4-22-2016

The Clean Power Plan: A Legal Analysis of the E.P.A.'s Final Rule

Robert Paul
Western Michigan University, bopaul66@yahooo.com

The Clean Power Plan:

A Legal Analysis of the EPA's Final Rule

Robert W. Paul

Western Michigan University

Kalamazoo, Michigan

ACKNOWLEDGEMENTS

I would like to express my sincerest gratitude and appreciation to Dr. Denise Keele, my thesis committee chair, for all of her amazing support and guidance throughout the entire course of this project. Without Dr. Keele's outstanding mentorship and persistence this would not have been possible. Her willingness to generously give so much of her time to this research has not gone unnoticed, and I thank her very much for everything she has done.

I would also like to offer special thanks to both Dr. Mark Hurwitz and Dr. Paul Clements for going above and beyond in serving as thesis committee members on this project. Without their respective help and comments this paper would not have developed into its final form. Thank you both.

Finally, I wish to thank my family, especially my mother and my father, for all of their encouragement not only throughout the course of this project, but throughout my entire educational career.

Abstract

The consensus among scientists is that climate change and its consequences are upon us as the result of human activity. The necessary reductions of emissions of greenhouse gases to mitigate these consequences have long been identified. The continued failure of the United States Congress to pass any national legislation directly addressing climate change has led President Obama to pursue executive action, through the authority of the Environmental Protection Agency, to regulate greenhouse gas emissions under the Clean Air Act section 111(d). Collectively known as the Clean Power Plan, the heart of this action is the carbon dioxide emissions Final Rule which requires the nation's existing fossil fuel-fired power plants to reduce emissions of carbon dioxide.

Litigation challenging the Clean Power Plan Final Rule commenced immediately upon its publication in the federal register in October, 2015, and now the fate of the Obama administration's plan is in the hands of the federal courts. Accordingly, this research was aimed at examining two primary questions: 1) what are the arguments for and against the Clean Power Plan's legality, and 2) what is the likely political and legal future of the Clean Power Plan? While the arguments challenging the Clean Power Plan are diverse and persuasive, this research concludes that the Final Rule is likely to survive its upcoming D.C. Circuit Court of Appeals appearance in June, 2016, for legal and political reasons. However, it is also nearly certain that the Clean Power Plan litigation will subsequently be heard by the United States Supreme Court, and the likelihood of the Final Rule's success at the Supreme Court is difficult, if not impossible, to determine at this time. However, given the lack of avenues to address climate change in the United States at this time, this research concludes that Clean Air Act section 111(d) is currently

the best legal avenue for the Obama administration to issue the Clean Power Plan Final Rule, even in light of the uncertainty of an almost imminent Supreme Court decision.

Acronyms and Abbreviations

Carbon Dioxide (CO_2)

Greenhouse Gas (GHG)

United States (US)

Electricity Generating Unit (EGU)

Climate Action Plan (CAP)

Clean Power Plan (CPP)

Environmental Protection Agency (EPA)

National Ambient Air Quality Standards (NAAQS)

State Implementation Plan (SIP)

Hazardous Air Pollutants (HAP)

Best System of Emissions Reductions (BSER)

Federal Implementation Plan (FIP)

National Emissions Standards for Hazardous Air Pollutants (NESHAPs)

Federal Energy Regulatory Commission (FERC)

Table of Contents

The Clean Power Plan:

A Legal Analysis of the EPA's Final Rule

Introduction

When we power our lives primarily by burning fossil fuels – such as coal, oil, and natural gas – for energy, we release a tremendous amount of carbon dioxide (CO_2), a key greenhouse gas (GHG), into the planet's atmosphere. This prevents the appropriate loss of our planet's heat energy to space and causes our planet to warm at an unnatural rate. Of the heat-trapping greenhouse gases emitted by sources in the United States (US), CO_2 is by far the most prevalent. Fossil fuel-fired electricity generating units (EGUs) are currently the largest source of CO_2 emissions in the US. In 2015, 67 percent of the 4 trillion kilowatt-hours of electricity generated in the US were produced by fossil fuel-fired electricity generating units; whereas renewable sources only accounted for 13 percent of electricity generation in the US (U.S. Energy Information Administration, 2016).

"The evidence points ineluctably to the conclusion that climate change is upon us as a result of greenhouse gas emissions, that climate changes already are occurring that harm our health and welfare, and that the effects will only worsen over time in the absence of regulatory action" (Percival, Schroeder, Miller & Leape, 2009). GHG pollution causes climate change which will have disastrous consequences that include increasing smog levels in cities, intensified

storms, reduced crop yields, increases in wildfires, increases in insect pests and the prevalence of the diseases transmitted by them, and increasing global temperatures (Karl, Melillo & Peterson, 2009). Limiting climate change will require substantial and sustained reductions of GHG emissions (Karl et al., 2009).

However, even in light of this information the United States (US) has struggled with national regulatory solutions to the problem of climate change. Although the US has been a continuing member of the voluntary 1992 United Nations Framework Convention on Climate Change, the US failed to finalize its membership in the more binding 1997 Kyoto Protocol after the United States Senate refused to ratify the membership. Also, the Environmental Protection Agency (EPA) under the Administration of President George W. Bush was sued by a coalition of twelve states, led by Massachusetts, for its failure to regulate carbon dioxide (CO_2) emissions (*Massachusetts et al. v. EPA et al., 2007*). In 2007, the Supreme Court, by a 5-4 majority, decided in the resulting case, *Massachusetts v. EPA* (2007) that the EPA has the authority to regulate GHGs under the Clean Air Act (CAA) (*Massachusetts et al. v. EPA et al., 2007*). A few years later, in 2009, the US House of Representatives attempted to pass a cap and trade bill which would have allowed the federal government to cap the total amount of legal emissions of certain GHGs over a period of time, however the United States Senate refused to hear the bill.

The continued failure of the United States Congress to pass any national legislation addressing the problem of climate change has led President Barack Obama to pursue executive action to regulate GHG emissions under the authority of the Clean Air Act (CAA). Collectively known as the 'Climate Action Plan' (CAP), the heart of this action is the recent (published October, 2015) carbon dioxide pollution Final Rule known as the 'Clean Power Plan' (CPP) which requires the nation's existing fossil fuel-fired EGUs to cut emissions of CO_2 by 32 percent

from 2005 levels by the year 2030 (42 U.S.C §7411). The CPP Final Rule, titled 'Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units' (hereafter, the Final Rule or CPP), has been in the federal courts since before it was even finalized and published in the federal register (42 U.S.C §7411). Lawsuits challenging the Final Rule have been consolidated at the D.C. Circuit Court level and are expected to eventually reach the United States Supreme Court. The Final Rule is currently awaiting the first judicial ruling on its legality from the D.C. Circuit Court of Appeals, which is often considered the second most important court in the US, after the US Supreme Court (Legal Progress, 2013). This is because the D.C. Circuit Court has the responsibility of deciding cases having to do with the decisions made by federal government agencies, such as the executive branch via the Environmental Protection Agency in this instance.

