.C. §7410(c)).

[61] *Id.*; *see also* 80 Fed. Reg. at 64,828, 64,840, 64,855-56, 64,861, 64,881-82.

[62] *See* 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. 64,966 (October 23, 2015). EPA's website provides technical support documents and other explanatory materials on the proposal: http://www2.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants#federal-plan.

[63] *Id.* at 64,946-47 (adding 40 C.F.R. §§60.5760-65).

[64] *Id.*

[65] *See, e.g.*, Rulemaking to Amend Dates in Federal Implementation Plans Addressing Interstate Transport of Ozone and Fine Particulate Matter, Interim Final Rule, 79 Fed. Reg. 71,663 (December 3, 2014) (after court lifted stay of rule, granting EPA motion to toll deadlines for three years, reflecting length of the litigation).

The eight-year interim compliance period for the CPP, as promulgated, begins in 2022 and runs through 2029.[66] The interim period is separated into three steps (2022-2024, 2025-2027, and 2028-2029), each with its own interim goal.[67] Under this timeline, affected power plants would have to meet each of the first, second, and third steps' CO_2 emission performance rates or follow an EPA-approved emissions reduction trajectory designed by the state itself for the eight-year period from 2022 to 2029.[68] The CPP, as promulgated, requires compliance with the state's final goal by 2030.[69] If the Rule is upheld, it is possible that some or all of these later compliance dates could be delayed or adjusted as well.

Prior Litigation Challenging the Clean Power Plan

Challenges to the CPP began well before the final Rule was published in the *Federal Register*. For example, when the Rule was proposed in 2014, Murray Energy Corporation (a coal company) and the states of West Virginia, Alabama, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and Wyoming filed petitions for review in the D.C. Circuit. They made several arguments in the alternative: that the court had authority to, and should, issue an extraordinary writ under the All Writs Act;[70] that EPA's public statements about its legal authority to regulate CO_2 emissions constituted final agency action subject to judicial review; and that the court should strike down the 2011 settlement agreement[71] that EPA reached with several other States and environmental groups setting a timeline for deciding on Section 111 rules for power plants.[72] A panel of the D.C. Circuit rejected these arguments and denied the petitions, saying the following:

> Petitioners are champing at the bit to challenge EPA's anticipated rule restricting carbon dioxide emissions from existing power plants. But EPA has not yet issued a final rule. It has issued only a proposed rule. Petitioners nonetheless ask the Court to jump into the fray now. They want us to do something that they candidly acknowledge we have never done before: review the legality of a proposed rule.... We do not have authority to review proposed agency rules.[73]

Oklahoma also sued to challenge the proposal in federal district court in Oklahoma and did not prevail;[74] the 10th Circuit denied Oklahoma's motion for an injunction pending appeal.[75]

States and energy companies also filed emergency petitions for an extraordinary writ in the D.C. Circuit in August 2015, after EPA had released, but not published, the final CPP.[76] A circuit panel again denied these petitions on September 9, 2015.[77] Petitions for panel reconsideration and for

---

[66] Clean Power Plan Final Rule, *supra* footnote 2, 80 Fed. Reg. at 64,664-74, 64,708, 65,743-44; *id.* at 64,944-46, 64,959-60 (adding 40 C.F.R. §§60.5745, 60.5880).

[67] *See id.*

[68] *See id.*

[69] *See id.*

[70] 28 U.S.C. §1651.

[71] *See supra*, footnote 28 and accompanying text.

[72] *See generally* Order, *In re* Murray Energy Corp., Nos. 14-1112 et al. (D.C. Cir. June 9, 2015).

[73] *Id.* at 6.

[74] *See* Order and Op., Oklahoma *ex rel*. Pruitt v. McCarthy, No. 4:15-cv-00369-CVE-FHM (N.D. Okla. July 27, 2015).

[75] *See* Order, Oklahoma *ex rel*. Pruitt v. McCarthy, No. 15-5066 (10th Cir. August 24, 2015).

[76] *See* Order, *In re* State of West Virginia, et al., No. 15-1277 (D.C. Cir. September 9, 2015).

[77] *Id.*; *see also* Order (D.C. Cir. August 19, 2015) (denying emergency motion to consolidate with Nos.14-1112, et al.).

rehearing en banc to essentially revive the earlier lawsuits challenging the proposed rule were denied as well, on September 29, 2015.[78]

West Virginia v. EPA and Consolidated Cases

Participants in the Litigation

The Petitioners and Others Opposing the Clean Power Plan

Parties began filing petitions in the D.C. Circuit challenging the final CPP starting on the day the Rule was published in the *Federal Register*, October 23, 2015.[79] CAA Section 307(b) requires that such petitions for review must be filed in the D.C. Circuit within 60 days after the Rule's publication in the *Federal Register*.[80] The deadline for petitions for review of the CPP was therefore December 22, 2015.

Parties that filed petitions challenging the CPP include 26 states. West Virginia and Texas spearheaded a coalition of 24 state petitioners in filing the lead case. Oklahoma, North Dakota, and Mississippi filed their own petitions.[81] The state of Nevada, while not a petitioner, filed a brief supporting the petitioners, raising the number of states opposing the CPP to 28.[82] On March 7, 2017, the court granted North Carolina's motion to withdraw as a petitioner. See **Figure 1**. Other petitioners challenging the Rule include three labor unions, a number of rural electric cooperatives and an association representing them, more than two dozen industry and trade groups, several nonprofit public policy organizations, and more than two dozen fossil-fuel-related companies and local electric utilities. Other fossil-fuel-related companies have moved to intervene on behalf of the petitioners.[83] In all, more than 100 parties filed dozens of petitions challenging the CPP.[84] All of these petitions have been consolidated into one case, captioned *West Virginia et al v. EPA et al*.[85] All petitioners jointly filed two briefs on the merits.[86]

In addition, various amici curiae (non-party "friends of the court") have filed briefs on the merits in support of the petitions challenging the Rule. These include a brief filed by Members of Congress, as discussed below.[87] Also among those who filed briefs as amici curiae are a group of

---

[78] *See* Orders, *In re* Murray Energy Corp., Nos. 14-1112 et al. (D.C. Cir. September 29, 2015).

[79] *See* docket for West Virginia v. EPA, *supra* footnote 3; Clean Power Plan Final Rule, *supra* footnote 2. As noted above, footnote 3, the briefs in the Clean Power Plan litigation are available online in several locations.

[80] 42 U.S.C. §7607(b).

[81] *See* docket for West Virginia v. EPA, *supra* footnote 3. State petitioners are West Virginia, Texas, Alabama, Arizona (Corp. Comm'n), Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana (Dep't of Envtl. Quality), Michigan (Atty. Gen.), Mississippi, Missouri, Montana, Nebraska, New Jersey, North Carolina (Dep't of Envtl. Quality), North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, Wisconsin, and Wyoming.

[82] *See* Br. of *Amici Curiae* State of Nevada and Consumers' Research in Supp. of Pet'rs (filed February 23, 2016) ("Nev. and Consumers' Res. Br. Supp. Pet'rs").

[83] *See* Opening Br. of Intervenors Dixon Bros., Inc., Nelson Bros., Inc., Wesco Int'l, Inc., Norfolk So. Corp., Joy Global Inc., Gulf Coast Lignite Coal., and Peabody Energy Corp. in Supp. of Pet'rs (filed February 23, 2016) ("Br. Intervenors Supp. Pet'rs").

[84] *See* docket for West Virginia v. EPA, *supra* footnote 3.

[85] *See id.*

[86] Opening Br. of Pet'rs on Core Legal Issues (filed February 19, 2016) ("Pet'rs Br. Core Legal Issues"); Opening Br. of Pet'rs on Procedural and Record-Based Issues (filed February 19, 2016) ("Pet'rs Br. Proc. and R. Issues").

[87] *See* Br. for Members of Cong. as *Amici Curiae* in Supp. of Pet'rs (filed February 23, 2016) ("Cong. Br. Supp.

scientists;[88] 166 state and local chambers of commerce and other business associations;[89] several legal foundations;[90] electric utilities;[91] former Public Utility Commissioners;[92] and groups representing women, minorities, seniors, and taxpayers.[93] In total, one intervenor brief and 12 *amicus* briefs were filed in support of the petitioners opposing the CPP.[94]

The Respondents and Others Supporting the Clean Power Plan

Respondents are EPA and its current Administrator, Gina McCarthy, in her official capacity.[95] Parties that have intervened in this case in support of respondents include a coalition of 18 states, the District of Columbia, and five other cities and a county (including some in states that have filed petitions challenging the CPP).[96] Other parties intervening in support of the CPP include regional, state, and municipal utilities and power companies;[97] more than a dozen nonprofit organizations (including environmental organizations);[98] and several energy industry associations.[99]

Two former EPA Administrators are supporting the CPP as amici curiae: William Ruckelshaus, who headed the agency in 1970, when the CAA was enacted, and again in the 1980s; and William Reilly, the EPA Administrator at the time Congress passed the Clean Air Act Amendments of

---

Pet'rs"); "Members of Congress," below.

[88] *See* Br. for *Amicus Curiae* Scientists in Supp. of Pet'rs (filed April 23, 2016) ("Scientists Br. Supp. Pet'rs").

[89] *See* Br. of 166 State and Local Bus. Ass'ns as *Amici Curiae* in Supp. of Pet'rs (filed February23, 2016) ("166 Bus. Ass'ns Br. Supp. Pet'rs").

[90] *See* Br. for Se. Legal Found. as *Amicus Curiae* in Supp. of Pet'rs (filed April 22, 2016) ("Se. Legal Found. Br. Supp. Pet'rs"); Br. of *Amici* Pac. Legal Found., Tex. Pub. Policy Found., Morning Star Packing Co., Merit Oil Co., Loggers Ass'n of N. Cal., and Norman Brown in Supp. of Pet'rs (filed February 23, 2016) ("Pac. Legal Found. et al. Br. Supp. Pet'rs"); Br. for *Amicus Curiae* Landmark Legal Found. in Supp. of Pet'rs (filed February 23, 2016) ("Landmark Legal Found. Br. Supp. Pet'rs").

[91] *See* Br. of *Amicus Curiae* Mun. Elec. Auth. of Ga. in Supp. of Pet'rs (filed February 23, 2016) ("MEAG Br. Supp. Pet'rs"); Br. for Pedernales Elec. Coop., Inc. as *Amicus Curiae* in Supp. of Pet'rs (filed February 23, 2016) ("Pedernales Br. Supp. Pet'rs").

[92] *See* Br. for *Amici Curiae* Former State Pub. Util. Comm'rs in Supp. of Pet'rs (filed February 23, 2016) ("Fmr. PUCs Br. Supp. Pet'rs").

[93] *See* Br. of Amici Curiae 60Plus Ass'n, Federalism in Action, Hispanic Leadership Fund, Indep. Women's Forum, Nat'l Taxpayers Union, and Taxpayers Prot. Alliance in Supp. of Pet'rs (filed February 23, 2016) ("60Plus Ass'n et al. Br. Supp. Pet'rs").

[94] *See* docket for West Virginia v. EPA, *supra* footnote 3.

[95] *See* Resp't EPA's Initial Br. (filed March 28, 2016) ("EPA Br."). They are represented by the Department of Justice.

