Updated: Nov. 17, 2015

On Friday, October 23, 2015, the Federal Register formally published EPA's rules to control greenhouse-gas emissions from fossil-fuel-fired power plants under the Clean Air Act. I described the basics of the rules after EPA released the unofficial text in August.

The final text of the rule to regulate **new and modified power plants** under Clean Air Act § 111(b)—known as the New Source Performance Standard, or NSPS—is now available at 80 Fed. Reg. 64,510-64,660. The rule to regulate existing power plants under Clean Air Act § 111(d)—known as the **Clean Power Plan**—is now available at 80 Fed. Reg. 64,662-64,964. And the proposed **Federal Plan** associated with the Clean Power Plan is also now available at 80 Fed. Reg. 64,966-65,116, and open for public comment until January 21, 2016.

Opponents were unsuccessful in their attempts to persuade courts to take the unusual action of hearing pre-publication challenges to the Clean Power Plan. Now that the final text is published in the Federal Register, lawsuits are fair game. Per the Clean Air Act, challengers have 60 days from the date of publication—**until December 22nd**—to file petitions for review in the D.C. Circuit Court of Appeals.

Unsurprisingly, litigants wasted no time. The Federal Register pages were still warm when petitions from dozens of states and industry groups hit the court clerk's desk on Friday. As we have long been predicting here on the *Legal Planet*, the flood of petitions was unprecedented for an environmental regulation. E&E News confirms [paywall] that it took less than twelve hours for the Clean Power Plan to become the most heavily litigated environmental regulation of all time.

Here is a quick overview of the action so far.

State Petitioners: In one corner, we have the state petitioners. West Virginia filed a petition for review of the Clean Power Plan together with 23 other states: Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, South Carolina, South Dakota, Texas, Utah, Wisconsin, and Wyoming. State petitioners argue that

> the final rule is in excess of the agency's statutory authority, goes beyond

> the bounds set by the United States Constitution, and otherwise is arbitrary, capricious, an abuse of discretion and not in accordance with law.

West Virginia Assistant Attorney General J. Zak Ritchie apparently arrived at the clerk's office extra early in order to be the first in line to file a lawsuit, thus ensuring West Virginia would be the first named party. It is fair to say that state challengers are eager for battle.

The states also filed a motion seeking a stay—a freeze of the rule—pending the court's decision about the rule's legality, claiming that "the States are being immediately and irreparably harmed by EPA's illegal effort to force States to reorder their electrical generation systems" and by "a timeline intended to force the States and other entities to make irreversible decisions before judicial review concludes."

Oklahoma, North Dakota, and Mississippi filed separate petitions for review, meaning more than half of U.S. states (27) oppose the Clean Power Plan.

The list of states challenging the Clean Power Plan is no real surprise; state petitioners are mostly red, mostly high-emitting or coal-heavy states that have long resisted serious climate action. All had previously declared their intention to challenge the Clean Power Plan, and many argued in prior lawsuits that EPA lacks authority to regulate greenhouse gases under the Clean Air Act. But there are a few interesting notes here.

First, the petitioners include New Jersey, a blue state. New Jersey has taken committed action over the past 15 years to reduce its greenhouse-gas emissions and currently has one of the lowest carbon emission rates of any state. In 2007, the state legislature adopted the most aggressive climate law in the nation, which committed New Jersey to cutting greenhouse-gas emissions 80 percent by 2050. New Jersey also supported EPA in the 2007 lawsuit *Massachusetts v. EPA*, in which the U.S. Supreme Court held that greenhouse gases are an air pollutant subject to regulation under the Clean Air Act. In 2011, however, New Jersey declared that it would pull out of the Regional Greenhouse Gas Initiative (RGGI), a cooperative greenhouse-gas cap-and-trade program covering nine Northeast states. And Republican Governor Chris Christie has been one of the most vocal opponents of the

Clean Power Plan. Governor Christie's presidential ambitions are surely playing a role in New Jersey's position reversal.