Since the decision to grant a stay of the Final Rule by the United States Supreme Court, the Final Rule's implementation has been halted pending the federal court's decisions on the actual legal permissibility of the rule by the D.C. Circuit Court of Appeals in June, and state deadlines for compliance with the CPP are no longer certain. Therefore, the fate of the Obama administration's Final Rule, and subsequently, the success of the President's Climate Action Plan, is currently in the hands of the federal courts. As Natural Resources Defense Council Climate Director Peter Altman appropriately describes the situation, the ensuing battles over the final CO_2 pollution rule that are to come promise to be, "the Super Bowl of climate politics" (Eilperin & Mufson, 2014).

This research examines the legal arguments for and against the Clean Power Plan. Throughout the course of this research the question of whether §111(d) of the CAA (the primary statutory authority which the federal government cites for its plan) is the correct legal avenue for

the federal government to issue its Final Rule is analyzed. This research also investigates the likely legal and political future of the Clean Power Plan.

Methodologies for this research included a review of both current and historic legislation, statutes and precedent concerning the Clean Air Act. Through the use of Columbia University's Sabin Center of Climate Change Law's 'Climate Litigation Chart' I was able to study the state and industry lawsuits that have been consolidated to challenge the EPA's Final Rule in the suit *West Virginia v. EPA* (D.C. Circuit Court of Appeals, no. 15-1363, et. al., 2015). The Sabin Center was my principal resource for accessing case lists as well as both primary and secondary source documents concerning climate change litigation in the US. The criteria for case inclusion in this study were that the case be an (1) industry lawsuit (2) challenging the Clean Power Plan. These criteria allowed me to properly narrow my research of the Sabin Center for Climate Change Law's extensive webpage and Climate Litigation Chart resources.

After first describing the relevant portions of the CAA, I summarize the CPP and its basic pillars. Then I present a legal analysis of both the arguments challenging the legality and supporting the legality of the CPP Final Rule. This research culminates in a discussion of the political future of the Clean Power Plan as well as the federal government's authority to regulate greenhouse gases under the authority of the Clean Air Act.

Clean Air Act Basics

The Clean Air Act (1963, 1970, 1977, 1990; 42 U.S.C. §7401) is the comprehensive federal legislation for regulating the emission of air pollutants in the United States.

Section 108 – The Definition of an Air Pollutant

Title 1, §108 of the Clean Air Act requires the Environmental Protection Agency to identify "air pollutants" anticipated to "endanger public health or welfare". An "air pollutant", as defined by the CAA, includes "any physical, chemical, biological, radioactive … substance or material which is emitted into or otherwise enters the ambient air" (Percival et al., 2009). If an air pollutant is then determined by the EPA administrator to endanger public health or welfare, different sections and subsections of the CAA authorize the EPA to regulate that air pollutant depending on whether the pollutant is a criteria pollutant, or a toxic pollutant, or is emitted from a variety of either stationary or mobile sources (Percival et al., 2009).

Section 109 – Setting National Ambient Air Quality Standards (Health-based)

Section109 of the CAA requires the EPA to adopt national ambient air quality standards (NAAQS) for criteria air pollutants determined to effect public health. These standards are considered health-based standards because of their objective to provide public health protection (US Environmental Protection Agency, 2016). The six criteria pollutants, established by Congress in the institution of the CAA (in the mid-1970s lead was also added), include: Carbon Monoxide, Sulfur Oxides, Nitrogen Oxides, Particulate Matter, Ozone, and Lead (Percival et al., 2009). These criteria air pollutants are named (regulated) by Congressional authority.

Section 110 – Implementation (Cooperative Federalism)

Section 110 of the Clean Air Act requires individual states to develop and submit to the EPA for approval State Implementation Plans (SIPs) specifying the measures the state will implement in order to meet the established NAAQS for a particular criteria air pollutant (Percival et al., 2009).

Section 111- Stationary Sources (Technology-based)

Section 111 of the CAA applies to a list of sources that the EPA finds "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare" (established in Title I, §108 of the CAA) (42 U.S.C §7411).

§111(b) specifically directs the Environmental Protection Agency to identify ("list") categories of stationary sources that significantly contribute to dangerous air pollution, and to establish emission standards for air pollutants emitted by new, modified, or reconstructed sources in the list categories (42 U.S.C §7411).

§111(d) directs the development of emission standards for pollutants emitted from existing sources in the listed categories. Emission standards cannot be established for a source under §111(d) of the CAA if that source is already regulated under the provisions of the Clean Air Act addressing hazardous air pollutants (HAPs) (42 U.S.C §7411). Emission standards developed under §111(d) must apply to "any *existing* source" (emphasis added) of air pollution (42 U.S.C §7411).

The Clean Air Act provides that an emission standard (for new or existing sources) must reflect the emission reductions achievable through the application of the "best system of emission reduction" (BSER) (42 U.S.C §7411). Therefore, the emissions standards established under § 111 of the CAA are considered technology-based standards as opposed to health-based standards established in §§108-110 of the CAA.

The EPA has currently established §111(d) regulations for existing sources for five categories of air pollution. Those categories that are currently regulated under §111(d) of the CAA are:

- Sulfuric acid plants (acid mist)

- Phosphate fertilizer plants (fluorides)
- Primary aluminum plants (fluorides)
- Kraft pulp plants (total reduced sulfur), and,
- Municipal solid waste landfills (landfill gases) (US EPA, N.D.)

Under the authority of §111(d) the EPA establishes emissions guidelines at the federal level and then the states design and enforce programs, commonly referred to as 'section 111(d) plans', that are an individualized equivalent to those federal guidelines to achieve the required reductions (US EPA, N.D.). After the EPA sets emissions guidelines for a source category under §111(d), the states are required to develop section 111(d) plans establishing the 'standards of performance' for the regulated sources within their state (US EPA, N.D.). The states then submit their section 111(d) plans to the EPA for review and approval or disapproval. In rare situations where states fail to submit a plan to the EPA, the EPA has the authority, under §111 of the CAA to prescribe an adequate plan (referred to as a Federal Implementation Plan or FIP) to the state (US EPA, N.D.). The EPA also has the authority, under §111 of the CAA, to enforce the provisions of a section 111(d) plan in cases where states fail to enforce their section 111(d) plans sufficiently (42 U.S.C §7411).

§111(d) of the CAA invokes the concept of "cooperative federalism", or the idea that the EPA, a federal agency, may establish national environmental standards, like the emissions guidelines in §111(d) of the CAA, that the states subsequently assume the responsibility for administering in a way that suits their individual state preferences or allows them to leave the responsibility of administration to the federal authority (in this instance., EPA) (Percival et al., 2009). According to Percival, Schroeder, Miller & Leape, "The federalization of environmental

law was a product of the concern that state and local authorities lacked the resources and political capability to control problems that were becoming national in scope" (Percival et al., 2009). Currently, cooperative federalism is the principal approach to federal-state relations under the key environmental statutes, such as the CAA (Percival et al., 2009).

Unlike the NAAQS which are regulated by §108-110 of the CAA and determined by the legislature strictly on the federal level, §111(d) of the CAA operates through the model of cooperative federalism where the federal government is permitted to establish emissions guidelines for source categories and the states are then required to submit SIPs until an adequate plan is submitted to the EPA administrator and implemented. Also, unlike the NAAQS, which are health-based standards, the basis of stationary sources emissions reductions standards is the technology-based BSERs.