[96] *See* Br. for State and Mun. Intervenors in Supp. of Resp'ts (filed March 29, 2016) ("State and Mun. Int. Br. Supp. EPA") (New York, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, Virginia, and Washington; the District of Columbia; cities of Boulder, Chicago, New York, Philadelphia, and South Miami; and Broward County, Florida).

[97] The cities of Austin and Seattle are participating through their municipally owned utilities. *See* Br. of Intervenors Calpine Corp., City of Austin d/b/a Austin Energy, City of Los Angeles (Dep't of Water and Power), City of Seattle (City Light Dep't), Nat'l Grid Generation, LLC, N.Y. Power Auth., Pac. Gas & Elec. Co., Sacramento Muni. Util. Dist., and So. Cal. Edison Co. in Supp. of Resp'ts (filed March 29, 2016) ("Power Cos. Int. Br. Supp. EPA").

[98] *See* Br. of Intervenor Envtl. and Pub. Health Orgs. in Supp. of Resp'ts (filed March 29, 2016) ("Envtl. and Pub. Health Orgs. Int. Br. Supp. EPA") (includes Am. Lung Ass'n, Ctr. for Biological Diversity, Clean Air Council, Clean Wis., Conservation L. Found., Envtl. Def. Fund, NRDC, Ohio Envtl. Council, Sierra Club, and six West Virginia groups).

[99] *See* Br. of Intervenors Advanced Energy Econ., Am. Wind Energy Ass'n, and Solar Energy Industries Ass'n in Supp. of Resp'ts (filed March 29, 2016) ("Advanced Energy Ass'ns Int. Br. Supp. EPA").

1990.[100] Former Secretaries of State and Defense and a Career Diplomat for the State Department also filed a brief supporting the CPP as amici curiae,[101] as did a policy institute;[102] a coalition of medical groups;[103] scientists;[104] grid experts;[105] companies[106] and business[107] and labor groups;[108] faith groups;[109] and a local government coalition comprising the National League of Cities, the U.S. Conference of Mayors, and 54 other cities and localities.[110] As discussed below, Members of Congress also filed a brief in support of the CPP.[111] In total, four intervenor briefs and 18 amici curiae briefs were offered in support of the CPP.[112]

Four states have not joined the litigation: Alaska (for which EPA did not set a goal in the final Rule),[113] Idaho, Pennsylvania, and Tennessee.

---

[100] *See* Br. of Former EPA Admins. William D. Ruckelshaus and William K. Reilly as *Amici Curiae* in Supp. of Resp'ts (filed March 31, 2016) ("Fmr. EPA Admins. Br. Supp. EPA").

[101] *See* Br. for *Amici Curiae* Madeleine K. Albright, Leon E. Panetta, and William J. Burns in Supp. of Resp'ts (filed April 1, 2016) ("Fmr. Dep't of State and Def. Officials Br. Supp. EPA").

[102] Br. of the Inst. for Policy Integrity at N.Y. Univ. Sch. of Law as *Amicus Curiae* in Supp. of Resp'ts (filed April 1, 2016) ("NYU IPI Br. Supp. EPA").

[103] *See* Br. of the Am. Thoracic Soc'y, Am. Med. Ass'n, Am. Acad. of Pediatrics, Nat'l Med. Ass'n, Am. Coll. of Preventive Med., Am. Coll. of Occupational and Envtl. Med., Nat'l Ass'n for Med. Dir. of Respiratory Care, and Am. Pub. Health Ass'n as *Amici Curiae* in Supp. of Resp'ts (filed April 1, 2016) ("Med. and Pub. Health Grps. Br. Supp. EPA").

[104] *See* Br. of *Amicus Curiae* Climate Scientists in Supp. of Resp'ts (filed April 1, 2016) ("Climate Scientists Br. Supp. EPA").

[105] Br. of *Amici Curiae* Grid Experts Benjamin F. Hobbs, Brendan Kirby, Kenneth J. Lutz, James D. Mccalley, and Brian Parsons in Supp. of Resp'ts (filed April 1, 2016) ("Grid Experts Br. Supp. EPA").

[106] Br. of *Amicus Curiae* Dominion Res., Inc. in Supp. of Resp'ts (filed April 1, 2016) ("Dominion Br. Supp. EPA"); Br. of *Amici Curiae* Amazon.Com, Inc., Apple Inc., Google Inc., and Microsoft Corp. in Supp. of Resp'ts (filed April 1, 2016) ("Tech. Br. Supp. EPA"); Br. of *Amici Curiae* Adobe, Inc., Mars, Inc., IKEA N. Am. Svcs. LLC, and Blue Cross and Blue Shield of Mass., Inc., in Supp. of Resp'ts (filed April 1, 2016) ("Adobe, Mars, Ikea, BCBS Br. Supp. EPA").

[107] *Amici Curiae* Br. of Sustainable Bus. Orgs. in Supp. of Resp'ts (filed April 1, 2016) ("Sustainable Bus. Orgs. Br. Supp. EPA") (includes Am. Sustainable Bus. Council, U.S. Black Chambers, Inc., Integrative Healthcare Policy Consortium, Sustainable Furnishings Council, Nat'l Small Bus. Network, Green Am., Climate Action Bus. Ass'n, and 18 other state, regional, and minority Chambers of Commerce and other business associations and companies).

[108] Br. of *Amicus Curiae* Serv. Emps. Int'l Union in Supp. of Resp'ts (filed April 1, 2016) ("SEIU Br. Supp. EPA").

[109] Br. of *Amici Curiae* Catholic Climate Covenant et al. in Supp. of Resp'ts (filed April 1, 2016) ("Faith Grps. Br. Supp. EPA") (includes 41 Christian and Jewish faith groups).

[110] *See* Br. of *Amici Curiae* Nat'l League of Cities; U.S. Conf. of Mayors; and 54 Cities, Counties, and Mayors in Supp. of EPA (filed April 1, 2016) ("Cities Br. Supp. EPA").

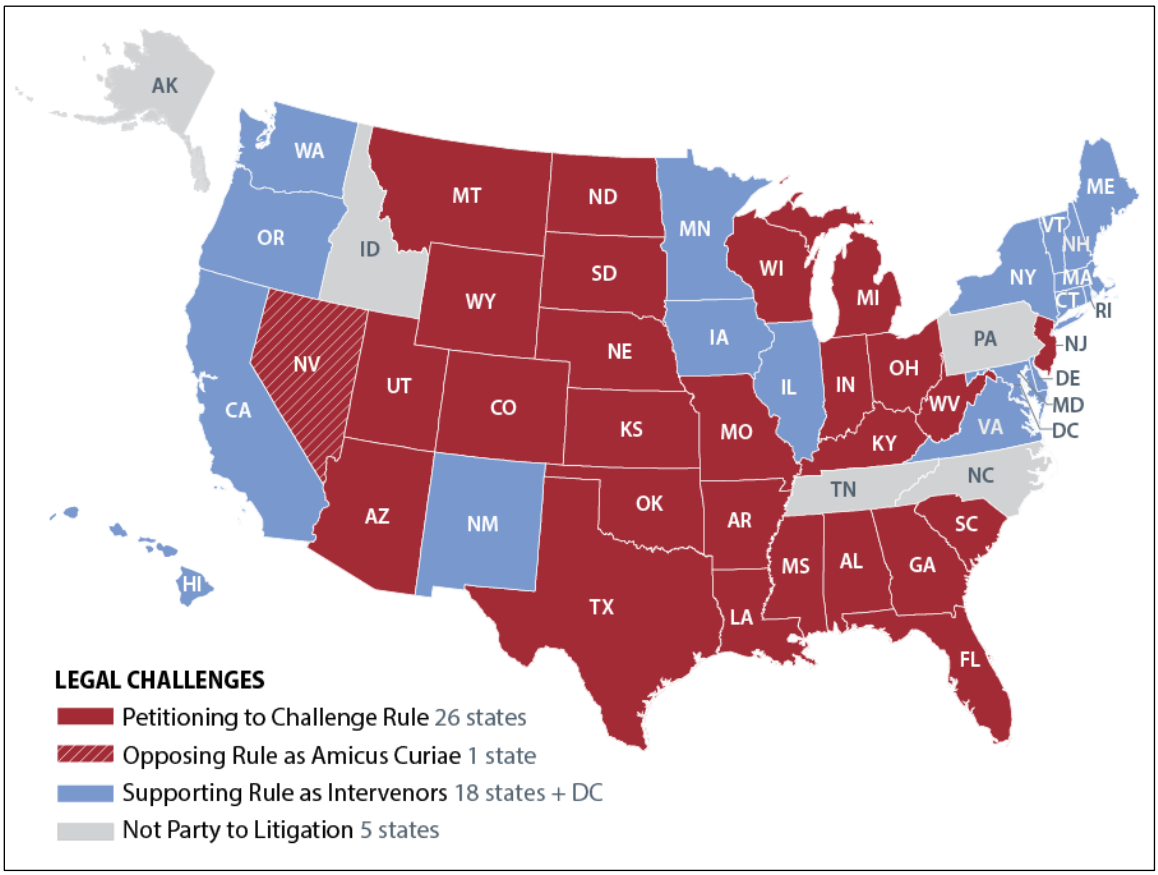
[111] *See* Br. *Amici Curiae* of Current Members of Cong. and Bipartisan Former Members of Cong. in Supp. of Resp'ts (filed March 31, 2016) ("Cong. Br. Supp. EPA"); "Members of Congress," below.

[112] *See also* Corrected Br. of *Amici Curiae* Fmr. State Envtl. and Energy Officials in Supp. of Resp'ts (filed April 1, 2016) ("Fmr. State Envtl. and Energy Officials Br. Supp. EPA"); Br. of Leon G. Billings and Thomas C. Jorling as Amici Curiae in Supp. of EPA (filed April 1, 2016) ("Cong. CAA Staff Br. Supp. EPA"); Br. of *Amici Curiae* Citizens Utility Bd., Consumers Union, and Pub. Citizen, Inc. in Supp. of Resp'ts (filed April 1, 2016) ("Consumer and Ratepayer Orgs. Br. Supp. EPA"); Br. of Union of Concerned Scientists as *Amicus Curiae* in Supp. of EPA (filed April 1, 2016) ("UCS Br. Supp. EPA"); *see generally* docket for West Virginia v. EPA, *supra* footnote 3.

[113] *See* Clean Power Plan Final Rule, *supra* footnote 2, 80 Fed. Reg. at 64,664: "Because the EPA does not possess all of the information or analytical tools needed to quantify the BSER for the two non-contiguous states with otherwise affected EGUs (Alaska and Hawaii) and the two U.S. territories with otherwise affected EGUs (Guam and Puerto Rico), these emission guidelines do not apply to those areas, and those areas will not be required to submit state plans on the schedule required by this final action." EPA also did not include Vermont or the District of Columbia in the final Rule because of the lack of affected electric generating units in those locations. *Id.*

Figure 1. States Participating in Clean Power Plan Litigation

Consolidated Petitions: *West Virginia et al. v. EPA et al.*, D.C. Circuit No. 15-1363



Source: Prepared by CRS from litigation filings in *West Virginia v. EPA.*

Notes: The Clean Power Plan, as finalized, did not set emissions goals for Alaska, Hawaii, Vermont, or the District of Columbia (the latter two because there are no affected electric generating units in those locations).

