

# **A Rocky Road Ahead for the EPA's Clean Power Plan**

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## **I. Introduction**

The Obama Administration's Clean Power Plan (CPP) represents the federal government's first major attempt at reducing carbon dioxide emissions from the nation's largest source of CO<sub>2</sub>: the electrical generation industry. Accounting for roughly 31% of carbon emissions in the US<sup>1</sup>, the electrical generation industry poses both a tremendous challenge and excellent opportunity to curb domestic carbon emissions and join the global community in addressing the threat of climate change.

As is common with major regulatory actions, the CPP has faced significant opposition on both legal and policy grounds. This paper will (1) describe some of the ways in which EPA has addressed policy concerns over the CPP and (2) outline the legal challenges the CPP faces.

## **II. Basics of the Final Rule**

EPA's final rule was announced on August 3, 2015, and published in the Federal Register on October 23, 2015. By the year 2030 the rule is designed to reduce CO<sub>2</sub> emissions from the nation's power plants to at least thirty-two percent below 2005 levels.<sup>2</sup>

The CPP will achieve this reduction by applying uniform emission standards to all eligible coal- and gas-fired power plants in the country. EPA used three basic building blocks to derive these standards:

- (1) Building Block 1: increasing the efficiency (heat rate) of existing coal-fired power plants;

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<sup>1</sup> *Climate Change Indicators in the United States*, US EPA, <http://www3.epa.gov/climatechange/science/indicators/ghg/us-ghg-emissions.html> (last updated Nov. 10, 2015).

<sup>2</sup> *FACT SHEET: Overview of the Clean Power Plan*, US EPA, <http://www2.epa.gov/cleanpowerplan/fact-sheet-overview-clean-power-plan> (last updated Aug. 6, 2015).

- (2) Building Block 2: shifting generation from coal-fired power plants to cleaner-burning natural gas-fired power plants; and
- (3) Building Block 3: substituting generation from renewable and zero-emitting sources for reduced generation at existing coal-fired plants.<sup>3</sup>

Together, the building blocks represent what EPA has determined to be the best system of emissions reduction (BSER). Using these building blocks, EPA derived emissions targets of 1,305 lbs CO<sub>2</sub>/MWh for coal-fired plants and 771 lbs CO<sub>2</sub>/MWh for gas-fired power plants. Individual state goals are based on these two rates and the number of each type of power plant operating in each state.<sup>4</sup> North Carolina's combined emission rate target for 2030 will be 1,136 lbs CO<sub>2</sub>/MWh.<sup>5</sup> Should North Carolina decide to adopt a mass-based target (an alternate option under the CPP) it will be held to an annual limit of 51,266,234 short tons of CO<sub>2</sub>.<sup>6</sup>

As required by the Clean Air Act, state governments, rather than the federal government, will determine how best to achieve these reductions. Over the next few years, states will be required to develop State Implementation Plans (SIPs) and submit them to EPA for review. So long as states demonstrate that their SIPs will achieve the emission reductions called for by EPA, they will have significant flexibility in *how* those reductions are achieved. Along with the measures included in the building blocks, states can also choose to enact demand-side energy efficiency programs, trade emission credits with other states, or develop other novel ways of reducing the carbon intensity of their power plants.

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<sup>3</sup> *Id.*

<sup>4</sup> *CO<sub>2</sub> Emission Performance Rate and Goal Computation Technical Support Document for CPP Final Rule* 18, US EPA, <http://www.epa.gov/sites/production/files/2015-11/documents/tsd-cpp-emission-performance-rate-goal-computation.pdf>

<sup>5</sup> *Id.* at 27

<sup>6</sup> *Id.* at 30

### **III. Major Changes from the Draft Rule**

EPA arrived at the final rule after a year-long comment and revision period during which it addressed many (though certainly not all) of the concerns raised in the more than 4.2 million comments submitted by stakeholders across the country—including the NC Department of Environmental Quality (formerly NC DENR) and the NC Utilities Commission Public Staff.<sup>7</sup>

Most notably, EPA (1) discarded the draft rule’s Building Block 4 and bolstered its justification for treating the electrical grid as a single interconnected system; (2) made interstate trading of emission reduction credits significantly easier; (3) added safeguards to ensure grid reliability; (4) dropped nuclear generation from its goal computation; (5) updated its renewable energy projections to more accurately capture the rate of technological advancement in that field; and (6) gave states additional time to develop and begin implementation of their SIPs.