Section 112 – Hazardous Air Pollutants

Section 112 of the Clean Air Act establishes 'national emission standards for hazardous air pollutants' (NESHAPs) (Hackel, 2014). A hazardous air pollutant (HAP) is defined by the CAA as "any air pollutant listed pursuant to subsection (b) of this section" (Hackel, 2014). HAPs are also referred to as toxic air pollutants or air toxics. These air toxics are air pollutants that are known or suspected to cause cancer or other serious health effects, or have adverse effects on the environment (Hackel, 2014). For this reason, the standards for hazardous air pollutants are also considered health-based standards.

§112(b) of the CAA contains a list of over 180 HAPs that are regulated by §112 of the CAA as well as provisions for the Environmental Protection Agency to add pollutants to the list of HAPs (Hackel, 2014). §112 (c) of the CAA requires the EPA to regularly update a list of all

the categories and subcategories of 'major' and 'area' sources of emissions of HAPs (Hackel, 2014). National emissions standards for hazardous air pollutants are then issued for each category of the sources of HAPs under the authority of §112(d) of the Act (Hackel, 2014). §112 of the CAA and the NESHAPs are often referred to as the 'air toxics program'.

Title II – Mobile Sources

Title II (§202-216) requires the EPA to identify "air pollutants" anticipated to "endanger public health or welfare" and requires the EPA to establish emission standards for mobile sources (automobiles) (80 Fed. Reg. 64661–65120).

§202(a) of the CAA requires that the EPA, through regulation, create standards applicable to the emission of any air pollutant from any class of new motor vehicles or new motor vehicle engines which have been determined to cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare (80 Fed. Reg. 64661–65120). §202 of the CAA prescribes the EPA with an avenue to administrate emission standards for pollutants once the pollutant has been identified as causing or contributing to air pollution which may reasonably be anticipated to endanger public health or public welfare (80 Fed. Reg. 64661–65120).

Greenhouse Gas Regulatory Authority

Congress' consistent failure to pass any national legislation to specifically address greenhouse gas emissions has led President Obama and the EPA to take executive action to address CO_2 pollution. The Clean Power Plan is the result of the culmination of a short history of GHG regulatory authority that began when the EPA, under the Bush administration, was sued by twelve states, led by Massachusetts, for its failure to regulate carbon dioxide emissions. The

resulting lawsuit, *Massachusetts v. EPA* (2007), first passed a standing to sue challenge when it was demonstrated that GHG emissions were indeed causing actual injury that was (at least in part) redressable by the EPA and its regulatory authority.

Since GHGs were never before listed as criteria air pollutants under §§ 108-109 of the CAA, the litigation centered around the mobile source language from Title II in §202 of the Act which states that Congress must regulate "any air pollutant" that may "reasonably be anticipated to endanger public health or welfare" to answer the fundamental question of whether GHGs could be considered an air pollutant given the language of the CAA (80 Fed. Reg. 64661–65120).

The EPA, under the Bush Administration, denied the State's petition, claiming that the CAA did not authorize the EPA to regulate GHGs from these mobile sources of emissions (Percival et al., 2009). Massachusetts appealed the EPA's denial of the petition to the D.C. Circuit Court of Appeals, and a divided court ruled in favor of the EPA (Percival et al., 2009). In 2007, the Supreme Court decided *Massachusetts v. EPA* by a 5-4 majority, stating in its majority opinion that the EPA does have the legal authority to regulate GHGs under the CAA (Percival et al., 2009). The Court established that the EPA was required, by the CAA, to determine whether or not the emissions of GHGs "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" (Percival et al., 2009). That is, on remand, the EPA was essentially required to issue an endangerment finding for GHGs.

In April, 2009, following the Court's opinion in *Massachusetts v. EPA*, the EPA acted by establishing a finding that GHGs contribute to air pollution that endangers the public health and welfare of current and future generations. Later that year, on December 7, 2009, the EPA

Administrator, under the recently inaugurated Obama administration, officially registered GHGs as air pollutants under §202(a) of the CAA after issuing two official findings (Business Roundtable, 2014). The first finding, commonly referred to as an 'Endangerment Finding', stated that the current and projected atmospheric concentrations of the six GHGs at issue in Massachusetts v. EPA threaten the public health and welfare of current and future generations by contributing to climate change (Business Roundtable, 2014). Those GHGs are:

- Carbon Dioxide (CO2)
- Methane Gas (CH4)
- Nitrous Oxide (N2O)
- Hydrofluorocarbons (HFCs)
- Perfluorocarbons (PFCs), and,
- Sulfur Hexafluoride (SF6) (Business Roundtable, 2014).

The second finding the EPA Administrator issued on December 7th, 2009, is known as a "Cause or Contribute Finding" (Business Roundtable, 2014). This specific finding set forth that the EPA Administrator recognizes that the combined emissions of those 6 GHGs (listed above) from new motor vehicles and new motor vehicle engines contribute to the GHG pollution which has been determined to threaten public health and welfare (Business Roundtable, 2014).

These two findings, which were officially published by the EPA on December 15, 2009, did not impose any actual requirements on the states or industries. However, they were a necessary prerequisite step towards finalizing the emissions standards for mobile sources of GHG pollution under §202 of the CAA. Section 202 of the CAA prescribes the EPA with an

avenue to administrate emission standards for pollutants once the pollutant has been identified as causing or contributing to air pollution which may reasonably be anticipated to endanger public health or public welfare. Therefore, when the EPA published its endangerment finding in late 2009, they effectively permitted the regulation of the six key GHGs from new motor vehicles and new motor vehicle engines under §202 of the Act.

The authority of the EPA to regulate GHGs under the CAA gathered further support from the Supreme Court when the Court issued its opinion in the case *American Electric Power Co., Inc. v. Connecticut* (2011). Prior to the proceedings of *Massachusetts v. EPA* (2007), in 2004, two groups of plaintiffs filed suits in district court against the same five electric power companies (*American Electric Power Co., Inc. v. Connecticut et al., 2011*). The first group of plaintiffs included eight states and New York City, the second group was comprised of three nonprofit land trusts (*American Electric Power Co., Inc. v. Connecticut et al., 2011*). The defendants were four private companies and the Tennessee Valley Authority (*American Electric Power Co., Inc. v. Connecticut et al., 2011*). By contributing to climate change the plaintiffs asserted that the defendants' CO_2 emissions created a "substantial and unreasonable interference with public rights," in violation of federal interstate public nuisance law (*American Electric Power Co., Inc. v. Connecticut et al., 2011*). The District Court dismissed both of the suits as presenting non-justiciable political questions, essentially claiming that the air pollution the petitioners wished to address as a public nuisance was already subject to the regulation of the CAA and the EPA, and therefore not subject to the federal nuisance law, but the Second Circuit Court of Appeals reversed that decision. The Second Circuit Court vacated the lower court decision and reinstated the lawsuit against the defendants that sought to limit the electric power generators' GHG emissions by recognizing that these emissions contributed to the public

nuisance of climate change (*American Electric Power Co., Inc. v. Connecticut et al., 2011*). The Court of Appeals held that the suits were not barred by the political question doctrine, and that the plaintiffs had adequately alleged standing (*American Electric Power Co., Inc. v. Connecticut et al., 2011*).. The Second Circuit ruled that the plaintiffs had properly stated a claim under the "federal common law of nuisance," and also that States may maintain suits to abate air and water pollution produced by other States or by out of-state industry (*American Electric Power Co., Inc. v. Connecticut et al., 2011*).. The Second Circuit Court ruled that federal nuisance common law could not be displaced by Congress passing laws that affect air pollution.