Members of Congress

Large groups of Members of Congress have filed amici curiae briefs on both sides of the litigation. A brief opposing the CPP was joined by 34 current Senators and 171 current Representatives in the 114th Congress. The brief argues, among other things, that Congress excluded power plants regulated under CAA Section 112 from "concurrent regulation" under Section 111(d) and that EPA "usurped the role of Congress" through the CPP's "expansive regulatory requirements."[114] A brief in support of the CPP was joined by 44 current and former Senators and 164 current and former Representatives; it argues, among other things, that Congress conferred "broad authority" on EPA in the CAA to help the agency achieve the act's broad anti-pollution objectives, and that the CPP is "consistent with the text, structure, and history" of the CAA.[115]

[114] *See generally* Cong. Br. Supp. Pet'rs.

[115] *See generally* Cong. Br. Supp. EPA.

Major Events in the Litigation

Stay Motions and Scheduling Motions Before the Circuit Court Panel

Many petitioners filed motions to stay the CPP alongside or soon after their petitions for review.[116] Briefing on the stay motions concluded in late December 2015.[117]

On January 21, 2016, the D.C. Circuit panel comprising Judges Srinivasan, Rogers, and Henderson issued an order denying the petitioners' motions to stay the CPP for the duration of the litigation. The court's *per curiam* order denying the motions to stay did not detail the court's reasoning, saying only that "[p]etitioners have not satisfied the stringent requirements for a stay pending court review."[118] However, the case cited in the order, *Winter v. Natural Resources Defense Council*,[119] as well as petitioners' stay motions and respondents' opposition briefs,[120] measured the motions against the four traditional factors for a stay: (1) likelihood of success on the merits, (2) irreparable harm to the movant absent a stay, (3) lack of substantial harm to others if a stay is granted, and (4) public interest. Thus, the stay briefing previewed some of the legal and factual arguments on both sides, including arguments relating to the scope of EPA's authority and the reasonableness of EPA's decisions.

The circuit panel's January 21 order also resolved another matter that had been disputed by the parties: the timing and manner in which the litigation will proceed. The petitioners had jointly requested that the D.C. Circuit bifurcate what they deemed "fundamental issues of legal authority" from record-based challenges to programmatic elements, in order to expedite consideration of the former. The respondents and respondent-intervenors opposed the petitioners' scheduling proposal, urging that the case be briefed and argued in one round addressing all issues. The circuit court's order rejects bifurcation of the case into two phases as requested by petitioners; the order does, however, expedite briefing of the case in order to allow oral argument in the current term of the court.[121] The panel ordered briefing on all issues to be completed in April 2016.[122]

Supreme Court Order Staying the Clean Power Plan Rule

In a procedurally rare step, various state and industry parties applied to the Supreme Court in late January 2016 for an immediate stay of the Rule, though the circuit court's order was a preliminary decision in a case that is still pending.[123] They submitted their applications to Chief Justice John Roberts, circuit justice for the D.C. Circuit,[124] who referred the actions to the full

[116] *See* docket for West Virginia v. EPA, *supra* footnote 3.

[117] *See id.*

[118] Order at 2, West Virginia v. EPA, No. 15-1363 (D.C. Cir. January 21, 2016).

[119] 555 U.S. 7, 20 (2008).

[120] *See generally* stay briefs on docket for West Virginia v. EPA, *supra* footnote 3.

[121] Order at 2, West Virginia v. EPA, No. 15-1363 (D.C. Cir. January 21, 2016).

[122] *Id.*

[123] See CRS Legal Sidebar WSLG1485, *Circuit Court Denies Stay of Clean Power Plan; States Ask Supreme Court to Step In (Part 1)*, by Alexandra M. Wyatt; CRS Legal Sidebar WSLG1489, *UPDATED: Circuit Court Denies Stay of Clean Power Plan; States Ask Supreme Court to Step In (Part 2)*, by Alexandra M. Wyatt.

[124] *See* Supreme Court of the United States, *Circuit Assignments* (April 4, 2014), http://www.supremecourt.gov/about/circuitAssignments.aspx.

Court.[125] At the request of the Court, EPA and others provided response briefs in opposition to the applications.[126]

The Court's response was likewise unusual: On February 9, 2016, the Supreme Court issued brief orders granting the applications and staying the Rule.[127] The orders did not provide explanation.[128] The stay pauses the CPP's legal effect while the Rule undergoes judicial review, and EPA may not enforce the Rule for the duration of the stay. (Nevertheless, some states are continuing to plan and prepare, to varying degrees, for the possibility that the Rule will eventually be upheld.)[129]

The Court was split five to four, with Chief Justice Roberts and Justices Scalia, Thomas, Alito, and Kennedy granting the applications, and Justices Ginsburg, Breyer, Sotomayor, and Kagan in favor of denying the applications.[130] The stay order was one of Justice Scalia's last votes on the Supreme Court. Justice Scalia's death on February 13, 2016, and the resulting current vacancy on the Court, will likely affect the course of the CPP litigation—although in ways that are uncertain at present.[131]

The D.C. Circuit Court Oral Argument

The three-judge panel originally set to hear *West Virginia v. EPA* comprised Judge Sri Srinivasan, Judge Judith Rogers, and Judge Karen LeCraft Henderson.[132] However, on May 16, 2016, the full D.C. Circuit ordered, "on the court's own motion, that these [consolidated] cases … be rescheduled for oral argument before the en banc court on Tuesday, September 27, 2016."[133]

The *Federal Rules of Appellate Procedure* provide for hearings en banc in limited circumstances:

> A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court

[125] *See* West Virginia v. EPA, Sup. Ct. Docket No. 15A773, *available at* http://www.supremecourt.gov/search.aspx?filename=/docketfiles/15a773.htm.

[126] *See id.*

[127] *See* Order in Pending Case, West Virginia v. EPA, No. 15A773 (S. Ct. February 9, 2016), https://www.supremecourt.gov/orders/courtorders/020916zr4_4g15.pdf. It does not appear that the Supreme Court has previously stayed or enjoined a final agency rule where a lower court had, after briefing, declined to do so.

[128] *See id.*

[129] *See, e.g.*, Press Release, State of Connecticut, "Gov. Malloy Statement on Supreme Court's Clean Power Plan Decision" (February 10, 2016), http://portal.ct.gov/Departments_and_Agencies/Office_of_the_Governor/Press_Room/Press_Releases/2016/02-2016/Gov__Malloy_Statement_on_Supreme_Court_s_Clean_Power_Plan_Decision/ ("it is important that we continue with preparations for compliance with the plan while these issues are being worked out in the courts"); Jim Spencer & David Shaffer, *Minnesota Vows to Move Ahead with Clean Power*, STAR TRIBUNE (February 16, 2016), http://www.startribune.com/minnesota-vows-to-move-ahead-with-clean-power/368563271/. *See also* E&E Publishing, LLC, POWER PLAN HUB, http://www.eenews.net/interactive/clean_power_plan (last visited April 13, 2016) (subscription).

[130] *See* Order in Pending Case, West Virginia v. EPA, No. 15A773 (S. Ct. February 9, 2016), https://www.supremecourt.gov/orders/courtorders/020916zr4_4g15.pdf.

[131] *See, e.g.*, CRS Legal Sidebar WSLG1495, *What Does Justice Scalia's Death Mean for Congress and the Nation?*, by Kate M. Manuel and Andrew Nolan; Alexandra M. Wyatt, *Environmental Law*, in CRS Report R44419, *Justice Antonin Scalia: His Jurisprudence and His Impact on the Court*, coordinated by Kate M. Manuel, Brandon J. Murrill, and Andrew Nolan.

[132] Order at 2, West Virginia v. EPA, No. 15-1363 (D.C. Cir. January 21, 2016).

[133] Order at 2, West Virginia v. EPA, No. 15-1363 (D.C. Cir. May 16, 2016).

> of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:
>
> (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
>
> (2) the proceeding involves a question of exceptional importance.[134]

The order was a surprise to many participants and observers.[135] While the order delayed argument by almost four months, it is possible that the ultimate effect will be to expedite resolution of the litigation by essentially skipping the usual step of a panel decision.[136]

The D.C. Circuit en banc court comprises 11 active judges.[137] Two judges did not participate in the decision to hear the case en banc: Chief Judge Merrick Garland and Judge Nina Pillard.[138] Reasons for recusal are generally not given and were not given in this instance. Judge Garland has not been participating in cases and matters while his Supreme Court nomination remains pending. It was unclear, however, why Judge Pillard recused herself from the initial decision to hear the case en banc.

On September 22, 2016 (five days prior to oral argument), the court issued a notice that Judge Pillard will participate in hearing argument.[139] As a result, the en banc court that heard oral arguments in *West Virginia v. EPA* included 10 judges. For oral argument, the court focused on five main areas: (1) statutory issues related to state authority and electricity generation shifts among affected power plants and renewable energy providers; (2) different amendments affecting CAA Sections 111(d) and 112; (3) constitutional issues; (4) notice issues; and (5) record-based issues.[140] The court had scheduled 3.5 hours of oral argument on these issues, but the argument on September 27, 2016, lasted about seven hours.[141]

A Selection of Arguments on the Merits

Following the Supreme Court's stay, the CPP litigation continues in the D.C. Circuit. This report does not aim to provide a comprehensive or representative preview of the many, often nuanced legal arguments that have been presented to the court for or against EPA's CPP.

The sections below offer a few highly condensed examples, drawn from litigation filings[142] and analyses of the oral arguments, to illustrate the range of issues and to give a flavor of some of the

---

[134] Fed. R. App. Proc. Rule 35(a).

[135] *See, e.g.*, Ellen M. Gilmer & Robin Bravender, *Clean Power Plan: Latest Legal Twist Shuffles Calendars, Prospects*, E&E NEWS, May 17, 2016, http://www.eenews.net/stories/1060037396 ("The court's announcement took everyone by surprise."); Juan Carlos Rodriguez, *3 Takeaways From DC Circ.'s Surprise CPP Argument Pivot*, ENVIRONMENTAL LAW360, May 17, 2016, http://www.law360.com/articles/797357/3-takeaways-from-dc-circ-s-surprise-cpp-argument-pivot.

[136] *See, e.g.*, *id.*

[137] There are a total of 17 judges on the D.C. Circuit—11 active judges and 6 senior judges. *See* U.S. Court of Appeals, the District of Columbia Circuit, *Judges*, https://www.cadc.uscourts.gov/internet/home.nsf/Content/Judges. *See also* D.C. Cir. R. 35.

[138] Order at 2, West Virginia v. EPA, No. 15-1363 (D.C. Cir. May 16, 2016); U.S. Court of Appeals, the District of Columbia Circuit, *Judges*, https://www.cadc.uscourts.gov/internet/home.nsf/Content/Judges.

[139] Order, West Virginia v. EPA, No. 15-1363 (D.C. Cir. September 22, 2016).

[140] Order at 2-3, West Virginia v. EPA, No. 15-1363 (D.C. Cir. August 17, 2016).

[141] *See id.*; *see also* Ellen M. Gilmer, *Clean Power Plan: Oral Arguments: The Blow by Blow*, E&E NEWS, September 28, 2016, http://www.eenews.net/stories/1060043538.

