

U.S. CLIMATE ACTION UNDER THE CLEAN AIR ACT

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Executive Summary

This brief provides a balanced assessment of the risks and challenges facing the Obama administration as it seeks to mitigate climate change using the Clean Air Act (CAA). It outlines the CAA and its applications for regulating domestic greenhouse gas (GHG) emissions, summarizes the likely challenges the administration will face in the coming years, and provides political analysis on the extent to which the United States will sustain its recent climate progress after the election of a new President and Congress in late 2016.

The CAA is the primary legislative tool used by the Obama administration to combat air pollution and cut greenhouse gas emissions. Under the CAA, the U.S. Environmental Protection Agency (EPA) has used several different approaches to regulate GHG's, with the most far reaching being the Clean Power Plan – a rule to regulate carbon dioxide (CO₂) emissions from existing fossil fuel power plants. The Clean Power Plan would be the first-ever nationwide set of limitations on CO₂, estimated to achieve nearly a 30 percent reduction in emissions from the electricity sector by 2030. The plan is novel in the way it regulates emissions from the electricity sector rather than through individual power plants, and in the flexibility it allows by providing states the opportunity to tailor their approach to local circumstances. These policy innovations are politically and legally significant. On the one hand they help reduce compliance costs and help create local buy-in, while on the other hand they create a greater risk of legal challenges.

Some states and companies are already challenging the rule in court, and political opposition may occur at various levels of government. States may choose to challenge implementation of the rule; a politically divided Congress may oppose the plan; and the courts may rule that portions of the rule need to be re-done by the EPA. Although the EPA and the Clean Power Plan may face numerous obstacles and setbacks before the plan is implemented, the long run direction is positive.

In the medium term, it is highly likely the EPA will be regulating emissions from power plants. This optimism stems from the fact that many states have already indicated they will move forward with implementation plans, the U.S. government has a legal obligation to regulate GHG emissions, and those regulations must be based on science – further solidifying the evidence-base for such legislation. Implementation of the Clean Power Plan will be far along by the time the next president enters office, making repeal difficult. For these reasons and more, there is every reason to be hopeful that Obama-era climate policies will have a lasting effect on U.S. emissions.

Introduction

In June 2013, President Obama unveiled a key component of his second-term domestic agenda: the Climate Action Plan, a wide-ranging interagency strategy to ratchet down U.S. GHG emissions and boost U.S. energy efficiency. The Climate Action Plan marshals the President's executive authority under federal law and features a suite of regulations, programs and measures—some already implemented and others proposed—across different sectors of the U.S. economy. The Plan articulates a goal of reducing U.S. GHG emissions by 17 percent below 2005 levels by 2020, and a 26-28 percent reduction by 2025.¹

The single most important driver behind the President's Climate Action Plan is the federal Clean Air Act (CAA). For over four decades, the CAA has served as the nation's primary law for curbing air pollution. In the last five years the Environmental Protection Agency (EPA) has begun using this statute as a tool for combatting GHG pollution, consistent with the Supreme Court's 2007 holding in *Massachusetts v. EPA* authorizing the agency to regulate GHG emissions under the CAA to the extent those pollutants contribute to climate change and endanger public health and welfare.²

Despite the increasing urgency of climate change, the current Republican-controlled Congress has launched a frontal assault on EPA's efforts to curb GHG emissions and the President's climate agenda in advance of the 2016 elections. The most prominent target of these attacks is the Clean Power Plan—the first-ever nationwide limits on carbon dioxide (CO₂)³ emissions from existing fossil fuel-fired power plants. Below, we discuss the Clean Power Plan in its proper legal, administrative, and political contexts, and its future prospects.

The Clean Air Act and How it Works

The CAA is a federal law designed to protect human health and the environment from the effects of air pollution. The statute's major programs were originally passed in 1970 by a nearly unanimous vote in Congress, and the law was revised and strengthened in 1977 and again in 1990 by overwhelming bipartisan majorities. The CAA has a 45-year track record of curbing dangerous pollution, improving the quality of our air and natural environment, protecting the health and welfare of our citizens, and saving many thousands of lives each year.⁴ The CAA's major accomplishments include cutting

¹ The Climate Action Plan can be found here:

<https://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf>.

