



ISSUE BRIEF

WHAT TO EXPECT IN CLEAN POWER PLAN LITIGATION

Rising sea levels. Raging storms. Searing heat. Ferocious fires. Severe drought. Punishing floods. These are the consequences of the carbon pollution that is changing our climate. They threaten our health, our security, and our economy more every day, and they call us, as Americans, to take action to stave off even worse climate disruption for our children and grandchildren.

President Obama has responded by directing the Environmental Protection Agency to establish standards under the Clean Air Act setting the first limits on carbon pollution from existing and future power plants. This rulemaking, known as the Clean Power Plan, is the single biggest step our country has ever taken to address climate change.

It will come as no surprise that polluters and their allies will challenge these clean air standards in court when the EPA finalizes them this summer. Polluters bring legal challenges virtually every time our government uses the Clean Air Act—passed by a bipartisan Congress and signed by President Nixon—to protect public health and our environment. For 45 years the EPA has prevailed in most of these legal cases, and the Natural Resources Defense Council believes that the EPA will prevail again when courts consider the Clean Power Plan.

This issue brief outlines what can be expected from the litigation that is likely to begin the day the Clean Power Plan is finalized. It describes the process, the rules that govern which court can hear which cases, and some of the key issues likely to be raised. It addresses these questions:

- Where and when can legal challenges to the Clean Power Plan be brought, and on what timetable are such cases likely to proceed?
- What will challengers have to show to get a stay (suspension) of implementation of the Clean Power Plan while the litigation proceeds?

- What are the main issues challengers will raise on the merits, and what are the principal responses?
- What is the likelihood the Clean Power Plan will eventually be reviewed by the U.S. Supreme Court?

In short, there is likely to be litigation over the Clean Power Plan as with other major Clean Air Act standards. Polluters and their allies shouldn't be able to delay the Clean Power Plan just by filing court cases. Our country needs to join the global fight to curb climate change now.

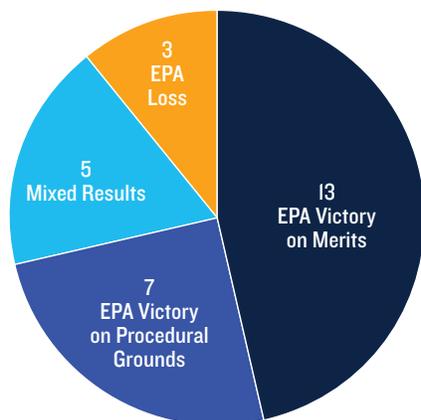
INTRODUCTION

On August 3, 2015, the United States Environmental Protection Agency (EPA) issued the final Clean Power Plan (CPP), a major initiative to cut carbon pollution significantly from U.S. power plants. The Plan establishes emissions guidelines for existing power plants under Section 111(d) of the Clean Air Act, under which states will write plans setting enforceable limits on the plants' carbon pollution.¹ The EPA also finalized another rule establishing carbon pollution standards for new and modified power plants under Section 111(b) of the Act.² A myriad of coal companies, power companies, conservative states, and ideological groups are expected to challenge the two final rules in the U.S. Court of Appeals for the District of Columbia Circuit (the D.C. Circuit) when they are published in the Federal Register in October. Also on August 3rd, the EPA proposed the elements of a federal plan to regulate power plants directly in any state that chooses not to write a satisfactory plan of its own.³ The proposed federal plan is open for public comment; lawsuits over the federal plan must wait for it to be finalized.

It is impossible to predict the outcome of the coming litigation with certainty, but two factors suggest that the courts will ultimately uphold the carbon pollution standards. First, the EPA has an excellent track record in clean air cases. In recent years, in both the Supreme Court and the D.C. Circuit, the agency has won important victories concerning interstate air pollution,⁴ greenhouse gas permitting requirements for new and modified industrial facilities,⁵ greenhouse gas standards for cars,⁶ and greenhouse gas standards for heavy-duty vehicles.⁷

According to a rough NRDC analysis of rules promulgated during the Obama administration, polluting industries have lost outright approximately 70 percent of their legal challenges to clean air standards. Counting partial losses, industries have lost about 90 percent of their clean air challenges.⁸