[142] Petitioners, intervenors in support of petitioners, and *amici curiae* opposing the Rule submitted briefs on the merits

points raised. Arguments are generally summarized in the same order briefed, with petitioners and their allies having submitted the first round of briefs against the CPP, and respondents EPA and Administrator McCarthy and their allies having then responded in the CPP's defense.

Standard of Review

As a threshold matter, the parties debate the standards by which a court should evaluate EPA's interpretation and implementation of CAA Section 111. Under the framework of *Chevron v. Natural Resources Defense Council, Inc.*, a court reviewing an agency rule defers to the agency's interpretation of an ambiguous statute if the agency's interpretation is reasonable.[143] In the 2014 *UARG v. EPA* decision, however, the Supreme Court opined that where a statutory interpretation by EPA "would bring about an enormous and transformative expansion in EPA's regulatory authority"—which some petitioners say the CPP would do—a court should demand "clear congressional authorization."[144]

Petitioners emphasize this and other language from *UARG*.[145] They also highlight language from *King v. Burwell*, the 2015 Supreme Court decision which, though it ultimately upheld the Affordable Care Act's insurance premium tax credits in all states, declined to give deference to the Internal Revenue Service's (IRS's) interpretation of that act because the IRS lacked "expertise in crafting health insurance policy…."[146] Petitioners' position against applying deference in the CPP litigation is illustrated by the first paragraph of their initial merits brief's Introduction:

> EPA … purports to have discovered sweeping authority in section 111(d) of the Clean Air Act—a provision that has been used only five times[147] in 45 years—to issue a "Power Plan" that forces States to fundamentally alter electricity generation throughout the country.
>
> But as the Supreme Court recently said, courts should "greet … with a measure of skepticism" claims by EPA to have "discover[ed] in a long-extant statute an unheralded power to regulate a significant portion of the American economy" and make "decisions of vast economic and political significance," [*UARG*], especially in areas outside an agency's "expertise," *King v. Burwell*….[148]

These arguments are echoed and further discussed in the briefs of several amici,[149] as well as in the brief of the intervenors supporting the petitioners.[150] The intervenors' brief also opposes

in late February 2016; respondents, intervenors in support of respondents, and *amici curiae* supporting the Rule submitted briefs on the merits in late March and early April 2016. *See generally* docket for West Virginia v. EPA, *supra* footnote 3. This report does not include any points made in petitioners' and their intervenors' replies; as noted in the court's scheduling order, "[a]ll issues and arguments must be raised by petitioners in the opening brief. The court ordinarily will not consider issues and arguments raised for the first time in the reply brief." Order re Briefing Format and Schedule, West Virginia v. EPA, No. 15-1363 (D.C. Cir. January 28, 2016).

[143] Chevron vs. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-843 (1984).

[144] UARG v. EPA, 134 S. Ct. 2427, 2444 (2014). *See also, e.g.*, CRS Legal Sidebar WSLG1315, *What Does King v. Burwell Mean for Chevron?*, by Daniel T. Shedd.

[145] *See, e.g.*, Pet'rs Br. Core Legal Issues at 3-4, 23-34, 66.

[146] Pet'rs Br. Core Legal Issues at 3, 23-35 (citing King v. Burwell, 135 S. Ct. 2480, 2489 (2015)).

[147] *Cf. supra*, footnote 36 and accompanying text.

[148] Pet'rs Br. Core Legal Issues at 3 (citations omitted); *see also id.* at 28 (Standard of Review section of brief).

[149] *See, e.g.*, Se. Legal Found. Br. Supp. Pet'rs at 8-9; Pac. Legal Found. et al. Br. Supp. Pet'rs at 13-15.

[150] *See* Br. Intervenors Supp. Pet'rs at 4, 12-22.

Chevron deference on the grounds that the CPP is, in their view, an example of lawmaking, among other reasons.[151]

Respondents, in contrast, argue for standard *Chevron* deference on statutory interpretation, and the likewise familiar "arbitrary and capricious" standard for review of agency actions under the Clean Air Act.[152] With respect to *Chevron* deference, EPA expands on its argument within its defense of including generation-shifting within its selected "best system":

> [T]he familiar two-step *Chevron* standard … fully applies to the interpretation of ambiguity that concerns the scope of an agency's regulatory authority.
>
> Petitioners, citing *King v. Burwell*, claim that *Chevron* does not apply. They are wrong. The CAA clearly delegates to EPA authority to fill gaps in the Act concerning the appropriate amount of pollution reduction that should be obtained from long-regulated major pollution sources.... Unlike *Burwell*, this case involves EPA's construction of a statute that it has long administered and of provisions that go to the core of EPA's mission to protect public health and welfare.
>
> … Petitioners construe *UARG* as obliterating the second step of *Chevron* in economically and politically significant cases. Under Petitioners' view, ambiguity in such cases must necessarily be resolved against the implementing agency's exercise of its regulatory authority …. But *UARG* does not nullify *Chevron*. *UARG* simply reflected one application of *Chevron* to particular facts, which are readily distinguishable from those here.…[153]

A number of EPA's supporting intervenors[154] and amici[155] share the agency's emphasis on deference and "normal administrative law principles."[156]

During the oral argument, the judges questioned whether the court should apply a heightened standard of review beyond the traditional *Chevron* deference,[157] citing *UARG* as an example where the Supreme Court ruled that "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[158] The judges raised the "major questions" doctrine, citing *King v. Burwell*, in questioning if the CPP was of such "deep 'economic and political significance'" that the court should not presume that Congress delegated interpretive authority and defer to the agency's interpretation of CAA Section 111 unless Congress expressly did so.[159] The court spent a significant portion of the oral argument on whether the CPP was "transformative" in terms of the Rule's impact on the power sector or the method in which EPA has chosen to regulate GHG emissions from power plants.[160] The standard

---

[151] *See id.*

[152] *See, e.g.*, EPA Br. at 23-25, 40-44, 60-61, 93. *See* CAA Section 307(d)(9), 42 U.S.C. §7607(d)(9) (CAA standard of review); *compare* 5 U.S.C. §706(2) (similar standard of review under Administrative Procedure Act).

[153] *Id.* at 40-42.

[154] *See, e.g.*, Advanced Energy Ass'ns Int. Br. Supp. EPA at 2-4; Envtl. and Pub. Health Orgs. Int. Br. Supp. EPA at 4.

[155] *See, e.g.*, Consumer and Ratepayer Orgs. Br. Supp. EPA at 1.

[156] *See* Envtl. and Pub. Health Orgs. Int. Br. Supp. EPA at 3.

[157] *See* Ellen M. Gilmer, *supra* footnote 141.

[158] *UARG*, 134 S. Ct. at 2444.

[159] *See* King v. Burwell, 135 S. Ct. 2480, 2489 (2015). *See also* Philip A. Wallach, *The D.C. Circuit Considers the Clean Power Plan, and Our Constitutional Future*, BROOKINGS INSTITUTE: FIXGOV BLOG (September 27, 2016), https://www.brookings.edu/blog/fixgov/2016/09/27/the-d-c-circuit-considers-the-clean-power-plan-and-our-constitutional-future.

[160] *See* James W. Rubin, *Clean Power Plan Finally Has Its Day in Court*, LAW360, October 1, 2016, http://www.law360.com/articles/847138/clean-power-plan-finally-has-its-day-in-court-now-what. *See also* Ellen M. Gilmer, *Clean Power Plan: In Debate over Legal Standard, 'How Transformative is Transformative?'* E&E NEWS,

of review applied in this case will likely draw attention to the broader legal debate surrounding the application of *Chevron* deference to an agency's statutory interpretation.[161]

Section 111(d) Scope of Authority

Petitioners focus much of their challenge on EPA's overall design of the CPP and, especially, its inclusion of electricity generation-shifting measures—exemplified by building blocks two and three, discussed above.[162] They allege that this exceeds EPA's scope of authority under Section 111(d).[163] Arguments that EPA cannot use Section 111(d) to regulate existing power plants at all because power plants regulated for hazardous air pollutants under Section 112 are discussed in the next section.[164]

"Outside the Fenceline" Measures

Petitioners have argued that, for various reasons drawn from both statutory text and context, Section 111 authorizes EPA to require only measures that can be applied to the "performance" of an individual "source" (also known as measures "inside the fenceline"), such as adoption of pollution control devices or other design or operational standards.[165] They say that Section 111 precludes generation-shifting from one type of electric generating unit to another, and does not authorize what they characterize as a reorganization of the nation's electric grid or states' energy economies.[166] Petitioners also maintain that EPA "cannot require States to adopt as a 'standard of performance' reduction obligations that can be met only through *non*-performance by regulated sources,"[167] saying the CPP "does not involve a source improving its emissions performance when it generates, but instead consists of plants *reducing* or *ceasing* work, or nonperformance, as their production is 'shifted' to EPA-preferred facilities."[168] During oral argument, the petitioners argued that power plants would be "subsidizing their competition" because the CPP effectively forces them to buy emission credits from renewable energy providers to meet their emission limits.[169] In their view, EPA has "confuse[d] 'standards of performance' with other [air quality based] programs" in the CAA, such as the NAAQS or acid rain cap-and-trade program.[170] This view is expanded on by various amici curiae,[171] including the Members of Congress supporting the petitioners.[172]

EPA wrote in the preamble to the final CPP that "the phrase 'system of emission reduction' … is capacious enough to include actions taken by the owner/operator of a stationary source designed to reduce emissions from that affected source, including actions that may occur off-site and

---

September 29, 2016, http://www.eenews.net/energywire/stories/1060043607.

[161] *See e.g.*, CRS Legal Sidebar WSLG1315, *What Does King v. Burwell Mean for Chevron?*, by Daniel T. Shedd.

[162] *See generally* Pet'rs Br. Core Legal Issues at 29-61; *supra*, "Overview of Clean Power Plan."

[163] *See generally* Pet'rs Br. Core Legal Issues at 29-61.

[164] *See* "Section 112 Exclusion" below.

[165] *See generally* Pet'rs Br. Core Legal Issues at 29-61; *see also, e.g.*, MEAG Br. Supp. Pet'rs at 10.

[166] *See* Pet'rs Br. Core Legal Issues at 29-61.

[167] *See id.* at 24-25.

[168] *See id.*

[169] *See* Philip A. Wallach, *supra* footnote 159.

[170] *See id.* at 54-55 (distinguishing CAA Sections 108-110, 401 et seq., 42 U.S.C. §§7408-7410, 7651 et seq.).

[171] *See, e.g.*, MEAG Br. Supp. Pet'rs at 9-13; Fmr. PUCs Br. Supp. Pet'rs at 4.

