Future of the Clean Power Plan

Tom Grever | Shook Hardy & Bacon L.L.P. | March 2, 2017

Caveat


I KNOW NOTHING!
I SEE NOTHING, I HEAR NOTHING!
memegenerator.net

Evolution of GHG Regulation

Mass. v. EPA (2007)

- GHGs are "air pollutants" subject to CAA; *must be regulated unless* no endangerment

Endangerment Finding (2009)

- GHGs from motor vehicles endanger environment, triggering new Auto Fuel Standards under Section 202.
- What about other sources?

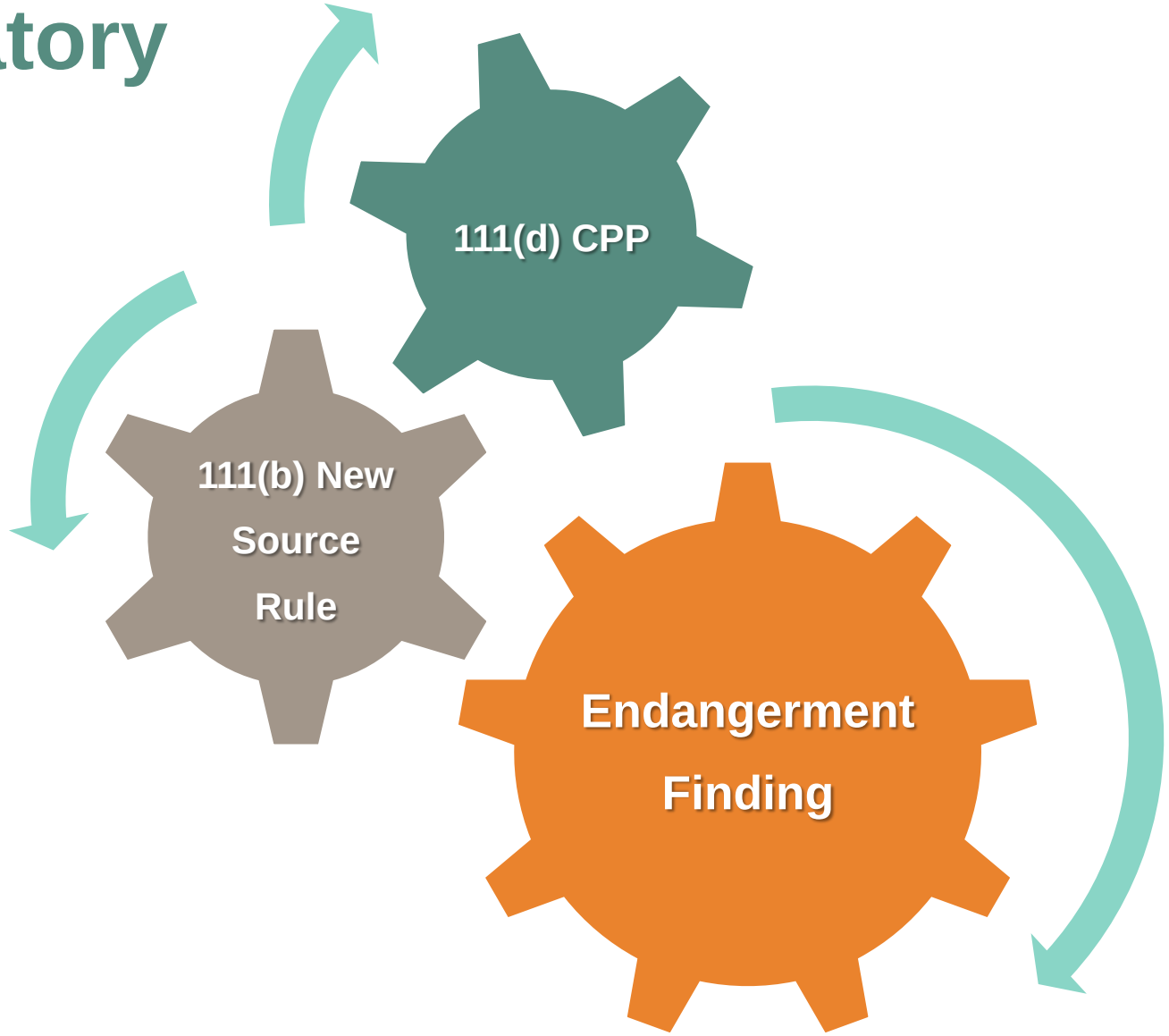
Clean Power Plan (2015)

