

Clean Power Plan Litigation Update



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EPA Rulemakings



- **March 2012: First Proposed Carbon Dioxide Standards for New Power Plants .**
 - Single standard for all fossil fuel-fired EGUs – natural gas combined cycle technology.
 - Withdrawn September 2013.
- **September 2013: Proposed Carbon Dioxide Standards for New Power Plants.**
- **June 2014: Proposed Carbon Dioxide Standards for Existing Power Plants.**
- **June 2014: Proposed Carbon Dioxide Standards for Modified and Reconstructed Power Plants.**
- **October 2014: Clean Power Plan Notice of Data Availability.**
- **October 2014: Clean Power Plan Supplemental Proposal for Tribes.**

EPA Rulemakings



- **North Dakota submitted technical and legal comments.**
 - Attorney General's Office.
 - Department of Health.
 - Public Service Commission.
- **42 U.S.C. § 7607(6)(B) requires that objections be raised during the public comment period.**

Final Rules: August 3, 2015



- Carbon Dioxide Standards for New, Modified, and Reconstructed Power Plants – 111(b)
 - **111(b) is a prerequisite for 111(d)**
- Carbon Dioxide Standards for Existing Power Plants or “Clean Power Plan” – 111(d)
- Proposed Federal Plan for the Clean Power Plan (including Model Rules)
 - Deadline for comments was January 21, 2016.

Pre-Publication Litigation



- Cases filed challenging both 111(b) and 111(d) rules, beginning in June 2012.
- Both in the D.C. Circuit Court of Appeals and federal district courts.
- Early cases clarified that:
 - Challenges must wait until after the rule is published in the Federal Register.
 - Challenges must be in the form of a petition for review filed with the D.C. Circuit Court of Appeals.

North Dakota Administrative Actions



- AG sent a letter to EPA Administrator McCarthy asking her to stay the CPP Rule, raising issues similar to those in North Dakota's Motion to Stay.
- AG filed a Petition for Reconsideration of the CPP Rule because North Dakota was not given an opportunity to comment on the drastic changes from the proposed rule.
- Other Petitions for Reconsideration: Kentucky, Montana, New Jersey

Petitions for Judicial Review



- **10/23/15: Both 111(b) and 111(d) were published.**
- **12/22/15: Deadline to file petitions for review.**
- **North Dakota immediately filed petitions for review on both rules.**

CPP/111(d) Litigation



- In less than 12 hours, it became the most litigated environmental rule.
- 200+ attorneys.
- 42 separate petitions.
- Consolidated as *West Virginia v. EPA*, Case No. 15-1363 (D.C. Cir.).

27 State Petitioners



- **North Dakota**
- **Oklahoma**
- **Mississippi**
- **24 State Coalition (West Virginia, 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)**

Industry Petitioners/Intervenors



- Dozens of industry petitioners, including trade associations, coal interests, and utilities.
- Including:
 - Basin Electric
 - Lignite Energy Council
 - Minnkota Power Cooperative
 - Montana-Dakota Utilities Co.
 - North American Coal
 - Denbury Onshore LLC

Intervenors for EPA



- **Many EPA supporters, including power companies, environmental groups, public health organizations, and several states.**
 - 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.

Neutral States



- Alaska (exempt)
- Idaho
- Nevada
- Tennessee
- Pennsylvania

Motions to Stay



- **North Dakota**
- **Oklahoma**
- **Mississippi DEQ**
- **24 States led by WV**
- **Basin Electric**
- **Chamber of Commerce and other trade groups**
- **Peabody Energy**
- **Murray Energy and coal-related groups**
- **Utilities and related groups**

ND's Motion to Stay 111(d)



- **Factors considered for granting a stay:**
 - Likelihood of success on the merits
 - Irreparable injury
 - Possibility of substantial harm to others
 - Public Interest

Legal Arguments



- EPA can't regulate existing sources under CAA § 111(d) because they're already regulated under CAA § 112.
- EPA exceeded its authority, violating the state's rights under the Clean Air Act.
- EPA is unlawfully regulating "beyond the fence-line."
- North Dakota wasn't given an opportunity for notice on comment on changes from the proposed to the final rule.