[172] *See* Cong. Br. Supp. Pet'rs at 17-19.

actions that a third party takes pursuant to a commercial relationship with the owner/operator."[173] In its brief, EPA states that "[t]he plain meaning of the word 'system' is expansive,"[174] that "statutory context makes clear that the word 'performance' refers to emissions performance, not production performance,"[175] and that the agency appropriately applied contextual constraints on BSER by, among other factors, limiting the CPP to actions taken by sources that result in emission reductions from sources.[176] Altogether, EPA says, petitioners "posit limitations on EPA's discretion that are not compelled by the statute, and would frustrate the statutory objective to protect public health and welfare."[177] Several of EPA's supporting intervenors and amici curiae generally agree;[178] for example, intervenor power companies state that "[e]lectricity providers have been shifting generation among affected units and to zero-emitting sources as a means of achieving emission reductions for decades, as these strategies achieve greater reductions at lower cost than by relying on control technology alone."[179]

Part of the oral argument focused on the definition of "system" with respect to BSER. Some of the judges questioned whether EPA's interpretation of BSER went beyond the Section 111(d) boundaries, while other judges noted that EPA's choice of generation-shifting as BSER was a reflection of what has already been demonstrated and implemented for the power sector.[180]

Role of the Federal Energy Regulatory Commission

Petitioners also argue that another limitation on EPA's authority is the authority given by law to the Federal Energy Regulatory Commission (FERC), and that EPA's design of the CPP violates that limitation. They state: "Congress has clearly confirmed the States' plenary authority in this area and granted to a different agency—FERC—the limited federal jurisdiction in this sphere."[181] A brief filed in opposition to the CPP by 18 former state Public Utility Commissioners also contends that the CPP is contrary to the Federal Power Act (FPA),[182] in part because of what they deem EPA's "unprecedented" interpretation of the term "system" in CAA Section 111.[183] They also describe the CPP's effects on states with different regulatory models (vertical integration, restructured, and municipal utilities and electric cooperatives).[184]

EPA counters that the CPP "does not intrude on FERC's power under the Federal Power Act …. The Rule appropriately limits air pollution under the CAA. It does not regulate any kind of

---

[173] Clean Power Plan Final Rule, *supra* footnote 2, 80 Fed. Reg. at 64,761.

[174] EPA Br. at 27; *see also id.* at 46 ("The phrase 'best system of emission reduction' in Section 111(a)(1) contrasts sharply with narrower language appearing elsewhere in the same statutory subsection").

[175] *Id.* at 65.

[176] *See id.* at 28.

[177] *Id.* at 40.

[178] *See, e.g.*, State and Mun. Int. Br. Supp. EPA at 25-29; Envtl. and Pub. Health Orgs. Int. Br. Supp. EPA at 5-19; Fmr. EPA Admins. Br. Supp. EPA at 16-19; Grid Experts Br. Supp. EPA at 31-37; *see generally* NYU IPI Br. Supp. EPA at 2-31.

[179] *See* Power Cos. Int. Br. Supp. EPA at 2-3. *See also, e.g.*, Dominion Br. Supp. EPA at 10 ("Foreclosing the ability of Dominion and other owners of regulated power plants to rely on trading measures as a means of compliance would unnecessarily increase the Rule's compliance costs….").

[180] *See* Ellen M. Gilmer, *supra* footnote 141.

[181] Pet'rs Br. Core Legal Issues at 38 (citations omitted); *see also* Landmark Legal Found. Br. Supp. Pet'rs at 9-11.

[182] 16 U.S.C. §§791a, et seq.

[183] *See* Fmr. PUCs Br. Supp. Pet'rs at 9-10.

[184] *See id.* at 10-24.

electricity sales or rates—interstate or intrastate. Thus, the dividing line between interstate and intrastate rate regulation addressed in the cases cited by Petitioners has no relevance here."[185] EPA adds that it consulted with FERC and "participated in multiple FERC technical conferences."[186] A group of former state environmental and energy officials, including Public Utility Commissioners, also filed a brief in support of the CPP, arguing in part that "[b]y design, the CPP respects and preserves the fundamental roles of grid operators and the jurisdiction of state regulatory bodies, including environmental agencies and Public Utility Commissions (PUC)."[187]

Section 112 Exclusion

One core set of arguments in the CPP litigation relates to the interpretation of language in CAA Section 111(d)(1)(A), which sets forth exclusions to EPA's authority to issue Section 111(d) emission guideline rules. To understand the dispute, it is useful to briefly review the history of the subsection and its cross-reference to the hazardous air pollutant (HAP) program under CAA Section 112.

Prior to the CAA Amendments of 1990, Section 111(d) required EPA to prescribe regulations for states to submit plans establishing and implementing standards of performance for any existing source, for any air pollutant meeting two requirements: (1) the air pollutant must be one "for which air quality criteria have not been issued or which is not included on a list published under section [1]08(a) or [1]12(b)(1)(A) of this title," and (2) the air pollutant must be one to which a Section 111(b) NSPS would apply if such existing source were a new source.[188] At that time, Section 112(b)(1)(A) described a process for listing HAPs. (Section 108(a) describes a process for listing "criteria" air pollutants; this cross-reference has not changed, nor has the second requirement.) Thus, for any air pollutant to which a Section 111(b) NSPS applied for new sources, EPA had to regulate the same pollutant under Section 111(d) for existing sources *unless* that air pollutant was already listed under the NAAQS or HAP programs.

In 1990, Congress made substantial amendments to CAA Section 112; among other changes, it replaced the former HAP listing process with a list of nearly 200 HAP, now contained in Section 112(b).[189] In doing so, it made Section 111(d)'s cross-reference to Section 112(b)(1)(A) obsolete, as there was no longer an (A). Both the House and the Senate offered amendments to the cross-reference—*both* of which were included in the final legislation that was passed, signed into law by President Bush, and included in the *Statutes at Large*. Under the House-originated provision, the Section 111(d) authority applies for any air pollutant that "is not included on a list published under section [1]08(a) of this title or emitted from a source category which is regulated under section [1]12 of this title.... "[190] The House-originated amendment was added to the *U.S. Code* by the House Office of the Law Revision Counsel.[191] The Senate-originated 1990 amendment to

[185] EPA Br. at 59.

[186] *See id.* at 150; *see also id.* at 55, 152.

[187] *See* Fmr. State Envtl. and Energy Officials Br. Supp. EPA at 3-4.

[188] 42 U.S.C. §7411(d)(1)(A) (1988).

[189] 42 U.S.C. §7412(b).

[190] P.L. 101-549, §108(g), 104 Stat. 2399, 2467 (1990), codified at 42 U.S.C. §7411(d)(1)(A)(i).

[191] *See* 2 U.S.C. §§285a-285g (Revision Counsel's authority); *see also* EPA Br. at 89; Pet'rs Br. Core Legal Issues at 69-73.

CAA Section 111(d)(1)(A) simply excludes from Section 111(d) regulation any air pollutant "included on a list published under section [1]08(a) or [1]12(b).... "[192] It is not in the *U.S. Code*.

Because power plants are a source category which is regulated under Section 112 for mercury and other HAP,[193] petitioners and their supporters argue that EPA is barred from regulating power plants under Section 111(d) for CO_2 in any manner.[194] Petitioners claim that EPA itself has previously given the *U.S. Code* text its "literal" meaning,[195] and that "EPA's attempts to escape the literal reading of the exclusion are unavailing."[196] In particular, they dispute EPA's "new assertions of ambiguity"[197] and any reliance on the Senate-originated amendment, which they describe as an "erroneous 'conforming amendment.'"[198] Petitioners also cite a footnote in the 2011 Supreme Court case *AEP v. Connecticut*, which said that "EPA may not employ [section 111(d)] if existing stationary sources of the pollutant in question are regulated under … § [1]12."[199] Members of Congress who submitted an *amicus curiae* brief against the CPP further discuss the Section 112 exclusion and its legislative history,[200] as did petitioners' intervenors, who further argue that EPA's interpretation violates constitutional principles of separation of powers.[201]

EPA generally counters that it "reasonably interpreted" Section 111(d) and its exclusion language, "which is ambiguous in several respects[,] consistent with the Act's purpose, the statutory context, and the legislative history," as well as its own past rulemakings.[202] The Agency states, among other things, that "Petitioners' interpretation of Section 111(d)—which would strip that provision of nearly all effect—is not reasonable, let alone mandatory," and that "when construing [the House-originated amendment] in a particular statutory context, one must take a 'commonsense' approach, and ask not only 'who' is regulated under Section 112 (i.e., source categories including power plants), but also 'what.'"[203] Essentially, EPA interprets Section 111(d)(1)(A) to exclude from Section 111(d) regulation any HAP emitted from a source category regulated under Section 112;[204] otherwise, it says, EPA would have to choose between regulating HAP *or* Section 111 air pollutants, leaving a "gap" and allowing the "unregulated emission of pollutants not listed as 'hazardous' or 'criteria,' but nonetheless dangerous to public health or

[192] P.L. 101-549, §302(a), 104 Stat. 2399, 2574 (1990).

[193] EPA has regulated HAP from power plants under CAA Section 112 as part of its mercury and air toxics standards (MATS). The Supreme Court held that EPA's promulgation of the MATS rule was unlawful for failure to properly consider costs at the threshold stage of determining whether such regulation was "appropriate and necessary." Michigan v. EPA, 135 S. Ct. 2699, 2707-2711 (2015). It remanded the case to the court of appeals, which remanded the MATS rule without vacatur to EPA to make the additional findings required by the Supreme Court. Order, White Stallion Energy Ctr. LLC v. EPA, No. 12-1100 (D.C. Cir. December 15, 2015) (per curiam).

[194] *See, e.g.*, Pet'rs Br. Core Legal Issues at 61-74; Pac. Legal Found. et al. Br. Supp. Pet'rs at 15-20. Note that CO_2 also is not listed as a criteria pollutant under a NAAQS under CAA Section 108(a).

[195] *See* Pet'rs Br. Core Legal Issues at 62-64. *See generally id.* at 61-74 (Section II of brief, "The Section 112 Exclusion Unambiguously Prohibits the Rule").

[196] *See id.* at 64.

[197] *See id.* at 65.

[198] *See id.* at 68-74.

[199] *Id.* at 62 (quoting *AEP*, 131 S. Ct. at 2537 n.7).

[200] *See* Cong. Br. Supp. Pet'rs at 4-13.

[201] *See* Br. Intervenors Supp. Pet'rs at 6-31. *See also, e.g.*, Landmark Legal Found. Br. Supp. Pet'rs at 2-7.

[202] *See generally* EPA Br. at 76-98; *see also* Clean Power Plan Final Rule, *supra* footnote 2, at 64,710-64,715.

[203] *See* EPA Br. 81 (citing Rush Prudential HMO v. Moran, 536 U.S. 355, 366 (2002)).

[204] *Id.* (citing Clean Power Plan Final Rule, *supra* footnote 2, 80 Fed. Reg. at 64,713).

welfare."[205] In addition, EPA argues that it "properly considered" the Senate-originated amendment as a "clear indication of congressional intent when interpreting Section 111(d),"[206] stating that "[i]t is black-letter law that the U.S. Code cannot prevail over the Statutes at Large when the two are inconsistent."[207] EPA's supporters also weighed in on the Section 112 exclusion issue, including the current and former Members of Congress who filed an amici curiae brief supporting the CPP.[208]

During the oral argument, the judges appeared to grapple with the two differing amendments of Section 111(d) and the complexity and ambiguity of the legislative history.[209] Some judges questioned whether the distinction between "conforming" and "substantive amendments" was confusing the issue further.[210] The judges' questions sought to find an interpretation that would give some effect to both amendments, while ensuring that the resulting interpretation would not create a "loophole" such that sources may evade regulation of certain pollutants.[211]

Constitutional Issues and Canon of Constitutional Avoidance

Petitioners contend that the CPP violates the U.S. Constitution, and that CAA Section 111(d) must be interpreted more narrowly than EPA interprets it so as to avoid certain constitutional issues.[212] For example, petitioners, including the 26 state petitioners opposing the CPP, claim that the CPP impermissibly invades traditional state police powers over the electrical grid and "commandeers" and "coerces" states and their officials and legislatures.[213] They argue that it does so even with the federal implementation plan option:[214]

> In order to pass constitutional muster, cooperative federalism programs must provide States with a meaningful opportunity to decline implementation. But the Rule does not do so; States that decline to take legislative or regulatory action to ensure increased generation by EPA's preferred power sources face the threat of insufficient electricity to meet demand. The Rule is thus an act of commandeering that leaves States no choice but to alter their laws and programs governing electricity generation and delivery to accord with federal policy.[215]

---

[205] *See id.* at 83-84.