#### **A. “Outside the Fence-Line” Measures**

One of the issues most commonly raised by stakeholders was a concern that EPA’s attempt to regulate activities “outside the fence-line” (i.e. not directly related to electricity generation at power plants) represented an illegal expansion of EPA’s authority under the Clean Air Act.<sup>8</sup>

Discarding Building Block 4 was the most straightforward measure EPA took to address this concern. Under the draft rule’s BSER, Building Block 4 assumed that states would enact energy efficiency measures to help reduce the demand for electricity. Although states can still implement energy efficiency programs to achieve their reduction goals, they are no longer required to do so and energy efficiency no longer contributes to a state’s goal calculation.

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<sup>7</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 205, 64661, 205, 64707 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

<sup>8</sup> See In the Matter of: Proposed Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Reply Comments of North Carolina Utilities Commission Public Staff, EPA Docket No. 2013-0602, at 6 (Dec. 1, 2014), <http://bipartisanpolicy.org/wp-content/uploads/2014/12/NCPublicStaff.pdf>.

In addition to removing Building Block 4, EPA has (somewhat more controversially) doubled down on its view that the electricity generation grid is an interconnected system rather than a web of entirely independent entities. EPA notes that “[a]lmost all electric utility generation units in the United States are electrically interconnected through power transmission lines and switching stations”<sup>9</sup> and stresses that this interdependence justifies the continued inclusion of Building Blocks 2 and 3.

### **B. Interstate Emission Trading**

Under the draft rule, states that wished to develop multistate partnerships (like the incredibly successful Regional Greenhouse Gas Initiative, RGGI) were required to include those plans in their SIPs. Given the potential complexity of coordinating the SIP drafting process among several states, EPA recognized the need to ease the barrier to interstate trading of emission credits. As a result, states will no longer be required to enter into interstate agreements before drafting their SIPs. Instead, all emissions reductions will be monitored and calculated in a way that makes them “trading ready,” essentially allowing states to trade credits whenever they choose regardless of whether or not they originally planned to do so.

### **C. Grid Reliability**

Many states, including North Carolina, raised concerns that the changes required by the CPP would compromise the reliability of the nation’s electrical grid. To address these concerns, EPA will require states to analyze the reliability impacts of their SIPs and demonstrate that they will not adversely affect grid reliability. The final rule also includes a widely demanded measure

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<sup>9</sup> *Legal Memorandum Accompanying Clean Power Plan for Certain Issues* 9, US EPA, <http://www.epa.gov/sites/production/files/2015-11/documents/cpp-legal-memo.pdf>

referred to as a “reliability safety valve,” which would allow states to temporarily suspend their SIPs in the event of unforeseen reliability issues.<sup>10</sup>

#### **D. Nuclear Power**

For states like North Carolina, which generates a significant amount of electricity from nuclear power, the draft rule’s treatment of nuclear generation capacity was problematic. The draft rule assumed that 6% of a state’s nuclear capacity was “at-risk” at any given time and included maintenance of that capacity in its BSER. As a result, if a state ever chose or was forced to retire any of its nuclear capacity, it would be required to make up the equivalent of 6% of that capacity through some other zero-emitting source or risk falling into non-compliance. To address this concern, EPA simply removed nuclear generation from its BSER calculations. Any new nuclear capacity a state brings online, however, can still be counted for compliance purposes.

#### **E. Renewables**

Many states and environmental groups asked EPA to increase its expectations for the growth of renewable energy. EPA found that based on the rate of technical development and rapidly diminishing costs, it could do just that.

#### **F. Timelines**

In response to concerns that the CPP left states and utilities with too little time to both develop and begin to implement their SIPs, EPA delayed interim implementation by two years. States will now have until 2022 to begin complying with the CPP.

### **IV. Legal Challenges**

The CPP has already been the subject of a significant amount of legal deliberation and will likely continue to be challenged in the courts for some time to come. Although the CPP

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<sup>10</sup> *FACT SHEET: Clean Power Plan Key Changes and Improvements*, US EPA, <http://www.epa.gov/cleanpowerplan/fact-sheet-clean-power-plan-key-changes-and-improvements> (last updated Aug. 13, 2015).

stands on solid legal ground, some believe it will ultimately be litigated before the Supreme Court.<sup>11</sup>

The earliest round of legal challenges to the CPP—*In Re Murray Energy Corp. and West Virginia et al v. EPA*—were defeated because of timeliness. In a consolidated order, the U.S. Court of Appeals for the D.C. Circuit found that neither of the two challenges were appropriate before the CPP was officially published in the Federal Register.<sup>12</sup>