FIGURE 1: INDUSTRY CHALLENGES TO EPA CLEAN AIR STANDARDS, 2010 TO 2015



Source: NRDC Analysis

Even where the EPA has lost, courts have issued narrow rulings that have allowed the agency to move forward with its clean air initiatives. For example, in *Michigan v. EPA*, decided in June 2015, the Supreme Court concluded that the EPA's justification for its rule governing mercury and toxic pollution from power plants was flawed because it did not specifically address costs at the initial stage of the rulemaking process.⁹ Notably, the Supreme Court did not block the standards for mercury and other air toxics (MATS), but simply remanded the case to the D.C. Circuit for further consideration. Given that the EPA has already determined that the benefits of the mercury standards greatly exceed the costs, it should have little difficulty fixing the problem identified by the Court. (In any case, the Supreme Court's MATS decision should not affect the Clean Power Plan because the statutory provisions differ, and the EPA is already explicitly considering the costs and benefits of the Clean Power Plan.)

PROCEDURE FOR JUDICIAL REVIEW OF CLEAN AIR RULES

The Clean Air Act provides that any challenge to the EPA's carbon pollution standards must be filed in the D.C. Circuit no later than 60 days after the rule is published in the *Federal Register*, and no earlier than the publication date.¹⁰ Challenges must be brought in the D.C. Circuit because the EPA's Clean Power Plan sets standards "of national applicability."¹¹

Some litigants have already filed cases too soon and in the wrong court. The CPP's opponents have candidly admitted that their goal is to bring a barrage of litigation to "gum up the works" for EPA, and already they have put this strategy into effect by bringing eight premature challenges to the power plant proposals. (All eight were rejected by federal courts).^{12,13} They may also attempt to sue outside the D.C. Circuit (as they have on prior occasions, without success).¹⁴ The only apparent purpose of these procedurally defective lawsuits is to drum up media attention or score political points.

MOTIONS TO STAY

Some litigants will likely move for a stay of the CPP—that is, a court order that temporarily suspends a rule until the Court reaches a decision on the merits.¹⁵ These motions will initiate the first round of CPP litigation.

Stays are rarely granted. Courts consider a stay "an intrusion into the ordinary process of administration and judicial review" and grant them only under extraordinary circumstances.¹⁶ To obtain a stay, a litigant must demonstrate that:

1. the litigant is likely to succeed on the merits;
2. absent a stay, the litigant will suffer irreparable harm in the time it takes to decide the case on a normal schedule;
3. a stay would not substantially injure other parties to the case; and
4. a stay would serve the public interest.¹⁷

It will be particularly difficult for opponents of the Clean Power Plan to show irreparable injury in the roughly one-year time frame necessary to decide the case on a normal schedule. Power companies, for example, won't have compliance obligations for several years. States are unlikely to succeed by claiming that writing a state plan is an irreparable harm, especially because they have the right to refuse to write a plan and to leave it to EPA to regulate power plants directly.

It will likely take several months for stay motions to be filed, briefed, and decided by the Court. The Court is likely to set a schedule that allows the EPA and its supporters—including states, businesses, and nongovernmental organizations—the opportunity to respond to all the stay motions at once. The challengers then get an opportunity to reply. Motions for stay are generally decided by a “motions panel” of three judges. After the motions panel rules, the litigation will move to briefing on the merits, generally before a different panel of D.C. Circuit judges.

MERITS LITIGATION

After the Court decides whether to stay the CPP, it will order briefing on the merits. The Court will establish a briefing schedule, including deadlines for challengers to submit their opening brief, for the EPA and its supporters to submit a response, and for the challengers to submit a reply. After all of the briefing is complete, the Court will hear oral arguments and then the Court will render a decision on every challenge leveled against the CPP. This entire process will likely take until the middle of 2016.

Polluters and their allies will probably advance several types of argument to try to persuade the Court to block the carbon pollution standards.