[206] *See id.* at 87.

[207] *See id.* at 88 (citations omitted). In general, if there is a discrepancy between the *U.S. Statutes at Large* and the *U.S. Code*, the *U.S. Statutes at Large* is the controlling legal evidence of the law, unless Congress has enacted the relevant title of the *U.S. Code* as positive law; in that case, the *U.S. Code* is also legal evidence of the law. *See* 1 U.S.C. §§12, 204(a). Congress has not enacted the provisions in question as positive law, although there is a bill to do so in the 114th Congress: H.R. 2834 would codify certain laws currently in Title 42 of the *U.S. Code* relating to the environment, including CAA Section 111(d), as a positive law title, which would be a new Title 55 of the *U.S. Code*.

[208] *See* Cong. Br. Supp. EPA at 17-27. *See also, e.g.*, State and Mun. Int. Br. Supp. EPA at 29-33; Envtl. and Pub. Health Orgs. Int. Br. Supp. EPA at 20-27; Cong. CAA Staff Br. Supp. EPA at 24-29.

[209] *See e.g.* Andrew Childers, *Clean Power Plan Scrutinized Through Lens of Supreme Court*, BLOOMBERG BNA ENERGY & CLIMATE REP., September 27, 2016, http://www.bna.com/clean-power-plan-n57982077646. *See also* Ellen M. Gilmer, *supra* footnote 141; James W. Rubin, *supra* footnote 160.

[210] *See* Juan Carlos Rodriguez, *DC Circ. Puts Clean Power Plan Foes, Backers on Hot Seat*, LAW360, September 27, 2016, http://www.law360.com/articles/845363/dc-circ-puts-clean-power-plan-foes-backers-on-hot-seat.

[211] *See* James W. Rubin, *supra* footnote 160.

[212] *See generally* Pet'rs Br. Core Legal Issues at 78-86.

[213] *See generally id.* at 5-6, 78-86.

[214] *See generally id.*

[215] *Id.* at 5-6.

However, during the oral argument, some judges questioned whether the CPP was any different from other regulatory programs (such as the Americans with Disabilities Act) that impose certain provisions that require state action to implement.[216]

Additionally, in arguing that the court should apply a non-deferential "clear statement" standard of review, petitioners cite D.C. Circuit precedent that "'[f]ederal law may not be interpreted to reach' areas traditionally subject to State regulation 'unless the language of the federal law compels the intrusion' with 'unmistakably clear … language.'"[217]

Intervenors opposing the CPP expand on several constitutional arguments. In addition to federalism and Tenth Amendment claims,[218] they state that "EPA's attempts to justify the Rule … trigger a separation-of-powers violation by usurping both the Legislative Branch's lawmaking power and the Judicial Branch's power to 'say what the law is.'"[219] Constitutional arguments are also expanded on by the amici curiae Members of Congress,[220] and by several of the legal groups and other amici opposing the CPP.[221]

EPA, in contrast, defends the CPP as a "textbook example of cooperative federalism."[222] EPA provides, among other reasons, that states can opt to do nothing, in which case the federal plan option imposes no new regulatory obligations on states.[223] The state and municipal intervenors supporting EPA also support the CPP as a lawful implementation of EPA's obligations under the cooperative federalism structure of Section 111(d), saying, among other things, that "[t]he fact that state regulatory agencies will continue exercising their ordinary oversight over their electric utilities—including over decisions made by power plants to comply with a federal plan—does not mean the Rule commandeers States."[224]

Several amici also dispute constitutional claims against the CPP, including the former EPA Administrators, whose brief describes their view how the CPP fits within the cooperative federalism model.[225] The amici curiae Members of Congress supporting the CPP also counter separation of powers arguments, in part on the grounds that the CAA delegated discretion to EPA with "meaningful criteria" that EPA followed.[226]

---

[216] *See* James W. Rubin, *supra* footnote 160; Ellen M. Gilmer, *supra* footnote 141.

[217] *See id.* at 23 (quoting Am. Bar Ass'n v. FTC, 430 F.3d 457, 471-72 (D.C.Cir. 2005) (internal quotation marks omitted)).

[218] *See* Br. Intervenors Supp. Pet'rs at 31-38.

[219] *See id.* at 11-12; *see also id.* at 39-43 (arguing that "the purpose of the Constitution's structural divisions of power applies here with special force to prohibit executive overreach and protect individual liberties").

[220] *See* Cong. Br. Supp. Pet'rs at 13-25.

[221] *See, e.g.*, Se. Legal Found. Br. Supp. Pet'rs at 4-10; Pac. Legal Found. et al. Br. Supp. Pet'rs at 24-28; Nev. and Consumers' Res. Br. Supp. Pet'rs at 19-26 (arguing, *inter alia*, that the CPP "undermines democratic accountability").

[222] *See* EPA Br. at 98.

[223] *See generally id.* at 98-106.

[224] *See* State and Mun. Int. Br. Supp. EPA at 22, 8-25; *see also, e.g.*, Envtl. and Pub. Health Orgs. Int. Br. Supp. EPA at 19-20.

[225] *See* Fmr. EPA Admins. Br. Supp. EPA at 4, 18-31. *See also, e.g.*, Fmr. State Envtl. and Energy Officials Br. Supp. EPA at 18-23.

[226] *See* Cong. Br. Supp. EPA at 4-5; *see generally id.* at 8-14.

Other Arguments Regarding Federal and State Roles

Petitioners and their supporters also base federalism arguments on the text of the CAA.[227] As stated in the brief submitted by 166 business associations, "Section 111(b) grants EPA authority to establish 'standards of performance' for new stationary sources; but Section 111(d) grants the States authority to establish those standards for existing sources. By displacing the authority reserved to the States in setting standards of performance for existing sources … EPA has violated the statute's unambiguous terms."[228] In addition, as matter of federal law, in the words of the amici curiae brief filed by the Pacific Legal Foundation and others, "[s]ince at least 1964, the national electric power system has been characterized by a 'bright line' divide between federal authority over wholesale sales of power in interstate commerce, regulated by the federal government, and state authority over planning, siting, and providing generation resources to local customers."[229]

EPA counters, among other things, that it does have authority under Section 111(d) and its long-standing regulations[230] to establish a minimum level of stringency, and that the CPP still allows each state to set particular standards of performance for particular sources:

> Under Section 111(d) …, the agency promulgates "guidelines" for states to follow when submitting "satisfactory" plans establishing emission standards for existing sources. While it is the states' job to establish such standards, those standards must "reflect[]" the "degree of emission limitation achievable through the application of the [BSER] … *the Administrator* determines has been adequately demonstrated." 42 U.S.C. § 7411(a)(1) (emphasis added [in brief]).[231]

EPA and its supporters also argue, for example, that the CPP generally preserves the existing federal-state division of authority relating to the electrical grid.[232]

Specific Record-Based Challenges

Petitioners jointly submitted two briefs on the merits: the first on "core legal issues" such as those described above, and the second on "procedural and record based issues."[233] As summarized below, many issues within the latter set were also addressed by the amici curiae in support of petitioners. EPA and various of its supporters have largely disputed these procedural and record based challenges.

Achievability and Cost-Benefit Analysis

Petitioners maintain that EPA has not satisfied its legal burden to show that the BSER in the CPP, or its component building blocks, are "adequately demonstrated" or the resulting emission guidelines "achievable" as required under the definition of "standard of performance" in CAA

[227] *See generally* Pet'rs Br. Core Legal Issues at 74-78; Nev. and Consumers' Res. Br. Supp. Pet'rs at 7-19.

[228] *See* 166 Bus. Ass'ns Br. Supp. Pet'rs at 11.

[229] Pac. Legal Found. Br. Supp. Pet'rs at 5; *see also id.* at 25-26 (citing FPC v. S. Cal. Edison Co., 376 U.S. 205, 215-16 (1964)).

[230] *See* 40 C.F.R. pt. 60, subpt. B.

[231] *See* EPA Br. at 73-74.

[232] *See, e.g., id.* at 55-60, 68-76; State and Mun. Int. Br. Supp. EPA at 8-17, 33-35; Fmr. State Envtl. and Energy Officials Br. Supp. EPA at 18-23.

[233] Pet'rs Br. Core Legal Issues; Pet'rs Br. Proc. and R. Issues.

Section 111(a)(1).[234] They also argue that EPA failed to account sufficiently for reliability of the electrical grid or for the need to build new infrastructure, such as transmission lines.[235] In addition, the petitioners oppose EPA's cost-benefit analysis for the Rule as "fundamentally flawed."[236]

As a legal matter, they urge that the potential for states to opt for a multi-state emission credit trading program to meet plan requirements cannot "save" the Rule from these alleged deficiencies in achievability.[237] Petitioners contend that achieving the required emission reductions is an "impossible task" for states.[238] To support this argument, petitioners submitted a letter to the court on September 23, 2016 (four days before the oral argument), citing California's proposed state plan to implement the CPP that would limit trading to states that had plans as stringent as California's requirements.[239] They claim that the proposed California plan that limits its carbon trading program may prevent robust trading systems from developing and shows that EPA has not demonstrated that states such as Montana, Kentucky, North Dakota, and West Virginia will be able to meet their reduction goals within their own borders.[240] When petitioners raised the proposed California trading program during the oral argument, the judges noted that California's plan was still in the proposal phase and questioned whether these issues should be deferred until states experience such difficulties during planning and implementation.[241]

A number of amici support these general arguments. For example, the brief of the 166 state and local business associations objects that the CPP would result in "devastating economic costs" and "decimate[]" some areas' employment and tax bases by raising costs of operation for American enterprise."[242] Groups representing women, minorities, and seniors, as well as taxpayers, allege that price increases resulting from coal-fired power plant closures and new infrastructure and efficiency requirements would most heavily impact disadvantaged groups.[243] Pedernales Electric Cooperative, which describes itself as "the largest non-profit electric distribution cooperative in the United States," frames the CPP's time frame as "unrealistic" and says that the CPP will have negative impacts on planning, reliability, and security,[244] concerns echoed by the Municipal Electric Authority of Georgia (MEAG).[245] MEAG also describes that it is subject to irrevocable long-term contracts based on specific power plants that will continue to impose payment obligations irrespective of the CPP, and says that adding on new contracts would force its communities to "pay[] twice" for electricity, resulting in negative environmental justice impacts.[246]

---

[234] *See generally* Pet'rs Br. Proc. and R. Issues at 17-55.

