WHAT’S NEXT?
LEGAL PERSPECTIVES ON THE CLEAN POWER PLAN

Wednesday, May 25 | 3 p.m. EDT
FREE CSG eCademy Webcast
Presented with AAPCA
Can EPA use section 111(d) to regulate a “source category” (coal-fired power plants) it has already regulated under Section 112?

EPA may use Section 111(d) to regulate “any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section [108(a) of the CAA] or emitted from a source category which is regulated under [section 112 of the CAA] but (ii) to which a standard of performance under this section would apply if such existing source were a new source.”
Section 111(d)

• “The Administrator shall prescribe regulations which shall establish a procedure similar to [the SIP process] under which each state shall submit to the Administrator a plan which establishes standards of performance for any existing source . . . to which a section 111(b) standard of performance would apply if such existing source were a new source.”

• EPA’s 111(d) regulations “shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.”
Definitions

• Section 111(a): “The term ‘standard of performance’ means 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 which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

• Section 302(l): “The term ‘standard of performance’ means a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.”
Clean Power Plan Webinar
CSG/AAPCA (May 25, 2016)

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Three Big Picture Points:

- **Climate Risk**: GHG concentrations continuing to mount, with climb in average temperatures and related changes in climate and environment (for example, ocean acidification/coral bleaching)
- **U.S. Power Sector Shifts**: Economically-driven shift toward gas and renewables over last decade, large drop in the sector’s GHG emissions
- **Legal backdrop on Clean Air Act and GHGs**: Massachusetts (2007); American Electric Power (2011); Utility Air Regulatory Group (2014)
Year-to-Date Global Temperature
for 2016 and the other seven warmest years on record
A POWER SHIFT IN THE UNITED STATES

Electric Generation Capacity by Year Installed

GW


Coal Natural Gas Other Fossil Nuclear Wind Solar Other Renewables

SOLAR

WIND
Key Statutory Language

111(a)(1): The term “standard of performance” means 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 which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

111(d)(1): The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by [Section 110] 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 [Section 108(a)] or [emitted from a source category which is regulated under [Section 112]]* but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. ...  

* Differing, Senate-originated language [“Section 112(b)”]
Key Features of CPP

- Emissions performance rates for coal and gas plants, with flexibility in how state plans and source operations can meet those goals
  Distinction between basis for setting stringency of environmental goals and permissible means of compliance
- Gradualism and moderation of targets
- Consistency with trends in sector
- Practical operation of power grid as consideration in setting goals
A CLIMATE CHANGE OF UNCERTAINTY

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The CPP’s Crazy Twists and Turns

• Multiple parties challenged the *proposed* rule (denied)
• Multiple parties asked the D.C. Circuit for a stay (denied)
  – But the D.C. Circuit issued a very expedited briefing schedule
• WV and others immediately appealed the stay decision
• Supreme Court issued a stay
  – HIGHLY UNUSUAL
  – REALLY BAD SIGN FOR THE EPA
• Then Scalia’s death changed everything
• After briefing → D.C. Circuit, on its own motion, ordered *En Banc* review (9 judges – no Garland and Pillard)
• What does all of this mean?
Yes, I use Twitter; I can’t help myself

Yesterday I put the chances of the #CleanPowerPlan surviving judicial review at < 10%. With #Scalia's death, I now say it's > 75%.
Likely Timing

➔ With arguments in September, expect a D.C. Circuit decision by Jan/Feb
➔ Petitions for cert take time
➔ Supreme Court could deny cert (unlikely), which would mean a final decision in early to mid 2017
➔ If Supreme Court grants cert: decision likely in very late 2017 or early to mid 2018
➔ Will the Supreme Court still only have 8 justices by then?
Our Poll: Is It Legal?

Clean Power Plan Poll Demographic

- Private Attorney: 56%
- Professor: 29%
- Utility: 5%
- Nonprofit: 5%
- Government/Other: 5%
Some Of The Poll Results...

Do you think the Clean Power Plan, as currently written, is legal?
Some More Results...

If you think the Clean Power Plan is illegal, please identify which of the following parts you believe are illegal (you may select more than one):

(a) The entire Clean Power Plan is illegal because it’s unconstitutional
(b) The entire Clean Power Plan is illegal because the EPA doesn’t have the authority to regulate power plant CO2 emissions under section 111(d)
(c) Building block one (6% reduction at coal plants) is illegal
(d) Building block two (running combined cycle natural gas plants instead of coal plants) is illegal
(e) Building block three (increased renewables and new nuclear) is illegal
(f) Building block four (increased energy efficiency) is illegal
If a Democrat gets elected, what’s next?

• Section 115 is a dangerous weapon
  – Look out – could be economy wide
  – Two things needed: (1) a study linking U.S. emissions to harm in other countries; and (2) reciprocity
  – (1) can be waived by the Secretary of State
  – (2) can be fulfilled either by Paris or going out and getting help from another country

• New 111(b) and 111(d) rules for other high-emitting industries

• Even stronger “fracking” (i.e., methane) regulations and more coal regs (ozone, CSAPR, etc)
If a Republican wins, what’s next?

• Repeal of CPP and 111(b) rule?
  – D.C. Circuit authority to do so based solely on policy (Nat'l Ass'n of Home Builders v. EPA – Garland decision)
  – Is this likely?
  – The candidates have promised to do it
  – Might need to also appoint a new Supreme Court justice

• Amend the Clean Air Act?
  – Need Congress

• Withdraw Paris commitment?

• Others?
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Questions?

Please submit them in the question box of the GoToWebinar taskbar.
The Supreme Court in UARG

“EPA’s interpretation is unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ Brown & Williamson, 529 U. S., at 159, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”
What EPA Said to the Supreme Court

“The stays motions “explicitly or implicitly ask this Court to toll all of the relevant deadlines set forth in the Rule, even those that would come due many years after the resolution of their challenge, for the period between the Rule's publication and the final disposition of their lawsuits. Entry of such a 'stay' would mean that, even if the government ultimately prevails on the merits and the Rule is sustained, implementation of each sequential step mandated by the Rule would be substantially delayed.”
What the Supreme Court Granted

Motion to “extend all compliance dates by the number of days between publication of the rule and a final decision by the courts, including this Court, relating to the rule’s validity.”