- First, they will argue that the Clean Air Act or parts of the CPP violate the U.S. Constitution. Constitutional challenges to previous Clean Air Act standards have never yet succeeded. For example, the state of Texas has argued on multiple occasions that the Clean Air Act violates the Constitution's prohibition on “commandeering” states to perform federal regulatory functions. Because states can refuse to write state plans, and leave it to the EPA to regulate polluters directly, the D.C. Circuit rejected Texas's argument in 2013 and again in 2014.^{18,19}
- Second, opponents are very likely to argue that the EPA lacks authority under the Clean Air Act to adopt the CPP. One line of argument, previewed in the premature *Murray Energy Corp. v. EPA* litigation, is that the EPA cannot set standards for power plants' carbon pollution under Section 111(d) because it has taken steps to curb their mercury pollution under a different provision of the Act, Section 112. This argument makes no practical sense, contradicts the structure of the Act, and requires that the Court ignore clear language adopted in the 1990 Clean Air Act amendments.

- Another likely argument is that the EPA lacks authority to consider measures such as renewable energy generation and when establishing standards for power plants. Many states and power companies want to use these indisputably effective measures as CPP compliance techniques. Nevertheless, they argue that the EPA cannot consider the reductions achievable from these measures when establishing the standards they have to meet. That's like a golfer who wants to set his handicap by playing a round of golf with one club, but then to use all the clubs in the bag when playing against his handicap. Although opponents argue that the EPA may not consider actions that take place “beyond the fence line” of the power plant, the agency has in fact previously set standards that incorporate pollution reduction measures that occur beyond the power plant.²⁰

On legal interpretation questions like these, the courts give the EPA substantial leeway (deference), under a case called *Chevron v. NRDC*.

- Finally, opponents will argue that one or more of the EPA's factual determinations are “arbitrary and capricious”—i.e., so clearly mistaken that they must be overturned. For example, they may quarrel with the EPA's factual conclusions concerning how much carbon reduction can be accomplished by making power plants more efficient, by shifting to cleaner forms of generation, or by making homes and commercial buildings more energy efficient. It is difficult for litigants to prevail on such arguments because courts properly grant agencies like the EPA substantial deference when evaluating the kind of scientific and technical questions at issue in the CPP.

REHEARING AND THE ROLE OF THE SUPREME COURT

Once the D.C. Circuit panel issues its merits opinion, the losing parties will have the option of seeking a rehearing of the case by the same panel or a review before all of the judges on the D.C. Circuit (called an *en banc* review). The defeated parties may also ask the Supreme Court to review the decision directly or after a rehearing. If the Supreme Court decides to hear the case, review of the CPP would likely be completed in 2017 or 2018.

CONCLUSION

All indications point toward litigation over the CPP, which might not wrap up until 2017 or 2018. Given the EPA's excellent track record in court and the significant agreement among experts that the CPP as proposed is reasonable and lawful, the odds strongly favor the EPA. Thus, it would be wise for states and utilities to begin preparing to implement the Clean Power Plan now, and not to wait for a final judicial decision, since such a decision will likely uphold the carbon pollution limits.