[235] *See id.* at 38-47.

[236] *See id.* at 69-71.

[237] *See id.* at 49-53.

[238] *See id.* at 53-55.

[239] *See* Letter of State Pet'rs, West Virginia v. EPA, No. 15-1363 (D.C. Cir. filed September 23, 2016) (filed pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure).

[240] *See id.* at 2.

[241] *See* Emily Holden & Debra Kahn, "Clean Power Plan: Inside the Judges' Questions on Carbon Trading," E&E News, September 29, 2016, http://www.eenews.net/stories/1060043590.

[242] *See* 166 Bus. Ass'ns Br. Supp. Pet'rs at 12-13.

[243] *See* 60Plus Ass'n et al. Br. Supp. Pet'rs at 4-11.

[244] *See* Pedernales Br. Supp. Pet'rs at 6, 17; *see generally id.* at 10-30.

[245] *See* MEAG Br. Supp. Pet'rs at 13-21.

[246] *See id.* at viii, 2, 14-18.

EPA responds that it identified an achievable degree of emission limitation by applying the best system, framing its modeling and other analysis as reasonable and its estimates as conservative.[247] EPA spends a substantial portion of its brief walking through its data and approach and working to counter petitioners' factual claims on those points.[248] It also argues, among other things, that it was not required to perform individual plant achievability analyses.[249] EPA states that achieving the emission rates would not require trading, though its analysis in the record demonstrates that trading programs are likely to be established.[250] EPA also contends that it reasonably considered costs, infrastructure, and grid reliability, including specific concerns raised by rural cooperatives and others, and that it reasonably calculated and confirmed all of the state-specific goals.[251] EPA cites extensively to its Rule preamble and technical supporting documents in the rulemaking docket.[252]

Intervenors and amici supporting EPA expand on these arguments relating to the achievability of the emission standards and the evidentiary basis for the BSER. Power companies, including cities doing business through their utilities, maintain that EPA appropriately considered the availability of emissions credit trading programs, and deny that the Rule would impair electric reliability in light of the "tremendous flexibility" provided to states and power companies.[253] Environmental and public health organizations also emphasize what they characterize as the "wide array of flexible compliance options,"[254] and explain their view that EPA reasonably applied the statutory factors to determine the degree of emission limitation required.[255] A coalition of wind, solar, and other advanced energy associations spends much of its brief arguing that "[t]he record demonstrates that EPA's determination of the [BSER], and the Building Blocks in particular, was eminently reasonable,"[256] and that EPA reasonably considered other aspects of achievability.[257] Comparable arguments are set forth in briefs submitted by, among others, former state environmental and energy officials.[258] One brief, submitted by a trio of consumers' groups, aims to rebut empirical claims by petitioners and their amici regarding electricity costs, saying that consumer costs would not meaningfully increase and that, rather, the CPP would *reduce* electricity costs by improving efficiency.[259]

---

[247] *See generally* EPA Br. at 117-64.

[248] *See generally id*.

[249] *See id.* at 142.

[250] *See id.* at 142-46.

[251] *See id.* at 148-74.

[252] *See generally id.* at 117-74 (citing, *inter alia*, Clean Power Plan Final Rule, *supra* footnote 2; EPA, *EPA's Responses to Public Comments on the EPA's Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units* ("Response to Comments") (August 2015), *available at* https://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-37106.

[253] *See* Power Cos. Int. Br. Supp. EPA at 9-14. One utility in particular, Dominion Resources, Inc., in its separate *amici curiae* brief, particularly emphasized the need for flexibility—including emissions trading and averaging approaches—for the CPP to be achievable. *See* Dominion Br. Supp. EPA at 4, 7-17.

[254] *See* Envtl. and Pub. Health Orgs. Int. Br. Supp. EPA at 19-20.

[255] *See id.* at 6-10.

[256] *See* Advanced Energy Ass'ns Int. Br. Supp. EPA at 1.

[257] *See id.* at 4-17.

[258] *See generally* Fmr. State Envtl. and Energy Officials Br. Supp. EPA.

[259] *See generally* Consumer and Ratepayer Orgs. Br. Supp. EPA at 3-31. For more information on the implications of the CPP on electric power system reliability, the costs of electric power to customers, and the future structure of the electric utility industry which could result from implementation of state compliance plans, *see* CRS Report R44265, *EPA's Clean Power Plan: Implications for the Electric Power Sector*, by Richard J. Campbell.

State-Specific Objections to Aspects of the CPP

Petitioners contend that the CPP should have been tailored to individual state circumstances. Wisconsin challenges EPA's calculation of its baseline emissions in light of the imminent retirement of a nuclear plant;[260] Arizona and Utah raise issues regarding EPA's accounting for trading between those states and Indian tribes;[261] New Jersey argues that EPA failed to property take into account its deregulation of energy services;[262] North Carolina argues that EPA arbitrarily excluded its emission reductions from consideration;[263] Wyoming charges that EPA ignored its "unique circumstances";[264] and Utah argues that the CPP "would cause particular harm" to that state.[265]

EPA generally counters these arguments one by one in its brief, saying overall that it reasonably calculated all state-specific goals and determined that all states would be able to develop compliant plans.[266] EPA also states that it reasonably determined that pre-2013 generating facilities could not provide emission-rate credits.[267]

During the oral argument, the judges suggested that these issues may be premature and that states will have future opportunities to seek judicial review if the reduction targets prove to be unachievable.[268]

Industry-Specific Objections to Aspects of the CPP

A number of claims pertain primarily to certain industry sectors or subsectors. For example, petitioners claim that in the CPP, EPA "ignores" large parts of the nation's electrical system: "existing renewable energy, nuclear generation that provides approximately 20% of the nation's power with zero emissions, hydroelectric generation that supplies the majority of electricity in many regions of the country, co-generation units, and waste-to-energy facilities with very low carbon footprints."[269] As a result, they say, EPA has "failed to consider an important aspect of the problem."[270] They also object to what they characterize as the Rule's limitations on the use of enhanced oil recovery that also results in associated CO_2 storage,[271] and its lack of different emission guidelines or compliance times for lignite coal-fired power plants.[272]

EPA, in response, cites to the record and argues, among other things, that it adequately explained its treatment of hydropower, nuclear plants, and waste-to-energy facilities.[273] EPA also insists that its limitations and reporting requirements for enhanced oil recovery are reasonable and do not

---

[260] *See* Pet'rs Br. Proc. and R. Issues at 72-73.

[261] *See id.* at 73-75.

[262] *See id.* at 80-82.

[263] *See id.* at 82-84.

[264] *See id.* at 75-77.

[265] *See id.* at 77-80.

[266] *See* EPA Br. at 164-74.

[267] *See id.* at 164-67.

[268] *See* James W. Rubin, *supra* footnote 160; Ellen M. Gilmer, *supra* footnote 141.

[269] *See* Pet'rs Br. Proc. and R. Issues at 56-57 (internal footnote omitted).

[270] *See id.* at 58 (quoting Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

[271] *See id.* at 64.

[272] *See id.* at 67.

[273] *See, e.g.*, EPA Br. at 164-68.

change an oil recovery well's permitting status,[274] and that it reasonably determined that no other subcategories of sources were necessary.[275]

In addition to issues raised in the briefing in *West Virginia v. EPA*, several other petitions for review brought by entities including the National Alliance of Forest Owners, Biogenic CO_2 Coalition, American Forest & Paper Association, and American Wood Council are, at the request of the petitioners and EPA, being held in abeyance pending potential administrative resolution of biogenic GHG emissions issues in the CPP.[276]

Procedural Challenges

Some challengers have disputed the adequacy of certain other procedural aspects of the issuance of the Rule under the CAA and the Administrative Procedure Act.[277] Petitioners charge that the final CPP "could not have been divined from its proposal,"[278] and that "[b]y departing so radically from that proposal, EPA promulgated a Rule on which the public had no opportunity to comment."[279]

EPA maintains that the final CPP is a logical outgrowth of the proposal and comments, and that EPA properly followed all other procedural requirements.[280] EPA, moreover, criticizes petitioners and others for referencing sources and documents that were not made a part of the rulemaking record.[281]

Similar to the state-specific record-based issues discussed above, the judges during oral argument questioned whether the notice issue was ripe for review because petitioners' administrative petitions for review were still pending before EPA.[282] Petitioners argued that EPA had effectively denied their administrative petitions when the agency in its brief argued that it had given adequate notice.[283]

---

[274] *See id.* at 163.

[275] *See id.* at 159-60.

[276] Order, West Virginia v. EPA (D.C. Cir. January 21, 2016) (holding in abeyance Nat'l Alliance of Forest Owners v. EPA, No. 15-1478; Biogenic CO2 Coalition v. EPA, No. 15-1479; and Am. Forest & Paper Ass'n, Inc. and Am. Wood Council v. EPA, No. 15-1485). For more information on the potential interactions between the CPP and biomass energy, see CRS Report R41440, *Biopower: Background and Federal Support*, by Kelsi Bracmort, and CRS Report R41603, *Is Biopower Carbon Neutral?*, by Kelsi Bracmort.

[277] *See, e.g.*, Pet'rs Br. Proc. and R. Issues at 11, 13-15 (citing CAA §307(d)(3), 42 U.S.C. 7607(d)(3)). In addition, Petitioner Energy & Environment Legal Institute (EELI) attempted to file a "Supplement to Brief of Petitioners on Procedural and Record-Based Issues" arguing that "EPA violated [CAA procedures and] the procedural due process rights of those affected by failing to place in the public docket during the notice and comment period documents showing substantial *ex parte* contacts which formed the basis of the agency action," based on certain communications between EPA personnel and environmental groups. EELI Br. at 1, 2-5. EPA objected, and the court denied EELI's motion for leave to file the separate supplement. Order, West Virginia v. EPA (D.C. Cir. March 21, 2016) (per curiam).

[278] *See* Pet'rs Br. Proc. and R. Issues at 11, 16.

[279] *See id.* at 11.

[280] *See* EPA Br. at 29, 107-16. For more information on similarities and differences between the proposal and the final CPP, *see* CRS Report R44145, *EPA's Clean Power Plan: Highlights of the Final Rule*, by Jonathan L. Ramseur and James E. McCarthy.

[281] *See, e.g.*, EPA Br. at 40, 137-38, 157-58 (citing CAA Section 307, 42 U.S.C. §7607(d) (review limited to record)).

[282] *See* James W. Rubin, *supra* footnote 160; Ellen M. Gilmer, *supra* footnote 141.