Unsurprisingly, the floodgates opened wide as soon as the rule was published in the Federal Register on October 23, 2015. By October 27 more than fifteen separate actions were filed challenging the validity of the CPP. The U.S. Court of Appeals for the D.C. Circuit has since consolidated the various petitions into a single docket under the name “The State of West Virginia, et al. v. EPA.”<sup>13</sup> Petitioners in the suit include the North Carolina Department of Environmental Quality, 23 other states, several utilities and related lobbying groups, coal-related trade associations, and the U.S. Chamber of Commerce.<sup>14</sup> The parties have also requested that the court issue a stay to freeze implementation of the final rule until its validity has been fully litigated. In requesting the stay, petitioners must show (1) that they are likely to win their primary case on the merits; (2) that they will suffer irreparable harm without a stay; and that (3) on balance, a stay is in the best interests of the public. EPA must file a response by December 3.<sup>15</sup>

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<sup>11</sup> Cara Horowitz, *Why Legal Challenges to the EPA Clean Power Plan Will End up at the Supreme Court*, LEGALPLANET (Aug. 5, 2015), <http://legal-planet.org/2015/08/05/why-legal-challenges-to-the-epa-clean-power-plan-will-end-up-at-the-supreme-court/>.

<sup>12</sup> *In re Murray Energy Corp.*, 788 F.3d 330, 333-34 (D.C. Cir. 2015).

<sup>13</sup> *Clean Power Plan Litigation Update*, HARVARD LAW SCHOOL ENVTL. LAW PROGRAM POLICY INITIATIVE (Oct. 30, 2015), <http://environment.law.harvard.edu/wp-content/uploads/2015/08/Clean-Power-Plan-Litigation-Update-1030.pdf>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

In their stay request, petitioners preview the two issues that will be at the heart of the upcoming challenge to the CPP: (1) EPA is acting far beyond its authority under §111(d) and (2) EPA is prohibited from regulating source categories under §111 if they have already been regulated under §112.

#### **A. EPA is Overstepping its Authority Under §111(d)**

Petitioners argue that §111(d) offers EPA very limited authority to issue regulations governing power plant emissions and that Building Blocks 2 and 3 of the CPP run afoul of the limits on that authority. Section 111(d) reads, in part, that EPA can require states to submit plans that “establish[] standards of performance for any existing source for any air pollutant” not already regulated by EPA.<sup>16</sup> Petitioners argue that neither of the two Building Blocks can be considered standards of *performance* because each would involve a reduction of generation at coal-fired power plants. This reduction, they contend, constitutes non-performance rather than performance. They also argue that the language is the source of the “outside the fence line” objection raised by many stakeholders during the comment period. Accordingly, Building Blocks 2 and 3 should be barred because they involve measures that cannot be directly implemented at the regulated source.<sup>17</sup> EPA, on the other hand, claims that “standards of performance” is a vague term and that the wider definition EPA attaches should be given deference.

Writing in the Harvard Environmental Law Review, Ann Carlson and Megan Herzog of the UCLA School of Law suggest that context will be the determining factor in whether or not courts give EPA’s interpretation the deference EPA seeks.

[W]e believe that EME Homer and UARG share an important lesson: in reviewing an agency's interpretation of statutory language, context matters

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<sup>16</sup> 42 U.S.C. §7411(d)(1)(A)(i).

<sup>17</sup> Petitioner’s Motion for Stay and For Expedited Consideration of Petition for Review at 4, *West Virginia v. E.P.A.*, No. 15-1363 (D.C. Cir. filed Aug. 2015).

significantly in deciding what a text allows. One could, indeed, go even further.

Context matters even when the statutory text arguably points in another direction.

This lesson, we suggest, will be extremely important as courts consider whether

the Clean Power Plan is a permissible implementation of section 111(d).<sup>18</sup>

They go on to suggest that if the CPP is convincingly portrayed as a measured and sensible rule and that if EPA is seen as fully appreciating the complexity of the problem it is attempting to wade into, it is possible that courts will give EPA's interpretation of §111(d) the *Chevron* deference it requests. If a competing narrative, portraying the CPP as a "power grab" from a headstrong federal agency, prevails, there may not be much hope of the CPP surviving a challenge before the Supreme Court.<sup>19</sup> Given the exhaustive amount of outreach EPA conducted while revising the draft rule, the significant changes it made to the rule, the relative flexibility it provides states, and the justification it has given for viewing the electrical grid as an interconnected system, it is not unlikely that the narrative more favorable to EPA will prevail.