The suits ended up in the U.S. Supreme Court in 2011 consolidated into the case *American Electric Power Co., Inc. v. Connecticut.* In an 8-0 decision authored by Justice Ruth Bader Ginsburg, the Court dismissed the case on the grounds that federal common nuisance law in regards to GHG emissions is preempted by the authority of the Clean Air Act (*American Electric Power Co., Inc. v. Connecticut et al., 2011*). The opinion was based entirely on the displacement, by Congress, of authority to regulate from federal common law to the EPA (via the authority of the CAA) as the decision-maker on GHG regulation. The Supreme Court committed the legal future of greenhouse gas regulation to the concept of federalism in its decision in *Massachusetts v. EPA* (2007) when the Court ruled that air pollution is an issue to be regulated by the EPA and the CAA.

More importantly, the Supreme Court held in *American Electric Power Co., Inc. v. EPA* (2011) that §111(d) of the CAA speaks directly to the problem of CO_2 emissions from existing stationary sources. As a result of this decision the Obama administration created a draft of the Clean Power Plan under the authority of § 111(d) to target stationary sources (E&E Publishing LLC, 2016).

The Clean Power Plan

On October 23, 2015, after receiving almost seven million public comments on the proposed rules, the Environmental Protection Agency (EPA) published two final rules for CO_2 emissions from fossil-fuel-fired power plants known collectively as the Clean Power Plan (CPP). The CPP's purpose is to secure critically important reductions in CO_2 from the largest emitters in the US – fossil fuel fired power plants - and to shift electrical energy production towards renewable sources (Respondent EPA's Opposition to motions to stay…, 2015). The first rule establishes CO_2 emission standards under §111(b) of the Clean Air Act (CAA) for new, modified, and reconstructed plants. (80 Fed. Reg. 64,510). The second rule, known as the Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (or the Final Rule) establishes emission guidelines for states to follow in developing SIPs to limit CO_2 pollution from existing power plants under § 111(d) of the CAA (42 U.S.C §7411). The current case, *West Virginia v. EPA* (2015), involves a challenge to the second rule in the CPP (the Final Rule).

§111 of the CAA requires the EPA to establish a list of source categories of pollution that the EPA finds to "cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare" (42 U.S.C §7411). The EPA has previously determined in its findings that CO_2 contributes to air pollution, namely GHG pollution, which may reasonably be anticipated to endanger the public health and welfare of current and future generations by causing climate change, and the US Supreme Court has ruled in the past that the EPA has the authority to regulate GHG emissions under the authority of the CAA in the landmark case, *Massachusetts v. EPA* (2007). With its CPP, the EPA is trying to use §111(d) to

establish emissions reduction guidelines to curb CO_2 emissions from existing fossil fuel-fired electricity generating units.

§111(d) specifically states that "the Administrator shall prescribe regulations which shall establish a procedure … 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… and (B) provides for the implementation and enforcement of such standards of performance" (42 U.S.C §7411). The CPP reflects this legislation when it uses §111(d) of the CAA to create an instance of cooperative federalism between the EPA and the states under which the EPA establishes emission guidelines and the states implement them by creating plans that are consistent with the EPA emission guidelines (42 U.S.C §7411).

The Final Rule reflects the EPA's determination of the best system for limiting the amount of CO_2 that fossil fuel-fired power plants emit into the atmosphere (Respondent EPA's opposition to motions to stay…, 2015) The Final Rule identifies emission reduction strategies that are already employed by power plants (Respondent EPA's opposition to motions to stay…, 2015). In the Final Rule, the EPA determined that the best system of emissions reductions (BSER) adequately demonstrated for existing plants required a combination of three building blocks:

(1) improving heat rate at coal-fired steam plants;

(2) substituting increased generation from lower-emitting existing natural gas combined cycle plants for generation from higher-emitting steam plants (which are primarily coal-fired); and

(3) substituting increased generation from new zero-emitting renewable energy generating capacity for generation from fossil-fuel-fired plants (which are primarily coal- or gas-fired) (42 U.S.C §7411).

The EPA determined that these three measures are the BSER because they can achieve substantial CO_2 reductions at a reasonable cost, without adverse impacts on energy availability and because each of them is already a well-established technique for reducing CO_2 pollution from stationary sources (42 U.S.C §7411). According to the EPA the Final Rule does not limit states and sources to applying the specific building block measures identified by EPA as the BSER for purposes of EPA's establishment of emission guidelines (42 U.S.C §7411).. Instead, states and sources have the flexibility to choose from a range of measures to achieve the required emission limitations (Respondent EPA's opposition to motions to stay…, 2015).

The CPP is to be phased in over an extended period of time. No reductions are required from sources until 2022 at the earliest and states may delay requiring emission reductions from sources until 2024 and still technically meet the Rule's requirements (Respondent EPA's opposition to motions to stay…, 2015).

States may also entirely decline to prepare and submit their own SIPs, in which case the EPA may require an FIP for the affected power plants in that state.

Procedural History

Since the publishing of the Final Rule in the federal register in October, 2015, the Final Rule has been the target of an onslaught of legal challenges. After the EPA published its CPP Final Rule in the Federal Register on October 23rd, 2015, twenty-one petitions for review were

immediately filed in the D.C. Circuit Court of Appeals to challenge the Final Rule (Arnold & Porter, 2016).

The pending petitions have since been consolidated in the D.C. Circuit Court of Appeals into the suit, *West Virginia v. EPA* (2015). The petitioning states in this matter, led by West Virginia, argued for the D.C. Circuit Court of Appeals to issue a stay on the EPA's final Clean Power Plan. In addition to the states petition for a stay, Oklahoma and North Dakota petitioned for stays in their separate proceedings, and three other motions for stay were filed by petitioners representing the U.S. coal industry, the U.S. Chamber of Commerce, and by the U.S. Utility Industry Interests (led by Utility Air Regulatory Group and two unions), respectively (Arnold & Porter, 2016).

As of December 4, 2015, the final day to submit a petition for review, there were 28 state petitions challenging the EPA's final Clean Power Plan carbon dioxide emission standards for existing EGUs (Arnold & Porter, 2016). Those states challenging the EPA's Final Rule are:

> Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin Wyoming, and Nevada (who filed an amicus brief in opposition of the Final Rule) (E&E Publishing LLC, 2016).

Some of the important legal issues the petitioners addressed in their motions for stay included the questions of whether the EPA has constitutional authority to regulate existing electrical generating units (EGUs) under §111(d) of the CAA when they are already regulated

under §112 of the CAA, and whether the EPA may cite the language of §111(d) to essentially restructure the way that electricity is generated and distributed by the states and industry.

On December 3, 2015, the EPA filed its brief opposing the motions to stay the Final Rule. The EPA argued that its CO_2 emissions guidelines are within the authority of the CAA and that it is not imposing on the regulatory authority of other federal agencies or the states with its emission reduction goals and BSERs (Arnold & Porter, 2016). The EPA also noted that the petitioners in *West Virginia v. EPA* (2015) failed to establish the necessary requirements for issuing a stay by failing to demonstrate a likelihood of "irreparable harm" resulting from the implementation of the Final Rule (Arnold & Porter, 2016). In the EPA motion opposing the stay, the EPA disputed that a stay would not be in the public interest because of the fact that climate change is already affecting the national public health and welfare, and the environment (Respondent EPA's opposition to motions to stay…, 2015).