² More detail on *Massachusetts v. EPA* can be found later in this brief, and through the United States Department of Justice here: <http://www.justice.gov/enrd/massachusetts-v-epa>.

³ In terms of its overall impact, CO₂ is by far the biggest contributor to climate change, although other GHGs have a greater heat-trapping potential on a pound-per-pound basis and are also significant drivers of climate change. These include methane (CH₄), nitrous oxide (N₂O), sulfur hexafluoride (SF₆), and chlorofluorocarbons (CFCs).

⁴ The original major provisions of the CAA included, among others, the National Ambient Air Quality Standards program, which seeks to reduce ambient air concentrations of carbon monoxide, nitrogen dioxide, ozone, sulfur dioxide, particulate matter, and lead; the National Emission Standards for Hazardous Air Pollutants program, targeting toxic or hazardous emissions; and performance standards for new, modified, and existing sources of other harmful air pollutants. Subsequent amendments added many other protective measures, including a permitting program for new and modified

smog-producing ground-level ozone by more than 25 percent since 1980; reducing toxic mercury emissions by 45 percent since 1990; reducing pollutants contributing to acid rain, sulfur dioxide, and nitrogen oxide by 71 and 46 percent, respectively, since 1980; phasing out the production and use of chemicals that contribute to the hole in the stratospheric ozone layer; and reducing the lead content in gasoline, which in turn has cut lead air pollution by 92 percent since 1980.⁵

Many of the CAA's major provisions operate according to cooperative federalism, a model in which the federal and state governments share different but complementary roles in executing a regulatory program. Notably, cooperative federalism does not commandeer state resources or require state governments to take any action; instead, it gives states the *option* of developing plans that implement EPA's requirements within their own borders. For example, under section 111 of the CAA, once EPA regulates new and modified sources of dangerous air pollution in a particular industry category, it must then establish guidelines that set forth mandatory emission limits for existing pollution sources within that same category.⁶ States then have the option of developing plans that apply those emission limits to pollution sources within their own borders, subject to approval and oversight by EPA. Although EPA's guidelines specify the degree of emission reduction required, states have significant flexibility in how they choose to tailor their plans. EPA will approve a state plan if it determines that the plan achieves equivalent emission reductions to those anticipated by EPA's guidelines and adheres to various criteria related primarily to enforceability, accountability, and oversight.⁷ If a state decides not to develop a plan, or submits a plan to EPA that is not legally sufficient, EPA will develop and administer a federal plan that will apply to sources within that state.⁸

pollution sources to prevent significant deterioration of air quality, an acid deposition control program, and stratospheric ozone protection measures.

⁵ Union of Concerned Scientists, 2014. *The Clean Air Act*. Available at:

http://www.ucsusa.org/global_warming/solutions/reduce-emissions/the-clean-air-act.html#.VS6lq5TF8ow

⁶ See 42 U.S.C. § 7411.

⁷ Environmental Defense Fund, *Section 111(d) of the Clean Air Act: the Legal Foundation for Strong, Flexible & Cost-Effective Carbon Pollution Standards for Existing Power Plants* (2013), available at

<http://blogs.edf.org/climate411/files/2013/10/Section-111d-of-the-Clean-Air-Act-The-Legal-Foundation-for-Strong-Flexible-Cost-Effective-Carbon-Pollution-Standards-for-Existing-Power-Plants-O.pdf>.

⁸ C2ES, *EPA Terminology Glossary*. Available at: <http://www.c2es.org/federal/executive/epa/terminology-glossary>

Box 1: Judicial Review Under the Clean Air Act

Congress first mandated major regulatory programs to protect the nation's air quality through the Clean Air Act in 1970. Amendments in 1977 and 1990 strengthened and expanded the statute's ability to more effectively address air pollution problems, including air toxics, acid rain, significant deterioration of ambient air quality, and interstate pollution. One important feature of the Clean Air Act is its judicial review provision, 42 U.S.C. § 7607(b) (also known as Section 307(b)), which permits affected parties to challenge in court the legality of rules, regulations, and other final actions taken by EPA pursuant to its Clean Air Act authority. Courts tend to defer to EPA's expertise on scientific and technical matters and with regard to points of legal ambiguity. To cite a few recent cases, in 2012, the U.S. Court of Appeals for the D.C. Circuit affirmed EPA's determination that greenhouse gases endanger the public health and welfare, *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), *reversed on other grounds sub. nom. Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014). Last year, in a decision that reversed the lower court's holding, the Supreme Court upheld the agency's Transport Rule, a regulatory program designed to limit cross-state pollution. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014).