Colorado is another blue (or at least purple) state petitioner that may come as somewhat of a surprise. Interestingly, in the case of Colorado, state leaders do not see eye-to-eye on the Clean Power Plan. Democratic Governor John Hickenlooper filed a petition for Colorado Supreme Court review of whether, under Colorado law, Republican Attorney General Cynthia Coffman overstepped her bounds in filling a lawsuit against the Clean Power Plan without consulting the Governor. Stay tuned as this drama continues to unfold.

The only other state petitioner with a Democratic governor is Missouri. Missouri Attorney General Chris Koster, also a Democrat, announced in early October that the state would join the coalition challenging the Clean Power Plan. Koster has challenged other ambitious EPA regulations (including the "waters of the United States" rule and mercury emissions rule), so Missouri's Clean Power Plan lawsuit came as no big shock.

Industry Petitioners: Next, we have the industry petitioners, who fall into three basic groups: trade associations, coal interests, and utilities.

A coalition of 15 trade associations led by the U.S. Chamber of Commerce filed both a petition seeking review of the Clean Power Plan and a stay motion. The listed petitioners include, among others: the National Association of Manufacturers, American Fuel and Petrochemical Manufacturers, American Coke and Coal Chemicals Institute, and Portland Cement Association.

A coal industry coalition including the National Mining Association, Murray Energy, and the American Coalition for Clean Coal Electricity filed a separate petition and stay motion.

Additionally, Utility Air Regulatory Group, American Public Power Association, and an assortment of 36 other power companies and utility industry and labor groups are challenging the Clean Power Plan and seeking a stay.

Update 11/12/2015: Entergy Corp. has also filed a petition for review.

Update 11/17/2015: West Virginia Coal Association filed a petition for review.

The Legal Theories: Petitioners' briefs will shed further light on their legal theories as to why the Clean Power Plan is unlawful; but so far, the petitions and stay motions have raised arguments that EPA and its allies have been long expecting, including arguments that EPA lacks legal authority to regulate "outside the fenceline" of individual power plants, that the Clean Air Act drafting "glitch" prevents EPA from regulating power plants under §111 altogether, and that the rule unlawfully extends beyond the boundaries of EPA authority into areas traditionally under the domain of states.

NSPS Challenges: Challenges to the new source rule are also rolling in. The Clean Air Act requires EPA to take action to regulate new and modified sources before or at the same time as regulating existing sources through the Clean Power Plan. For this reason, you should expect to see many of the same parties in both proceedings. North Dakota has already filed a lawsuit challenging the new source rule (***North Dakota v. EPA*, D.C. Cir., No. 15-1381**), and Murray Energy has declared its intent to file a challenge. (For more on the likely content of NSPS lawsuits, *see* my prior posts.) As expected, most of the focus so far has been on challenging the Clean Power Plan directly (where the political cachet is greater).

Update 11/3/2015*: Led by West Virginia, twenty-three other states (Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, and Wyoming) filed a *petition* today asking the D.C. Circuit Court of Appeals to strike down the new source rule. Note that Colorado and New Jersey did not join the challenge to the new source rule, although they are petitioning the court to review the Clean Power Plan. The Energy & Environment Legal Institute also will file a challenge to the new source rule.

EPA's Allies: Nine environmental and public health organizations (including the American Lung Association, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Natural Resources Defense Council, Ohio Environmental Council, and Sierra Club) have filed a request to intervene as interested parties in support of EPA in the Clean Power Plan litigation. So, too, have several renewable energy groups, including the American Wind Energy Association and Advanced Energy Economy.

The environmental coalition has also asked to intervene on behalf of EPA in the

NSPS litigation.

Robert Redford is also an EPA ally

Additionally, attorneys general from at least 15 states (California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Massachusetts, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington) plus New York City and Washington, DC have declared their intent to intervene on behalf of EPA in the Clean Power Plan litigation. California Governor Jerry Brown has been particularly vociferous in his support of EPA, declaring his intent to do "everything in [his] power to fight this pernicious lawsuit" and defeat those who aim "to take America into a dark age of climate denial." New York State Attorney General Eric Schneiderman has also pledged "to aggressively defend EPA's Clean Power Plan."