On January 21, 2016, the D.C. Circuit Court of Appeals denied the petitioner's motions asking for a stay of the implementation of the CPP (Arnold & Porter, 2016). The order stated that the petitioners had not satisfied the requirements for a stay. The order also mentioned that the members of the panel that will eventually review the challenge to the EPA rule on June 2nd, 2016, are Judges Judith W. Rogers (appointed by President Clinton), Karen LeCraft Henderson (appointed by President George H.W. Bush) and Sri Srinivasan (appointed by Obama) (Arnold & Porter, 2016).

After the D.C. Circuit denied the petitioner's motions for a stay of the Clean Power Plan, a group of 29 states and state agencies led by West Virginia filed an application for an immediate stay with the United States Supreme Court (Arnold & Porter, 2016). The Supreme Court, with a

vote of five to four, blocked the administration's implementation of the CPP by issuing a stay of the Final Rule pending further review by the D.C. Circuit Court of Appeals (Arnold & Porter, 2016). The vote was along the partisan lines of the Justices who heard the case, as most cases that are concerned with deference to executive agency's actions usually are (Gass, 2016).

Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan all denied the application for a stay of the Final Rule. Justice Scalia, Justice Kennedy, Justice Thomas, Justice Roberts and Justice Alito all voted in favor of a stay of the final rule. The CPP is, therefore, delayed until after the D.C. Circuit Court of Appeals completes its review of the arguments for the plan's legal permissibility on either June 2nd or June 3rd, 2016, and the Supreme Court has completed its inevitable review of the rule somewhere in the unforeseeable future as well.

Challenges to the Clean Power Plan

The Section 112 Exclusion

According to the Petitioners in *West Virginia v. EPA* (2015), §111(d) of the CAA limits the EPA's authority to regulate certain sources of air pollution by prohibiting the EPA from enacting standards for "any air pollutant . . . emitted from a source category which is regulated under [§112 of the CAA]" (42 U.S.C §7411). This exclusion, referred to as the section 112 exclusion, is a product of the interaction between §111 and §112 of the CAA. The language of the CAA somewhat ambiguously sets forth that:

> "The Administrator shall prescribe regulations which shall establish a procedure … 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 §[1]08(a) of this title or emitted from a source category which is regulated under §[1]12 of this title…" (42 U.S.C §7411).

The petitioners argue that the EPA may not regulate any air pollutants under §111(d) that are already being regulated under the §112 HAP standards section of the Clean Air Act. This potentially compromises the Final Rule because the sources the EPA intends to regulate for CO_2 emissions through the Final Rule are already subject to regulation as sources of HAP under the authority of section 112 of the CAA.

Petitioners argue that the infrequent use of §111(d) of the CAA until now has largely been the product of the limitations imposed by this' section 112 exclusion' (State Petitioners' motion for stay…, 2015). They claim that since the 1990 amendments to the CAA, §111(d) has included a provision which prohibits the EPA's use of §111(d) to require states to regulate "any air pollutant … emitted from a source category which is regulated under §[1]12" (42 U.S.C §7411).

West Virginia and its fellow petitioners argue that Congress's decision to adopt the section 112 exclusion in §111(d) of the CAA was a product of the expansion of §112 in the 1990 Amendments to the CAA (State Petitioners' motion for stay…, 2015). §112 of the CAA was originally enacted in 1970 and was very limited in its authority to regulate primarily due to its limited definition. During the 1990 Amendments to the CAA, Congress broadly expanded the reach of §112 of the Act by re-defining HAPs as any pollutant with "a threat of adverse human health effects" "through inhalation or other routes of exposure" or "adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise" (State Petitioners' motion for stay…, 2015). Those opposing the CPP Final Rule claim that the

expansion of the §112 HAP program in 1990 necessarily required that Congress limit the reach of §111(d) to avoid an overwhelming instance of double regulation (State Petitioners' motion for stay…, 2015).

Arguments against the Best System of Emissions Reductions (BSERs)

Opponents of the Final Rule also argue that the EPA has calculated its BSER building blocks based on the concept of shifting electricity generation away from fossil fuel-fired power plants and towards other renewable sources of energy that the EPA prefers (State Petitioners' motion for stay…, 2015). Petitioners in *West Virginia v. EPA* (2015) contend that the EPA is arbitrarily attempting to require the States to restructure the way they generate electricity by establishing its final carbon pollution emissions guidelines, which the states and industry must satisfy in submitting their individual SIPs (State Petitioners' motion for stay…, 2015). They argue that the EPA is unlawfully relying on five rarely cited words in a rarely-used provision of the CAA, 'best system of emission reduction' (BSER), to assert the authority to require the states to achieve CO_2 emissions reductions that the EPA calculated with the intent of shifting electricity generation in the states away from coal and fossil fuel-fired power plants and towards other renewable sources of energy that the EPA prefers (State Petitioners' motion for stay…, 2015).

The petitioners argue that the BSER building blocks do not adequately fit the definition for a system of emissions reductions as defined by section 111(d) of the CAA because they are not technology-based standards. That is, the shift in electricity production that the building blocks of the plan require is not based on technology that can be applied to the sources (State Petitioners' motion for stay…, 2015). The petitioners in *West Virginia v. EPA* (2015) recognize that the Clean Power Plan Final Rule establishes CO_2 emission requirements for each State based

upon three "building blocks" that the EPA has established: (1) making improvements to coal-fired power plants to increase their efficiency; (2) shifting natural gas combined cycle generation for generation from coal; and (3) substituting electricity generation from fossil fuels to low or zero-carbon energy generation, such as wind and solar (42 U.S.C §7411). However, the petitioners argue that building blocks 2 and 3 are not applicable to a particular source and that they require states and industry to shift from current sources of energy production to sources which the EPA prefers which oversteps the authority of the Act (State Petitioners' motion for stay…, 2015). According to the opposition to the CPP Final Rule, §111(d) only concerns the reduction of emissions by improving a source's performance through measures that can be "appli[ed]" to a stationary source (State Petitioners' motion for stay…, 2015). The opposition to the CPP final rule points out in their motion for a stay of the CPP that;

> "Section 111(d) limits EPA to requiring States—if certain prerequisites are met—to establish 'standards of performance for any existing source' that reflect emission reductions through improvements to a source's performance. 42 U.S.C. § 7411(d)(1)(A). A "standard of performance" must be "appl[icable] . . . to a particular source," id. § 7411(d)(1)(B), and set forth "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," id. § 7411(a)(1)" (State Petitioners' motion for stay…, 2015).

The petitioners assert that a standard of performance based on the BSER must be physically applicable to a source being regulated for air pollution. The petitioners argue that the CPP Final Rule far exceeds the authority granted to the EPA under the CAA §111(d) because the plan's building blocks 2 and 3 are not measures that can actually be "applied" to a source's performance and the EPA is basing their required emissions reductions on these building blocks. Instead of basing emissions reductions on 'applicable' technologies the petitioners argue that the CPP imposes measures that require that renewable sources of generation of energy are

substituted in place of fossil-fuel fired energy production, which opponents of the Final Rule claim is not permitted by the language of the act. They further claim that the CPP does not aim to improve efficiency at individual existing stationary sources by imposing improved designs and operational advances as the CAA permits, and that it instead tries to regulate the state's energy generation which, they assert, is a clear overstepping of the authority permitted to the EPA by the CAA (State Petitioners' motion for stay…, 2015).