[283] *Id.*

Selected Additional Factual and Policy Issues Briefed by Amici Curiae

Finally, in addition to the many arguments made by the parties to the case, points raised in the briefs of amici curiae expand on the parties' arguments and bring other issues, perspectives, and facts to the court's attention. Again, this report does not aim to provide a comprehensive or representative preview of the many legal and factual claims in the CPP litigation. The many points raised by amici include, but are not limited to, the following points, which—like those previously discussed—have been highly condensed from their original forms.[284]

Supporting Petitioners

- The Pacific Legal Foundation and allies claim that EPA failed to make the required endangerment finding under CAA Section 111 and that EPA could not rely on the endangerment finding that it made in 2009 in the context of motor vehicles.[285] They also insist that if EPA is to regulate GHGs, it may only do so through NAAQS under CAA Section 108, "the regulatory path Congress prescribed for air pollutants in the 'ambient air' emitted from 'numerous or diverse' sources."[286]
- Groups representing seniors, minorities, and women argue, among other things, that "EPA's plans to incentivize investment in low-income communities will do nothing to help those facing immediate increases in electricity rates."[287]
- A group of 13 scientists submitted a brief contending that the lines of evidence cited by EPA in support of its scientific conclusions on the dangers of GHGs and climate change have been "definitively invalidated by real world empirical temperature data,"[288] and that EPA's Social Cost of Carbon analysis is "nonsense that no rational person would use for public policy."[289]

Supporting Respondents

- Former officials Madeleine K. Albright, Leon E. Panetta, and William J. Burns[290] assert that the CPP is "integral to continued U.S. leadership in the fight against climate change," having inspired other countries' commitments to emission reductions,[291] and that "global warming is a national security issue."[292] A brief of the Union of Concerned Scientists argues that the CPP "plays a key role in the worldwide implementation of the breakthrough Paris Agreement."[293]

---

[284] As noted above, this report does not include arguments in petitioners' and their supporters' reply briefs.

[285] *See* Pac. Legal Found. et al. Br. Supp. Pet'rs at 20-24.

[286] *See id.* at 10-15.

[287] *See* 60Plus Ass'n et al. Br. Supp. Pet'rs at 14-16.

[288] *See* Scientists Br. Supp. Pet'rs at 3.

[289] *See id.* at 2.

[290] Madeleine K. Albright served as the Secretary of State from 1997 to 2001 and as U.S. Permanent Representative to the United Nations from 1993 to 1997. Leon E. Panetta served, *inter alia*, as Secretary of Defense for the United States from 2011 to 2013 and director of the Central Intelligence Agency from 2009 to 2011. Career Ambassador William J. Burns served, *inter alia*, as Deputy Secretary of State from 2011 to 2014.

[291] *See* Fmr. Dep't of State and Def. Officials Br. Supp. EPA at 10-11.

[292] *See id.* at 11-14.

[293] *See* UCS Br. Supp. EPA at 14, 14-27.

- Technology companies Amazon.com, Inc., Google Inc., Microsoft Corp., and Apple Inc. (for which former EPA Administrator Lisa P. Jackson is now Vice President of Environmental Initiatives)[294] submitted a brief arguing that the CPP "will help Tech Amici—and countless other companies—power their operations in ways consistent with their environmental commitments and business needs."[295] Several other consumer brand companies also highlight their environmental commitments and state that they would face "economic and social disruptions as a direct result of inaction on regulating power plant emissions."[296]
- Forty-one Christian and Jewish faith groups provided a brief asserting "a moral imperative to protect the Earth and all its inhabitants from a climate crisis of our own making."[297]
- A group of 20 scientists submitted a brief regarding the science of climate change, its impacts (particularly in the United States), and the contribution by combustion of fossil fuels.[298] A coalition of public health groups filed another brief arguing that climate change, "caused by utility sector carbon emissions, has adverse human health impacts," especially on vulnerable populations, in light of impacts on heat, ozone, particulate matter, pollen, and microbial hazards.[299]

Taken together, the briefs in the CPP litigation touch on not only legal and technical issues under CAA Section 111 and administrative law principles, but also broader policy debates regarding the environment, the economy, and governance.

Next Steps in *West Virginia v. EPA*

As noted above, oral argument was held on September 27, 2016.[300] As a practical matter, the court may take some months after oral argument to issue a decision.

Once the D.C. Circuit issues a judgment, a dissatisfied party may seek Supreme Court review.[301] Because of the high stakes of the case and because whichever side is dissatisfied with the result is likely to appeal (and indeed, parties from both sides could file cross-appeals of different aspects of the decision), the case is widely considered a near certainty to reach the Supreme Court, most likely in 2017 or 2018.[302] The D.C. Circuit's decision to hear the case en banc in the first instance

---

[294] Apple, Press Info, Apple Leadership: Lisa Jackson, http://www.apple.com/pr/bios/lisa-jackson.html (last visited April 13, 2016).

[295] *See* Tech. Br. Supp. EPA at 3; *see generally id*.

[296] *See* Adobe, Mars, Ikea, BCBS Br. Supp. EPA at 3, 6; *see generally id.* at 16-24.

[297] *See* Faith Grps. Br. Supp. EPA at 2.

[298] *See generally* Climate Scientists Br. Supp. EPA.

[299] *See* Med. and Pub. Health Groups Br. Supp. EPA at 4; *see generally id*.

[300] Order at 2, West Virginia v. EPA, No. 15-1363 (D.C. Cir. May 16, 2016).

[301] *See Rules of the Supreme Court of the United States*, R. 10-14 (2013).

[302] *See, e.g.*, Sidley Austin LLP, White Paper, EFFECT OF SUPREME COURT STAY ON CLEAN POWER PLAN DEADLINES (2016), *available at* http://www.chamberlitigation.com/sites/default/files/scotus/files/2016/White%20Paper%20on%20Impact%20of%20Stay%20on%20CPP%20Deadlines.pdf (predicting time frame for Clean Power Plan litigation after Supreme Court stay and arguing for tolling of all CPP deadlines for the length of the duration of the litigation if the Rule is upheld); James W. Rubin, *Clean Power Plan Finally Has Its Day In Court—Now What?* LAW360, October 1, 2016, https://www.law360.com/environmental/articles/847138/clean-power-plan-finally-has-its-day-in-court-now-what- (projecting that the case may "not be heard [by the Supreme Court] until fall of 2017 or even later. Legal uncertainty thus could continue into 2018.").

could potentially streamline the litigation and hasten Supreme Court review somewhat, relative to the initial and ordinary schedule in which a case must first be decided by a three-judge panel before any petitions may be filed for rehearing of the panel decision en banc.

North Dakota v. EPA: Section 111(b) Litigation

In addition to the direct legal challenge to the CPP rule for CO_2 from existing power plants under CAA Section 111(d), 25 states—led by North Dakota and West Virginia—have filed petitions in the D.C. Circuit challenging EPA's final NSPS rule for CO_2 from new, modified, and reconstructed power plants under CAA Section 111(b), which it calls the "Carbon Pollution Standards."[303] The states have been joined by other petitioners including a labor union, a rural electric cooperatives association, several other fossil-fuel-related companies and utilities, and several industry and trade groups; most of the petitioners overlap with those who also filed challenges to the CPP, although there are somewhat fewer petitioners challenging the NSPS. The petitions have been consolidated under the case caption *North Dakota v. EPA*.[304] Most of the states and a number of the nonprofit organizations that intervened in support of EPA in the CPP case also intervened in the NSPS challenge in support of EPA.[305]

In the Section 111(b) litigation, one of the primary issues is EPA's establishment of standards of performance based on technologies including carbon capture and sequestration/storage (CCS).[306] Natural gas plants and modified coal plants can reach the final NSPSs with efficient generation technology, but new coal plants would need to implement partial CCS.[307] Critics of the NSPSs for power plants say, for example, that CCS technology is not yet commercially available nor fully technically feasible, and therefore that it is not "adequately demonstrated" or the "best system" under Section 111(b).[308] They also argue that EPA improperly relied on separate demonstrations of individual components of the technology, and that the NSPSs are otherwise arbitrary, capricious, an abuse of discretion, contrary to law, or unconstitutional.[309] EPA, in the Section 111(b) final rule's preamble, argued that its Carbon Pollution Standards were reasonable and

[303] *See generally* docket for North Dakota v. EPA, No. 15-1381 (D.C. Cir. filed October 23, 2015); Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64,510 (October 23, 2015) (hereinafter "NSPS Final Rule"). As with the CPP litigation, several websites have been maintaining compilations of major filings and orders in the case, including the Chamber of Commerce of the United States, a petitioner, at its *U.S. Chamber Litigation Center*, http://www.chamberlitigation.com/chamber-commerce-et-al-v-epa-nsps-rule; and the Environmental Defense Fund, an intervenor in support of EPA, at its *Clean Power Plan Case Resources* website at https://www.edf.org/climate/clean-power-plan-case-resources (tab for "111(d)"). Colorado and New Jersey did not join the coalition of states challenging the NSPS rule.

[304] *See generally* docket for North Dakota v. EPA, *supra* footnote 303.

[305] *See id.*

[306] *See, e.g.*, Chamber of Commerce of the United States of America, et al., Pet'rs Prelim. Stmt. of Issues to be Raised, North Dakota v. EPA, Nos. 15-1381, 15-1469 (D.C. Cir. filed January 25, 2016) ("Chamber of Commerce Stmt. of Issues"); Murray Energy Corp., Stmt. of Issues to be Raised, North Dakota v. EPA, Nos. 15-1381, 15-1396 (D.C. Cir. filed December 2, 2015) ("Murray Energy Stmt. of Issues").

[307] *See* NSPS Final Rule, *supra* footnote 303, 80 Fed. Reg. at 64,513-14, 64,543-97.

[308] *See generally, e.g.*, Chamber of Commerce Stmt. of Issues; Murray Energy Stmt. of Issues.

[309] *See, e.g.*, Chamber of Commerce Stmt. of Issues; Murray Energy Stmt. of Issues; *see also, e.g.*, Energy & Env't Legal Inst., Pet'r Stmt. of Issues to Be Raised, at 3, North Dakota v. EPA, Nos. 15-1381, 15-1397 (D.C. Cir. filed December 2, 2015) (raising issue that "the Final Rule creates an unconstitutional taking of property interests that can be avoided by an interpretation that is more consistent with the plain text of the rule and more consistent with past practice").

lawful.[310] EPA provided rationales for basing the standard for new coal plants on partial CCS: It explained technical configurations and operational flexibilities that may be available; worked through its analyses of feasibility, cost, and other criteria; and discussed "alternative compliance options that new source project developers can elect to use, instead of … partial CCS, to meet the final standard of performance."[311]

In addition to the D.C. Circuit litigation, petitions were filed before EPA seeking administrative reconsideration of the NSPS rule; EPA denied the petitions in May 2016. The D.C. Circuit suspended the briefing schedule in the *North Dakota v. EPA* case in June 2016 to allow the court to consolidate new lawsuits filed challenging EPA's denial of the petitions. On August 30, 2016, the court issued a revised briefing schedule to begin on October 13, 2016, with opening briefs and conclude by February 6, 2017.[312] The court has scheduled oral arguments for April 17, 2017.

As noted above, the finalization of NSPSs for new air pollutant sources under Section 111(b) of the CAA is a prerequisite for the use of authority under Section 111(d) to regulate existing sources, so this litigation could threaten EPA's basis for the CPP.[313] Thus, regardless of the outcome of *West Virginia v. EPA*, the litigation in *North Dakota v. EPA* potentially could impact the CPP as well.

Author Information

Linda Tsang
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.

[310] *See generally* NSPS Final Rule, *supra* footnote 303.

[311] *Id*., 80 Fed. Reg. at 64547-48; *see generally id.* at 64,547-97.

[312] *See* Order, North Dakota v. EPA, No. 15-1381 (D.C. Cir. August 30, 2016).

[313] *See supra*, "Clean Air Act Section 111."