### **B. §112 Exclusion**

The plain language of the CAA states that EPA cannot use §111(d) to regulate "any air pollutant" emitted from a "source category which is regulated under [§112]."<sup>20</sup> Petitioners claim that because power plants are "extensively regulated" under §112, EPA is barred from issuing any §111(d) standards for any pollutants emitted by power plants.<sup>21</sup>

Although this seems like a cut and dry issue, it is complicated significantly by an error that occurred during passage of the 1990 CAA Amendments. The House and Senate each passed

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<sup>18</sup> Ann E. Carlson & Megan M. Herzog, *Text in Context: The Fate of Emergent Climate Regulation After Uarg & Eme Homer*, 39 HARV. ENVTL. L. REV. 23 (2015)

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Petitioner's Motion for Stay and For Expedited Consideration of Petition for Review at 12, *West Virginia v. E.P.A.*, No. 15-1363 (D.C. Cir. filed Aug. 2015).

conflicting amendments to §111 that were both ultimately passed by the other body and signed into law. Although only the House amendment made its way into the U.S. Code, both can be found in the Statutes at Large. Unlike the House amendment, the Senate amendment only bars §111 regulation of an air pollutant if that same air pollutant is also regulated under §112. Notably, the Senate amendment does not bar §111 regulations on the grounds that the *source category* in question is also regulated under §112.

Because §112 regulations cover hazardous air pollutants (HAPs), EPA has attempted to reconcile the conflicting amendments applying only to HAPs (i.e. if a source category is regulated under §112, HAPs emitted from that source category cannot be regulated under §111). EPA argues that it is entitled to *Chevron* deference and that its interpretation of the conflicting amendments should control.

## **V. Resistance from the General Assembly**

A bill pending in the North Carolina General Assembly could significantly complicate North Carolina's path forward under the CPP. H 571—passed by the N.C. House of Representatives on April 20, 2015—originally directed NC DENR and related state agencies to develop a State Implementation Plan (SIP) in compliance with the CPP.<sup>22</sup> Upon reaching the Senate in August, however, the bill was amended to (1) limit emissions reductions in the NC SIP to *only* those attainable through heat rate improvements at the state's coal-fired power plants and (2) direct the Secretary of Environment and Natural Resources to file suit against the CPP in federal court.<sup>23</sup> The amended bill has now returned to the House, where it is unlikely to pass in its amended form.<sup>24</sup>

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<sup>22</sup> H. 571, Gen. Assemb., 2015 Sess. (N.C. 2015)

<sup>23</sup> H. 517-ASB-79 Gen. Assemb., 2015 Sess. (N.C. 2015)

<sup>24</sup> Dave Dewitt, *NC Senate Passes Bill That Sets Up Showdown With EPA*, WUNC (Aug. 5, 2015), <http://wunc.org/post/nc-senate-passes-bill-sets-showdown-epa#stream/0>.

Though it remains to be seen what final form the bill will take in a potential conference committee, the bill in its current form would have significant consequences for the state. Thanks to forward-thinking steps taken by the state in past decades, North Carolina already boasts one of the most efficient fleets of coal-fired power plants in the country.<sup>25</sup> Limiting the NC SIP to further efficiency improvements at these plants would likely have the self-defeating effects of committing North Carolina to pursuing one of the most expensive paths to compliance while simultaneously ensuring that the state fails to reach its emission reduction goals.<sup>26</sup> Under those circumstances, EPA would be required to subject North Carolina to a Federal Implementation Plan that would be far from ideal for the state because of its “one size fits all” nature.

## **VI. Conclusion**

The CPP undoubtedly faces an uphill battle. After being thoroughly revised by EPA, it is likely to be the subject of legal challenges for the foreseeable future. In the meantime, state legislatures like North Carolina’s General Assembly are attempting to prevent good faith cooperation. Given the tremendously high stakes involved, it is undoubtedly in the best interests of North Carolina and the nation to resolve these disputes as expeditiously and fairly as possible.

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<sup>25</sup> See *In the Matter of: Proposed Emission Guidelines for Existing Stationary Sources*, *supra* note 6, at 7.

<sup>26</sup> *North Carolina*, E & E PUBLISHING, LLC,

[http://www.eenews.net/interactive/clean\\_power\\_plan/states/north\\_carolina](http://www.eenews.net/interactive/clean_power_plan/states/north_carolina) (last visited Jan. 9, 2015).