Lack of Clear Congressional Intent

Petitioners state that §111(d) does not authorize the EPA to require states to restructure their electrical grids in the way the CPP Final Rule intends to (State Petitioners' motion for stay…, 2015). The opposition to the CPP argues that the EPA lacks the expertise to regulate the energy sector in the way that it is imposing in the Final Rule, which is primarily an area that is left to the responsibility of the individual states or, to the extent of federalism and interstate commerce, the Federal Energy Regulatory Commission (FERC).

The Petitioners state that §111(d) also does not authorize the EPA to require states to restructure their electrical grids in the way the CPP Final Rule intends to in the absence of unambiguously, clear congressional intent (State Petitioners' motion for stay…, 2015). Furthermore, the petitioners claim that the EPA has exceeded its authority under §111(d) of the Act in light of the ruling set forth by the Supreme Court in *Utility Air Regulatory Group v. EPA* (2014) (hereafter, UARG) (State Petitioners' motion for stay…, 2015). In UARG, the Supreme Court shot down an attempted EPA regulation of CO_2 emissions, holding that "[w]hen 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"

(*Utility Air Regulatory Group v. Environmental Protection Agency et al., 2014*). The Court set forth that Congress is expected to "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance'" (*Utility Air Regulatory Group v. Environmental Protection Agency et al., 2014*). West Virginia and its co-petitioners contend that the language of §111(d) does not allow the EPA to make decisions of such vast economic and political significance, much less "clearly" authorize it to do so in the way that the Supreme Court's ruling in UARG seems to require (State Petitioners' motion for stay…, 2015).

According to the petitioners, the "generation shifting" (or, the required shifting of sources of energy generation) at the heart of the CPP is a power that EPA has only recently "discover[ed]" in §111(d) for the first time in the CAA's existence (State Petitioners' motion for stay…, 2015).

The CPP also relies greatly on the use of the term "best system of emissions reductions" (BSER) which has only been cited a handful of times in the past. This is important because the Court, in UARG, instructed the EPA that the agency must point to "clear" congressional authorization whenever it "claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy" (*Utility Air Regulatory Group v. Environmental Protection Agency et al., 2014*). They state, in their motion for a stay of the plan submitted to the D.C. Circuit Court of Appeals, that, "At a minimum, it is hardly "clear" from the text of §111(d) that Congress intended that rarely-used provision to transform EPA from an environmental regulator into the nation's most powerful central planner, making "decisions of vast economic and political significance" (State Petitioners' motion for stay…, 2015). They claim that the "EPA cannot show the clear statement required under UARG for such a capacious assertion of authority" (State Petitioners' motion for stay…, 2015). The petitioners basically

spell out that Congress did not authorize the EPA the authority to regulate the electric grid by creating the CAA.

The petitioners argue that at this time, it would be difficult for the EPA to point to clear congressional authorization under §111 of the CAA for the administration to require states to establish standards of performance based on BSERs that necessitate that states rework their current electrical generation systems (State Petitioners' motion for stay…, 2015). The opponents of the Plan further argue that the EPA's CPP Final Rule for existing sources violates the text of §111(d) with its generation shifting building blocks, as well as the Court's ruling in UARG with its inability to cite clear congressional intent for doing so. Ultimately, opponents of the Final Rule use these arguments in conjunction to assert that the CPP Final Rule is arbitrary and capricious, and that the authority the EPA is citing in section 111(d) of the CAA is unfounded.

Legality of the Clean Power Plan

EPA Response to Section 112 Exclusion Arguments

To confront the problem of the §112 exclusion, the EPA argues that the prior regulation of different pollutants emitted by power plants under a different provision of the CAA than §111(d) does not ultimately prevent CO_2 regulation under §111(d) of the CAA (Respondent EPA's Opposition to motions to stay…, 2015).

Opponents of the Final Rule argue that §111(d) does not allow any regulation of existing power plants' CO_2 emissions (Respondent EPA's Opposition to motions to stay…, 2015). Opponents argue that if a source category's emissions of HAPs have been regulated under §112 of the CAA those sources' emissions of any pollutant can no longer be addressed by §111(d) (Respondent EPA's Opposition to motions to stay…, 2015). They accordingly contend that,

because the sources being regulated by the Final Rule emit HAPs that were regulated by the EPA in the 2012 Mercury and Air Toxics Standards (MATS) the EPA cannot address any emissions – hazardous or not – from those sources attempting to be regulated under the authority of §111(d) of the CAA (State Petitioner's motion for stay…, 2015).

The EPA argues, in response to these claims, that the language of the CAA does not support the petitioner's interpretation of the CAA outlined in the paragraph above (Respondent EPA's Opposition to motions to stay…, 2015). According to the EPA, the 1990 §111(d) amendments to the CAA state that the EPA shall regulate any air pollutant "[1] for which air quality criteria have not been issued OR, [2] which 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 (emphasis added)" (42 U.S.C §7411). The EPA argues that because air quality criteria have not currently been issued for CO_2 (as an individual pollutant) under §112 of the CAA a precise reading of the section actually provides the EPA the authority to issue the Final Rule for CO_2 emissions, specifically. In contrast to the opponents of the Final Rule, the EPA interprets §111(d) as barring regulation of pollutants only in regard to specific "hazardous" pollutants actually regulated under §112 (Respondent EPA's Opposition to motions to stay…, 2015).

The EPA states, in its motion opposing a stay of the final rule, that the phrase "regulated under section [112]" as it exists in the section 112 exclusion, must consider only those HAPs that are directly addressed by §112's regulatory overreach (Respondent EPA's Opposition to motions to stay…, 2015). CO2 is not one of those specific HAPs directly addressed by section 112. The Supreme Court, in 2015, ruled in *Michigan. v. EPA* (US Supreme Court, 2015) that the EPA had actually violated the legal authority of the CAA in enacting a rule regulating fossil fuel-fired

power plants for CO2 emissions under the authority of §112 of the CAA (State Petitioner's motion for stay…, 2015).

Arguments in Favor of the Best System of Emissions Reductions (BSERs)

Another one of the primary arguments against the legality of the Final Rule is that the EPA illegally included electricity generation-shifting measures within the BSERs outlined in the Final Rule (see above section), rather than confining their emission guidelines to certain limited actions that power plants can actually apply within the boundaries of their particular plants (Respondent EPA's Opposition to motions to stay…, 2015). The EPA argues that the emission guidelines in the Final Rule are legally permissible under the authority of §111(d) of the Act because they are based on a "system of emission reduction" that has been "adequately demonstrated," and that is the "best" system obtainable in accordance with the language of the CAA (42 U.S.C §7411). The EPA also argues that the emission guidelines established by the Final Rule reflect an 'achievable' degree of emissions limitations as is required by the language of the CAA (Respondent EPA's opposition to motions to stay…, 2015).

Opponents of the CPP argue that the EPA exceeded the authority of the CAA by including measures to shift the generation of energy from fossil fuel fired stationary sources to renewable sources of energy. However, the EPA contends that emissions guidelines must not necessarily be exclusive to measures that may be applied directly to the existing stationary sources (Respondent EPA's opposition to motions to stay…, 2015).