- Based on 2009 Endangerment Finding
- 111(b) New/Modified Sources (NSPS)
- 111(d) Existing Sources (ESPS)

CAA Section 111

- 111(b): EPA "shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare" THEN establish "Federal standards of performance for new sources within such category"
- "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): each State shall submit 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 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title, but (ii) to which a standard of performance under this section would apply if such existing source were a new source…"

EPA Regulatory Options



Regulatory Options – Endangerment Finding

- Upheld by DC Circuit (2012), not currently being litigated
- Rescind it altogether?
- Limit it: Reinterpret “judgment” that it applies to Power Plants?
- Requires rulemaking
- Congressional amendment to CAA?

WOTUS Executive Order–- A Clue for CPP?

Section 1. Policy.
It is in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.

Sec. 2. Review of the Waters of the United States Rule.
(a) The Administrator of the Environmental Protection Agency (Administrator) and the Assistant Secretary of the Army … shall…publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law.

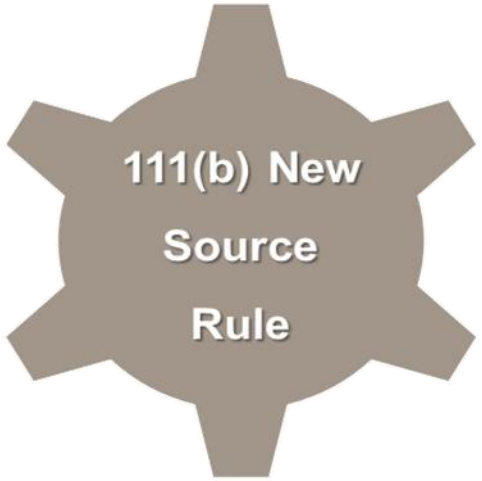
***

(c) With respect to any litigation … the Attorney General may, as he deems appropriate, inform any court of such review and take such measures as he deems appropriate concerning any such litigation pending the completion of further administrative proceedings related to the rule.