Irreparable Harm



- **EPA's analysis shows plant retirements in 2016**
 - Coyote Station
 - R.M. Heskett Unit 1
 - MRYS Unit 1
 - Spiritwood Station
- **EPA's analysis shows plant retirements in 2018**
 - Coal Creek Station Unit 1
 - R.M. Heskett Unit 2

Irreparable Harm



- Deprives ND of its sovereign authority, interests, and policies.
- Economic loss due to harm to ND's budget.
 - Tax revenue from coal conversion and coal severance.
 - Revenue from royalty and lease payments from coal on state lands.
- If successful on the merits, ND will not be able to recover economic damages to compensate the State for the significant resources needed to implement the rule.

Irreparable Harm Declarations



- **Dave Glatt, NDDH**
- **Jessica Binder, Mercer County**
- **John Neumann, North American Coal**
- **Kelly Schmidt, State Treasurer**
- **Ladd Erickson, McLean County**
- **Lance Gaebe, ND Department of Trust Lands**
- **Lynn Helms, Department of Mineral Resources**
- **Randy Christmann, ND PSC**
- **Ryan Rauschenberger, Tax Commissioner**
- **Tyler Hamman, Transmission Authority**

EPA's Response



- **Challengers not more likely than not to win on legal arguments.**
- **Challengers won't suffer irreparable harm if the rule proceeds.**
- **Public will be harmed by a stay.**
- **Public interest in reject stay of a rule that is a critical component of climate mitigation strategy.**

D.C. Circuit Order: January 21, 2016



- **Per curiam.**
- **Denied stay motions: “Petitioners have not met the stringent requirements for a stay pending judicial review.”**
- **Good news: Granted states’ request for expedited briefing schedule.**

D.C. Circuit Court Panel



- Judge Karen Henderson (George H.W. Bush-appointee)
- Judge Judith Rogers (Clinton-appointee)
- Judge Sri Srinivasan (Obama-appointee)

CPP/111(d) Briefing Schedule



- **Petitioner briefs due February 19.**
 - 2 briefs; 42,000 words total.
- **EPA brief due March 28.**
- **Petitioners reply briefs due April 15.**
- **Oral argument scheduled for June 2-3.**

SCOTUS Petitions



- 5 different groups immediately filed petitions asking the Supreme Court to stay the CPP.
- Won't affect on-going D.C. Circuit schedule.
- Arguments mirrored Motions to Stay.
- Chief Justice John G. Roberts is designated to handle emergency matters for the D.C. Circuit.
 - He can decide himself or refer to the court.
 - He gave EPA one week to respond (Feb. 4).

CPP Litigation Timeline



- **Decision by D.C. Circuit late summer or early fall.**
 - Before September 6 deadline for state plan extension request?
- **No matter the outcome, there will likely be petitions for cert and Supreme Court review.**

New Source/111(b) Litigation



- 16 separate petitions.
- Consolidated as *North Dakota v. EPA*, D.C. Cir. No. 15-1381.

State Petitioners



- **North Dakota**
- **23 State Coalition (West Virginia, Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Wisconsin and Wyoming)**

Industry Petitioners/Intervenors



- Various trade associations, coal interests, and utilities.
- Lignite Energy Council.

Intervenors for EPA



- **Many EPA supporters, including environmental groups, public health organizations, and several states.**
 - California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, Massachusetts, District of Columbia, City of New York, and Minnesota.

New Source/111(b) Status



- **Non-binding statements of issues filed.**
- **Proposed briefing formats due 2/22/16.**
- **Same panel as Clean Power Plan/111(d).**

ND's Non-Binding Statement of Issues



- Emission standards are based on technologies that have not been adequately demonstrated and are not achievable.
- EPA's relied on separate alleged "demonstrations" of the individual components of the technology.
- EPA failed to create a lignite coal subcategory.
- The rule is an unconstitutional taking of property interests.
- The rule violates the Energy Policy Act of 2005.

Anticipated Litigation Timeline



- **CPP Rule:**
 - Spring 2016: Decision on Motion to Stay
 - Spring 2016: Merits Briefing
 - Late Summer or Early Fall: D.C. Cir. Court Decision
 - 2017: Supreme Court
- **111(b) Rule: ?**