The EPA contends that the three "building blocks" that form the basis for federal emissions reductions strategies - (1) making improvements to coal-fired power plants to increase their efficiency; (2) shifting natural gas combined cycle generation for generation from coal; and

(3) substituting electricity generation from fossil fuels to low or zero-carbon energy generation, such as wind and solar - legally constitute a "best system of emissions reduction", as required by CAA §111(d) (Respondent EPA's opposition to motions to stay…, 2015). The EPA argues that a "system of emissions reductions" should be understood to encompass any set of legal measures aimed at reducing emissions, and that the set of measures the EPA has defined as the basic building blocks for the BSER unquestionably fulfill this definition (Respondent EPA's opposition to motions to stay…, 2015).

The EPA further argues that its emission reduction guidelines within the final rule have also been adequately demonstrated as emission reduction systems within the electric generation sector (Respondent EPA's opposition to motions to stay…, 2015). The EPA points out that each of the three measures mentioned above, including the generating shifting measures, are already systems that are widely employed by stationary sources of emissions (Respondent EPA's opposition to motions to stay…, 2015). The EPA contends that the emissions guidelines set forth by the Final Rule are achievable in their motion opposing a stay of the final rule in the D.C. Circuit Court.

Congress was Intentionally Vague

While opponents of the Final Rule contend that UARG seems to require clear congressional intent in order for the EPA to regulate carbon emissions under the authority of the CAA, the EPA proposes, in their motion opposing a stay of the final rule, that according to the Supreme Court in *Massachusetts v. EPA* (2007), Congress deliberately used the expansive phrase "best system of emission reduction" in defining the term "standard of performance" because it understood "that without regulatory flexibility, changing circumstances and scientific

developments would soon render the [CAA] obsolete" (*Massachusetts v. EPA, 2007*). The EPA cites the Supreme Court when it invokes that Congress' use of "[b]road language" in §111 "reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence" (*Massachusetts v. EPA, 2007*). The EPA contends that the phrase, "best system of emissions reduction" encompasses a wide range of potential emission reducing measures that are not limited by the fact of whether or not the system may literally be "appl[ied]" to a stationary source of emissions because Congress did not want to accidentally limit the CAA with narrow language (Respondent EPA's opposition to motions to stay…, 2015).

All of these counter arguments supplement the EPA's argument that the Final Rule is legally permissible by the language of the CAA. The proponents of the Final Rule contend that it is not arbitrary or capricious and that it should be implemented.

Political and Legal Future of the Clean Power Plan

The EPA's Final Rule is currently awaiting oral arguments in the United States Court of Appeals for the District of Columbia in early June. Until then, the Final Rule will remain on hold after the United States Supreme Court's decision to grant a stay of the implementation of the Final Rule until it is heard before the federal courts. After the D.C. Circuit Court of Appeals issues its opinion, the losing side of the lawsuit can be expected to appeal to US Supreme Court. Although legal experts argue that it's impossible to predict how any particular judge will rule in a given case, judges track records can serve as a good indication of how a judge may approach a particular issue (E&E Publishing LLC, 2016). Environmental law is an area of law that has a tendency to provoke Judges political ideologies, and for this reason it is important to account for the ideological backgrounds that the Judges in this suit come from. The D.C. Circuit Court of

Appeals Judges who will decide the case on its actual merits in June are Judge Judith Rogers, Judge Karen LeCraft Henderson, and Judge Sri Srinivasan.

According to E&E, Judge Rogers has a reputation for defending the EPA in the D.C. Circuit (E&E Publishing LLC, 2016). Appointed by President Bill Clinton in 1994, Rogers, in 2012, dissented from her colleagues in a 2-1 decision to throw out the EPA's Cross-State Air Pollution Rule (E&E Publishing LLC, 2016). She wrote in her dissent that the Court's decision was effectively trampling on the court's precedent in regards to CAA issues (E&E Publishing LLC, 2016). After the D.C. Circuit denied the rule and Judge Rogers issued her dissent, the U.S. Supreme Court went on to uphold the program's legality (E&E Publishing LLC, 2016).

Judge Karen LeCraft Henderson was appointed to the D.C. Circuit Court of Appeals in 1990 by then President George H.W. Bush. Before her appointment to the D.C. Circuit Court of Appeals, she was appointed as a U.S. District Court Judge in the state of South Carolina by President Ronald Reagan in 1986 (E&E Publishing LLC, 2016). According to E&E, Judge Henderson is considered the most likely judge to vote against the EPA in *West Virginia v. EPA* (E&E Publishing LLC, 2016). Judge Henderson is also the only Republican-appointed judge sitting on the panel in *West Virginia v. EPA.*

The final judge on the Panel for the D.C. Circuit Court of Appeals for the case of *West Virginia v. EPA* is Judge Sri Srinivasan. Sri, notably, worked as a law clerk for former Supreme Court Justice Sandra Day O'Connor (E&E Publishing LLC, 2016). The newest member of the D.C. Circuit Court of Appeals, he was appointed in 2013 by President Barack Obama. Judge Srinivasan has already issued pro-environmentalist opinions in his time serving on the court, which is favorable for the EPA in *West Virginia v. EPA* (E&E Publishing LLC, 2016).

Regardless of the make-up of the D.C. Circuit Court of Appeals, it is likely that no matter what opinion the D.C. Circuit issues in June the case will be appealed, successfully, to the US Supreme Court given the suit's significance and the impact a ruling in the case is likely to have on the entire nation. However, given that 1) the D.C. Circuit Court recently declined to issue a stay of the Final Rule based on the legal arguments described above and also 2) the composition and voting behavior of the judges who will serve on the panel for the case, it can likely be assumed that the Final Rule's legality will be affirmed by the D.C. Circuit Court of Appeals in June in the Case of *West Virginia v. EPA.*

Inevitably, the case will be appealed to the U.S. Supreme Court by the losing party at the D.C. Circuit Court of Appeals. Although a stay of the rule at the Supreme Court level would normally have signaled the end of the road for the CPP in the Supreme Court, the recent death of Justice Antonin Scalia has drastically altered that conception (E&E Publishing LLC, 2016). Justice Scalia died just days after he issued the Court's opinion in a 5-4 decision to stay the Final Rule at the federal level while it is under review in the lower courts. Given the apparent ambiguity involved in many of the legal arguments presented above, Justice Scalia's vacant seat may ultimately determine the fate of President Obama and the EPA's seemingly once-doomed CPP. Equally importantly, if a new justice isn't appointed by the time the case makes it to the Supreme Court (possibly as soon as 2017) the Justices could likely cast a split vote of 4-4 which would uphold the D.C. Circuit Court of Appeals Decision (which, again, would likely be to uphold the final rule on its legal merits) making the upcoming legal battle in the D.C. Circuit Court of Appeals even more critical.

The ideology of the Justices becomes very important in a case like West Virginia v. EPA where an executive agency's rule is being petitioned because Justices deference to executive

agencies is usually based in ideology (Gass, 2016). If Justices agree with a rule on an ideological level they uphold it, if they disagree with the rule ideologically they deny it (Gass, 2016). This leads some experts to believe that had a majority of Justices agreed with the rule ideologically it would not have been stayed by the Supreme Court (Gass, 2016). With Justice Scalia (one of the votes for a stay of the Final Rule) gone this makes the upcoming Supreme Court Justice appointment even more decisive to the outcome of the Clean Power Plan, because the ideology of the newest Justice is likely to sway the Court in a 5-4 majority.