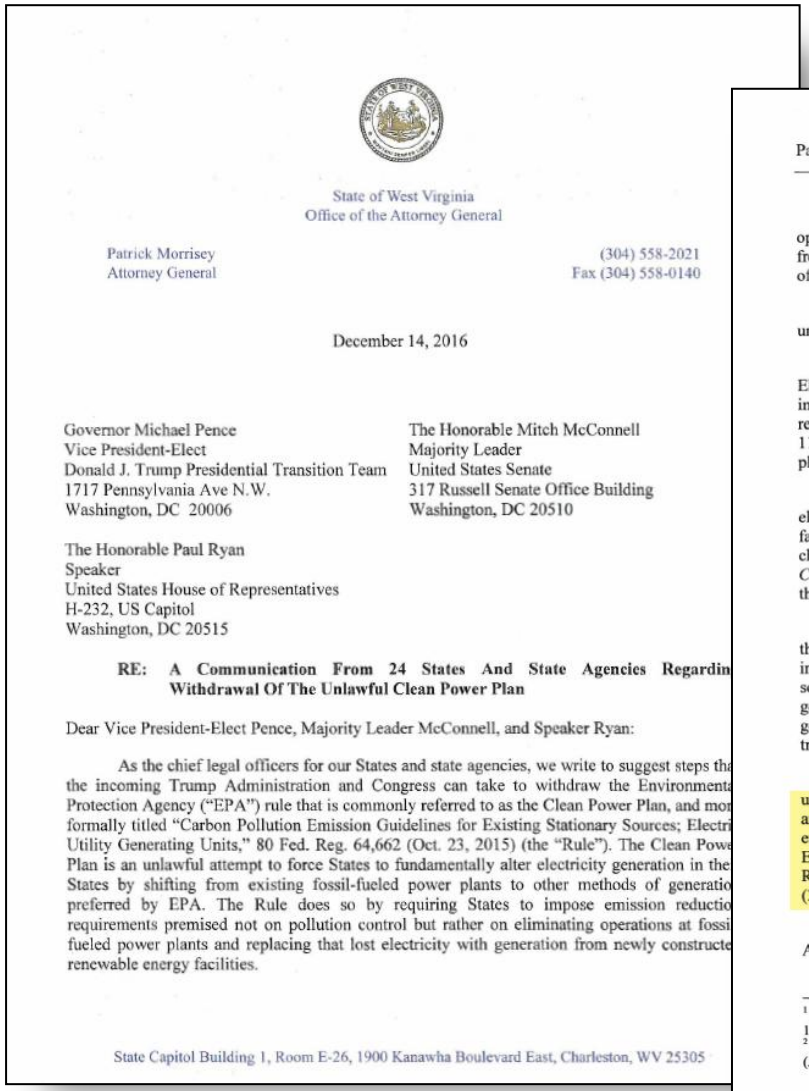
Litigation Update

- Existing Source Rule 111(d)
  - All compliance deadlines are stayed pending final outcome
  - Argument to D.C. Circuit *en banc*: September 2016
  - Timing of decision…?
  - Further review by Supreme Court?
- New Source Rule 111(b)
  - Briefing to D.C. Circuit completed
  - Oral Argument: April 7
  - Timing of decision…?

Regulatory Options- 111(b) New Sources



- Requires CCS for new/modified coal plants
- Stop defending litigation?
- Ask Court to vacate and remand?
  - Review/reinterpret carbon capture/sequestration as “adequately demonstrated technology”
- No 111b = no 111d
  - 111(d) only applies to sources “to which a standard of performance under this section would apply if such existing source were a new source…”



State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

(304) 558-2021
Fax (304) 558-0140

December 14, 2016

Governor Michael Pence
Vice President-Elect
Donald J. Trump Presidential Transition Team
1717 Pennsylvania Ave N.W.
Washington, DC 20006

The Honorable Mitch McConnell
Majority Leader
United States Senate
317 Russell Senate Office Building
Washington, DC 20510

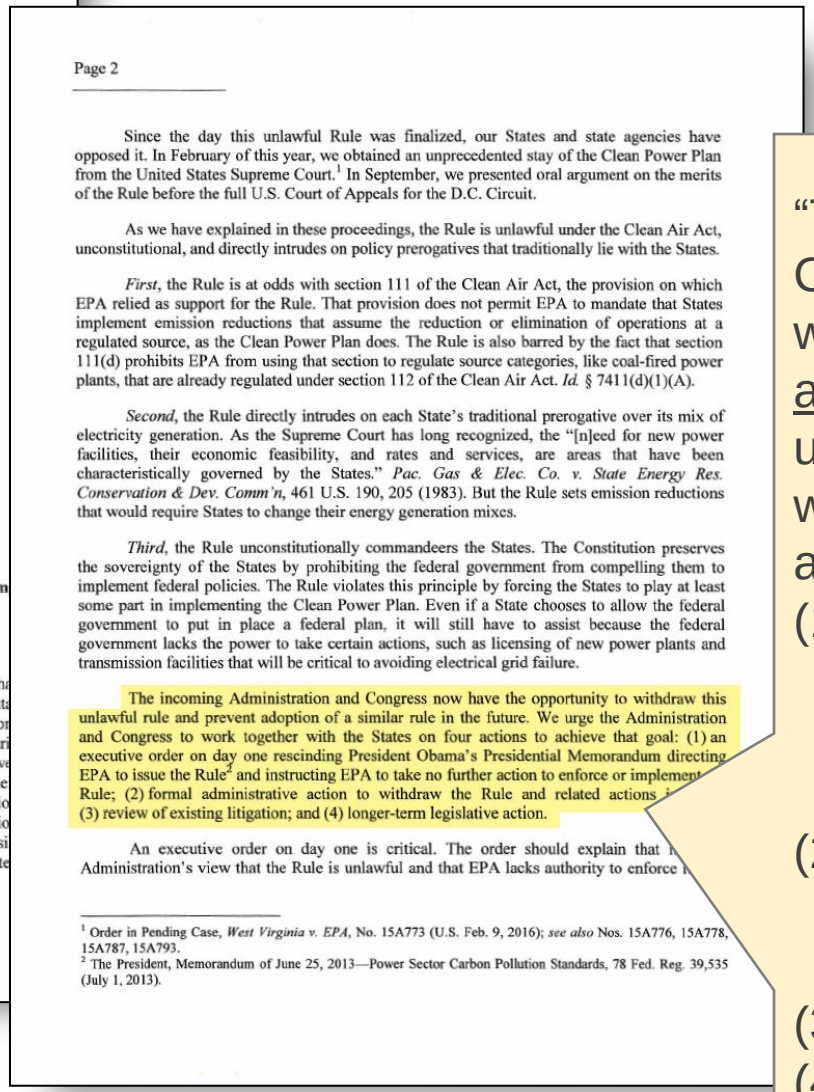
The Honorable Paul Ryan
Speaker
United States House of Representatives
H-232, US Capitol
Washington, DC 20515