However, a court will not hesitate to overrule EPA when it decides the agency has overstepped its legal boundaries. For example, in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) the D.C. Circuit struck down EPA's Clean Air Mercury Rule in its entirety because the agency had not followed the proper rulemaking procedures set forth in the Clean Air Act. In some cases, courts will approve parts of an EPA program while rejecting others. In *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), the Supreme Court reversed EPA's determination that it could require preconstruction permits for new and modified sources of air pollution based on their greenhouse gas emissions. However, the court affirmed that the agency may impose limits on greenhouse gas emissions from sources that must obtain preconstruction permits due to their emissions of other pollutants.

Critics of the Clean Power Plan will challenge the rule in court as soon as it is finalized. In fact, a group of states and industry parties already filed a series of petitions in the U.S. Court of Appeals for the D.C. Circuit attacking the proposed rule. Although the D.C. Circuit dismissed these petitions as premature, there is no doubt that the courts (and, most likely, the Supreme Court) will eventually address the legal merits of the Clean Power Plan. It is impossible to predict the outcome of this anticipated litigation, which depends on a constellation of factors—including many outside the control of the agency and the litigants themselves. Given the Clean Power Plan's high public profile, its unique regulatory design, and the relatively untested nature of section 111(d), courts may review the rule with closer scrutiny than usual. Yet one must also bear in mind the considerable deference that courts grant EPA on technical, scientific, and legally ambiguous questions, as well as the broad language of section 111(d). The judges reviewing the Clean Power Plan will consider all these factors during their review of the rule. Regardless of the outcome of litigation, we can safely say that the Clean Power Plan is already driving not only conversations, but real decisions regarding the need for significant near-term reductions in GHG emissions from the electric sector.

The Clean Air Act and Climate Action

While Congress originally enacted the CAA to address conventional pollutants such as ozone, lead, and particulate matter, it also ensured that the statute would be flexible enough to apply to pollutants that might pose problems to future generations. By the time that climate change became an issue of public urgency in the 1990s and 2000s, advocates began to press EPA to use its authority under the statute to control climate-forcing GHG pollutants. The agency's authority to regulate GHG emissions under the CAA was definitively established by the U.S. Supreme Court in *Massachusetts v. EPA* in 2007. In December 2009, the EPA issued a finding that GHG emissions endanger the public health and welfare of current and future generations. This finding was upheld in court in the face of a vigorous industry challenge, and the agency thus became obligated to limit dangerous GHG emissions where applicable under the CAA.⁹

In the following five years, the agency took a three-pronged approach to regulating greenhouse gases under the CAA. In 2010 and 2011 EPA released the Mobile Source Standards, which apply to GHG emissions from vehicles and require a 5 percent annual improvement in the energy efficiency of the vehicle fleet, with new standards extending out to 2025. Also in 2010 and 2011, EPA established pre-construction permitting requirements for new and modified major stationary sources of air pollution, mandating the installation of the best available control technology for GHG emissions at regulated units. The Supreme Court subsequently limited the application of this program to pollution sources that would already be required to obtain a permit due to their emissions of non-GHG pollutants.¹⁰ However, once the program applied to a given source of pollution, that source would then be subject to controls for its GHG emissions.¹¹