***Update 11/4/2015:* As of today, 18 states, DC, and 6 local governments have *asked to intervene* in support of EPA in the Clean Power Plan litigation, including: California, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, Washington, and the cities of New York, Philadelphia, Chicago, Boulder, South Miami, and Broward County, Florida.**

Sixteen states (California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington), the District of Columbia, and New York City have *asked to intervene* in support of EPA in the NSPS litigation.

***Update 11/5/2015:* A group of power companies, including Calpine, Austin Energy, PG&E, Seattle City Light, and National Grid *filed* a motion to intervene on behalf of EPA. NextEra Energy filed a separate motion to *intervene*.**

Congress: Meanwhile, Congressional Republicans are extending the Clean Power Plan battle to the halls of the Capitol. Senate Majority Leader Mitch McConnell of Kentucky and at least 47 other senators are attempting to overturn EPA's new source rule via resolution under the Congressional Review Act (S.J. Res. 23), while a

separate resolution backed by at least 48 senators seeks to overturn the Clean Power Plan (S.J. Res. 24). The Congressional Review Act of 1996 allows Congress to review regulations that are likely to result in "major" economic impacts before they take effect, and pass a resolution disapproving the rule and declaring that the rule shall have no force. The resolutions will likely come to a Senate vote in mid-November.

Notably, there has been only one successful regulatory challenge in the history of the Congressional Review Act, and it concerned an ergonomic standards rule promulgated by the Clinton Administration. In this case, congressional resolutions are unlikely to overrule the §111 rules because President Obama would never sign the resolutions even should they reach his desk, and Congress likely could not muster the two-thirds vote necessary to override a presidential veto. Nonetheless, congressional disapproval would send a message to the international community that the United States is divided in its support of U.S. emission-reduction commitments, and potentially undercut the U.N. climate negotiations in Paris next month.

Update 11/17/2015: Today, the Senate voted 52-46 in favor of S.J. Res. 23 and S.J. Res. 24. President Obama has vowed to veto the resolutions should they reach his desk. Notably, 52 votes is far short of the two-thirds vote necessary to override a presidential veto.

Litigation Timeline & What to Expect: The D.C. Circuit has consolidated the various legal challenges to the Clean Power Plan into one proceeding (***West Virginia v. EPA*, D.C. Cir., No. 15-1363**). Sometime in early 2016, a panel of three judges will decide whether to stay the rule before hearing arguments on the merits. (*See* Ann Carlson's prior post regarding the composition of the three-judge panel.) Because a stay could significantly disrupt rule implementation, and because arguments related to the stay will preview arguments on the merits, this phase of the litigation is exceptionally important to both sides of the case. In order to obtain a stay, petitioners must demonstrate, among other things, that they will be irreparably harmed by the rule during the litigation period. Petitioners must also show a likelihood of prevailing on the merits. Notably, the Clean Power Plan's long compliance timeline, which allows states several years to prepare a state compliance plan, poses a significant barrier to petitioners' efforts to demonstrate irreparable harm.

Update 10/29/2015: the D.C. Circuit issued an order outlining the schedule

for briefing on the stay, with briefing to conclude by December 23rd.

Sometime in 2016, following its decision on the stay, the panel will hear oral arguments on the merits. The panel might not render a final decision until late 2016 or early 2017. At that point, the losing side could request the full bench to review the panel's decision—known as *en banc* review. The court rarely grants *en banc* review, but may elect to do so in a very high-profile case such as this one.

Sometime in 2017 or 2018, court watchers predict the battle will end up in the U.S. Supreme Court. At that time, a new President will be in charge of EPA, and he or she could influence the course of litigation and rule implementation.

Buckle up, folks—this is just the beginning.