RE: A Communication From 24 States And State Agencies Regardin
Withdrawal Of The Unlawful Clean Power Plan

Dear Vice President-Elect Pence, Majority Leader McConnell, and Speaker Ryan:

As the chief legal officers for our States and state agencies, we write to suggest steps tha
the incoming Trump Administration and Congress can take to withdraw the Environmenta
Protection Agency ("EPA") rule that is commonly referred to as the Clean Power Plan, and mor
formally titled "Carbon Pollution Emission Guidelines for Existing Stationary Sources; Electri
Utility Generating Units," 80 Fed. Reg. 64,662 (Oct. 23, 2015) (the "Rule"). The Clean Powe
Plan is an unlawful attempt to force States to fundamentally alter electricity generation in the
States by shifting from existing fossil-fueled power plants to other methods of generatio
preferred by EPA. The Rule does so by requiring States to impose emission reductio
requirements premised not on pollution control but rather on eliminating operations at fossi
fueled power plants and replacing that lost electricity with generation from newly constructe
renewable energy facilities.

State Capitol Building 1, Room E-26, 1900 Kanawha Boulevard East, Charleston, WV 25305



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Since the day this unlawful Rule was finalized, our States and state agencies have opposed it. In February of this year, we obtained an unprecedented stay of the Clean Power Plan from the United States Supreme Court.[1] In September, we presented oral argument on the merits of the Rule before the full U.S. Court of Appeals for the D.C. Circuit.

As we have explained in these proceedings, the Rule is unlawful under the Clean Air Act, unconstitutional, and directly intrudes on policy prerogatives that traditionally lie with the States.

First, the Rule is at odds with section 111 of the Clean Air Act, the provision on which EPA relied as support for the Rule. That provision does not permit EPA to mandate that States implement emission reductions that assume the reduction or elimination of operations at a regulated source, as the Clean Power Plan does. The Rule is also barred by the fact that section 111(d) prohibits EPA from using that section to regulate source categories, like coal-fired power plants, that are already regulated under section 112 of the Clean Air Act. *Id.* § 7411(d)(1)(A).

Second, the Rule directly intrudes on each State's traditional prerogative over its mix of electricity generation. As the Supreme Court has long recognized, the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). But the Rule sets emission reductions that would require States to change their energy generation mixes.

Third, the Rule unconstitutionally commandeers the States. The Constitution preserves the sovereignty of the States by prohibiting the federal government from compelling them to implement federal policies. The Rule violates this principle by forcing the States to play at least some part in implementing the Clean Power Plan. Even if a State chooses to allow the federal government to put in place a federal plan, it will still have to assist because the federal government lacks the power to take certain actions, such as licensing of new power plants and transmission facilities that will be critical to avoiding electrical grid failure.

The incoming Administration and Congress now have the opportunity to withdraw this unlawful rule and prevent adoption of a similar rule in the future. We urge the Administration and Congress to work together with the States on four actions to achieve that goal: (1) an executive order on day one rescinding President Obama's Presidential Memorandum directing EPA to issue the Rule[2] and instructing EPA to take no further action to enforce or implement the Rule; (2) formal administrative action to withdraw the Rule and related actions in court; (3) review of existing litigation; and (4) longer-term legislative action.

An executive order on day one is critical. The order should explain that the Administration's view that the Rule is unlawful and that EPA lacks authority to enforce it

[1] Order in Pending Case, *West Virginia v. EPA*, No. 15A773 (U.S. Feb. 9, 2016); *see also* Nos. 15A776, 15A778, 15A787, 15A793.
[2] The President, Memorandum of June 25, 2013—Power Sector Carbon Pollution Standards, 78 Fed. Reg. 39,535 (July 1, 2013).

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(4) longer-term legislative action."

Regulatory Options– 111(d)

- Step back on defending litigation?
- Ask DC Circuit to vacate and remand the rule?
  - Rescind altogether?
  - Reinterpret 111d vs. 112 issue?
    - "…(i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title…"
  - Reinterpret limit of regulations- remove "beyond-the-fenceline" obligations?
  - Notice and comment rulemaking = more litigation
  - Timing is everything

Questions?