ENDNOTES

- 1 U.S. Environmental Protection Agency (hereinafter “US EPA”), “Clean Power Plan for Existing Power Plants,” Aug. 3, 2015, <http://www2.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants#CPP-final>.
- 2 U.S. EPA, “Carbon Pollution Standards for New, Modified and Reconstructed Power Plants,” Aug. 3, 2015, <http://www2.epa.gov/cleanpowerplan/carbon-pollution-standards-new-modified-and-reconstructed-power-plants>.
- 3 U.S. EPA, “Proposed Federal Plan for the Clean Power Plan,” Aug. 3, 2015, <http://www2.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants#federal-plan>.
- 4 See *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014).
- 5 See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2448 (2014) (holding that EPA correctly determined that new and modified stationary sources should be subject to “best available control technology” for their GHG emissions).
- 6 See *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 126 (D.C. Cir. 2012).
- 7 See *Delta Const. Co. v. EPA*, 783 F.3d 1291, 1293 (D.C. Cir. 2015).
- 8 NRDC, “Litigation Challenges to EPA Clean Air Act Rules,” July 2015, <http://www.nrdc.org/air/clean-power-plan/files/CAA-rules-and-litigation-table.pdf>.
- 9 *Michigan v. EPA*, 576 U.S. (2015).
- 10 42 U.S.C. § 7607(b) (“A petition for review of action of the Administrator in promulgating . . . any standard of performance or requirement under section [1] . . . may be filed only in the United States Court of Appeals for the District of Columbia . . . Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register . . .”).
- 11 *Ibid.*
- 12 The eight unsuccessful cases are: *Las Brisas Energy Ctr., LLC v. EPA*, No. 12-1248, 2012 WL 10939210 (D.C. Cir. Dec. 13, 2012); *Nebraska v. EPA*, 4:14-cv-3006, 2014 WL 4983678 (D. Neb. Oct. 6, 2014); *In re: Murray Energy Corp.* (consolidated with *Murray Energy Corp. v. EPA and West Virginia v. EPA*), 788 F.3d 330 (D.C. Cir. 2015) (rehearing en banc denied Sept. 29, 2015); *Oklahoma v. McCarthy*, 2015 WL 4414384 (D. Okla., dismissed, Jul. 17, 2015), injunction pending appeal denied (10th Cir., Aug. 8, 2015); *In re: State of West Virginia and Peabody Energy Corp. v. EPA*, Nos. 15-1277 & 15-1284 (D.C. Cir., petitions denied, Sept. 9, 2015).
- 13 *Las Brisas Energy Ctr., LLC v. EPA*, No. 12-1248, 2012 WL 10939210 (D.C. Cir. Dec. 13, 2012); *Nebraska v. EPA*, 4:14-cv-3006, 2014 WL 4983678 (D. Neb. Oct. 6, 2014); *In Re: Murray Energy Corp.*, consolidated with *Murray Energy Corp. v. EPA & West Virginia v. EPA*, Nos. 14-1112, 14-1146, & 14-1151, 2015 WL 3555931 (D.C. Cir. Jun. 9, 2015) *Oklahoma v. McCarthy*, No. 15-CV-0369-CVE-FHM (D. Okla. Jul. 17, 2015).
- 14 Governor Asa Hutchinson of Arkansas has suggested that he is interested in filing suit outside the D.C. Circuit. See Wesley Brown, “Arkansas May Seek Different Venue to Challenge EPA ‘Dirty Air’ Rules,” *City Wire*, Jun. 14, 2015, 2:19 p.m., www.thecitywire.com/node/37843#.VYHJbFVhHw. One Court has already rebuffed an attempt to litigate the CPP outside of the D.C. Circuit. See *Oklahoma v. McCarthy*, 2015 WL 4414384 (D. Okla. Jul. 17, 2015) (the legality of the CPP “must be decided by the court with exclusive jurisdiction over these matters, and that court is the D.C. Circuit.”). Attempts to litigate other clean air rules outside of the D.C. Circuit have been no more successful. See *Texas v. EPA*, No. 10-60961, 2011 WL 710598, at *5 (5th Cir. Feb. 24, 2011) (rejecting Texas’s challenge to GHG rule in the Fifth Circuit: “Because this case involves a challenge to a nationally applicable regulation under the Clean Air Act, venue is improper in this Court”).
- 15 Pursuant to Rule 18 of the Federal Rules of Appellate Procedure and 5 U.S.C. § 705.
- 16 *Nken v. Holder*, 556 U.S. 418, 427 (2009).
- 17 *Ibid.* at 434.
- 18 *Texas v. EPA*, 726 F.3d 180, 196–97 (D.C. Cir. 2013).
- 19 *Miss. Comm’n on Env’tl. Quality v. EPA*, No. 12-1309, 2015 WL 3461262, at *31 (D.C. Cir. Jun. 2, 2015) (citing *Texas v. EPA*, 726 F.3d 180, 196–97 [D.C. Cir. 2013]).
- 20 See “Clean Power Plan on Solid Legal Ground,” NRDC *Switchboard*, Jun. 3, 2015, switchboard.nrdc.org/blogs/ddoniger/clean_power_plan_on_solid_lega.html.