A nomination from either political party in the US before the case reaches the Supreme Court would have a critical impact on the outcome of *West Virginia v. EPA* and, subsequently, the legal merits of the CPP Final Rule. If the case is heard by the full Court the vote of the newest Justice, and thus his or her party of nomination, will have a deciding impact on the decision of the Supreme Court.

Conclusions

Given the legal analysis that was conducted throughout the course of this research, §111(d) of the CAA is, currently, the best available legal avenue for President Obama and the EPA to issue the Clean Power Plan Final Rule. This is because of a combination of factors, the most important of which is that executive action is, at this time, the only realistic option for the federal government to properly utilize the CAA to regulate GHG pollution from the main contributors of GHG emissions; stationary sources. The program that exists to regulate NAAQS from stationary sources under §108-110 of the CAA is, as was described earlier, regulated by Congress, and at this time it seems very unlikely that Congress is going to be capable of passing legislation to modify the NAAQS program any time soon. Also, as was mentioned above, the

NAAQS program is a health-based program as opposed to the technology-based program that §111 entails, and CO_2's lack of a direct negative impact on public health makes it difficult to regulate under a health-based program

The most favorable avenue for federal action addressing the problem of GHG emissions from stationary sources in the United States would be for Congress to pass legislation, such as legislation establishing a distinct act from the CAA that more directly address the problem of climate change, but this more favorable avenue doesn't appear to be viable options given the current political makeup of the legislative branch in the US.

The EPA has accumulated what appears to be the appropriate legal foundation to issue the CPP, and for this reason it can be assumed that the arguments for the plan will likely not be determined to be arbitrary and capricious. According to the Court in *Massachusetts v. EPA* (2007), Congress' use of broad and somewhat ambiguous language in §111(d) is actually the product of an intentional effort to confer flexibility in that section of the Clean Air Act. This, along with the EPA Administrator's endangerment finding for the six key GHGs prepared the legal stage for the EPA to issue carbon pollution standards for major stationary sources under the authority of the CAA. The Supreme Court, in *American Electric Power Co., Inc. v. Connecticut,* further promoted §111(d) as the correct avenue to regulate GHGs when they determined that §111(d) "speaks directly" to the problem of CO_2 emissions from existing stationary sources *(American Electric Power Co., Inc. v. Connecticut, 2011).*

The Supreme Court also essentially denied the EPA access to the avenue of §112 as a means to regulate GHG pollution in the case, *Michigan v. EPA* (2015). Therefore, at this time, the only remaining option for the EPA to make a practical attempt at regulating GHG pollution

from large stationary sources under the authority of the CAA as it currently exists is the avenue of §111 of the CAA. This fact, coupled with the convincing argument that the EPA presents in its motion opposing a stay of the Final Rule, essentially providing that the rule is not arbitrary and capricious, offers a sound legal argument for the CPP's legal permissibility under the authority of §111(d) of the CAA.

However, only the federal courts' opinions on the legal merits of the Final Rule will ultimately determine the legality of President Obama and the EPA's CPP Final Rule. The upcoming showdown in the D.C. Circuit Court of Appeals in June will offer the first glimpses of how the federal judiciary will weigh the legal arguments presented and discussed above. The composition of the Supreme Court at the time the case inevitably reaches the Supreme Court will also have a tremendous impact on the outcome of *West Virginia v. EPA* when it finally reaches the Supreme Court and thus on the legality of the CPP.

The EPA has seemingly gone all-in with the CPP, and it has decided on a reasonable avenue to issue its CPP given the current political climate of the US. Now the EPA and the Petitioners in *West Virginia v. EPA* must prepare for what is going to be one of the most momentous legal battles in the history of GHG regulation and the field of environmental law.

Cases and Motions Cited

American Electric Power Co., Inc. v. Connecticut et al., 564 U.S. S. Ct. (2011)

Massachusetts et al. v. Environmental Protection Agency et al., 549 U.S. S. Ct. 497 (2007)

Respondent EPA's opposition to motions to stay final rule in *State of West Virginia Et Al. v. United States Environmental Protection Agency* (December 3rd, 2015)

State Petitioners' motion for stay and for expedited consideration of petition for review in *State of West Virginia Et Al. v. United States Environmental Protection Agency* (2015)

Utility Air Regulatory Group v. Environmental Protection Agency et al., 573 U.S. S. Ct. (2014)

Statutes and Rules Cited

Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64661–65120 (October 23, 2015) (to be codified at 40 CFR pt. 60)

Clean Air Act of 1990 Section 111(d), Standards of performance for new stationary sources, 42 U.S.C §7411(1990)

Works Cited

Arnold & Porter (2016). Climate change litigation in the U.S. Retrieved from www.climatecasechart.com

Business Roundtable (2014, August 18). Background paper on significant EPA regulations pending or proposed: Regulation of greenhouse gas emissions under the Clean Air Act. Retrieved from http://businessroundtable.org/sites/default/files/reports/Regulation%20of%20GHG%20Under%20the%20CAA%20Background.2014.08.18.pdf

Eilperin, J., Mufson, S. (2014, June 2). Everything you need to know about the EPA's proposed rule on coal plants. *The Washington Post*. Retrieved from https://www.washingtonpost.com/national/health-science/epa-will-propose-a-rule-to-cut-emissions-from-existing-coal-plants-by-up-to-30-percent/2014/06/02/f37f0a10-e81d-11e3-afc6-a1dd9407abcf_story.html

E&E Publishing LLC (2016). E&E's power plan hub: Your guide to the clean power plan in the courts. Retrieved from http://www.eenews.net/eep/documents/Clean_Power_Plan_Courts.pdf

Gass, H. (2016). Supreme Court blocks Clean Power Plan, but perhaps not its goals. *The Christian Science Monitor*.

Hackel, A. (2014, March 18). Section 112 of the Clean Air Act (CAA) [PowerPoint Slides]. Retrieved from http://www.epaejtraining.org/OAQPS/wp-content/uploads/2013/09/1pm_Angela_Hackel_Overview_of_Section_112_508.pdf

Karl, T. R., Melillo, J.M., & Peterson, T. C. (2009). Global climate change impacts in the United States

Legal Progress (2013). Why the D.C. Circuit matters. Retrieved from https://www.americanprogress.org/wp-content/uploads/2013/03/Why-the-D.C.-Circuit-Matters1.pdf

Percival, R.V., Schroeder, C.H., Miller, A.S., & Leape, J.P. (2009). New York, New York: Aspen Publishers

U.S. Energy Information Administration, (2016, March 29). Electricity in the United States. Retrieved from http://www.eia.gov/energyexplained/index.cfm?page=electricity_in_the_united_states

US Environmental Protection Agency, (2016). NAAQS table. Retrieved from https://www.epa.gov/criteria-air-pollutants/naaqs-table

United States Environmental Protection Agency [US EPA], (No date). Overview on the Clean Air Act: Section 111 and the state plan structure [PowerPoint Slides]. Retrieved from https://www.epa.gov/sites/production/files/2015-04/documents/epa-webinar-clean-air-act-section-111d.pdf