Third, EPA developed CO₂ performance standards for the operation of fossil fuel-fired power plants under section 111 of the CAA. In January 2014, under instruction from President Obama, EPA proposed a set of performance standards limiting CO₂ emissions from new fossil fuel-fired power plants under section 111(b) of the statute. The CAA also requires EPA to establish existing source guidelines under section 111(d) once it has regulated a source category under section 111(b). Section 111(d) has long served an important gap-filling role in the Clean Air Act's regulatory scheme for existing sources. Whereas sections 108 through 110 cover pollutants that degrade ambient air quality, such as ozone and fine particulate matter, and section 112 concerns hazardous and toxic air pollutants like mercury and arsenic, section 111(d) covers all other dangerous pollutants not included in either the 108-110 or the 112 programs. Because of this gap in coverage, climate advocates and EPA staff have concluded that section

⁹ EDF, 2011. *Overview: EPA's Endangerment Finding for Greenhouse Gas Pollution*. September 2011. Available at: <http://www.edf.org/sites/default/files/epa-endangerment-finding-overview.pdf>

¹⁰ *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2244 (2014).

¹¹ *Id.* at 2449.

111(d) represents the best section of the Clean Air Act for regulating GHGs from existing sources, an approach ratified by the Supreme Court.¹²

In June 2014, in line with its mandate, EPA proposed the Clean Power Plan, a comprehensive program under section 111(d) for reducing CO₂ emissions from existing fossil fuel-fired power plants. EPA estimates that the program will achieve nearly a 30 percent reduction in CO₂ emissions from the existing fleet of power plants by 2030, relative to 2005 levels.

The Clean Power Plan

EPA's draft Clean Power Plan is somewhat unique in that it creates state-by-state emission reduction targets for power plant CO₂ emissions rather than source-by-source, or power plant-by-power plant, standards. That is, the Plan tabulates the average emission rate (in terms of pounds of CO₂ emitted per megawatt-hour of electricity generated) of each state's fleet of fossil-fired plants subject to regulation, and then determines the emission reductions achievable in each state according to a suite of four "building blocks." These four blocks account for the following emission reduction strategies: improved efficiency at individual coal plants; replacement of coal-fired electricity generation with generation from combined-cycle natural gas plants; replacement of fossil-fired generation with zero-emitting resources; and avoided emissions due to demand-side energy efficiency.

To maximize the principle of cooperative federalism and minimize the regulatory burden on source operators, the Clean Power Plan has two key features:

1. It allows states the greatest possible flexibility permitted under the Clean Air Act, according to EPA's legal analysis. Both during and as a result of its outreach efforts to stakeholders, EPA identified flexibility as a critical consideration in generating support for the plan from utilities and state governments. Section 111(d) requires EPA to establish emission standards based on the "best system of emissions reduction," and the agency has reasonably interpreted this language to permit a regulatory program for fossil fuel-fired power plants that considers the electric system as a whole. That is, instead of requiring specific emissions cuts from each and every power plant smokestack, EPA's program allows states to develop plans that take into account emission reductions resulting from actions related to other aspects of the electric sector. This approach allows for a much more flexible regulatory design than a more traditional command-and-control regime.
2. Section 111(d) directs EPA to give states the initial opportunity to implement the performance standards. By putting states in charge of their own plans to implement the standard, the Clean Power Plan establishes a nationwide "bottom-up" approach to mitigating climate pollution. Under the proposed rule,

¹² *American Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011).

each state is required to meet a standard for how much carbon pollution its fleet of fossil fuel-fired power plants can emit for every megawatt generated (a “rate-based” standard). States also have the option of converting these rate-based standards into annual tonnage caps of carbon pollution that its fossil plants may emit (a “mass-based” standard). Each state also has the option of declining to develop a plan, in which case EPA will step in to create and administer a federal plan for that state.

The Clean Air Act scheme grants states, rather than the federal government, the first opportunity to implement the rule. This designation has significant political implications. Today, there is a deep partisan divide between Republicans and Democrats, and “top-down” federal action can present challenges for both parties. By granting implementation power to the states, EPA is able to say that the Clean Power Plan is not top-down, and is therefore limiting the influence of the federal government in state affairs.

That said, the flexibility available to states under the CAA, while significant, is dramatically lower than it would be under standalone legislation. Traditionally, section 111(d) has been used to cut emissions smokestack-by-smokestack, identifying a type of emission source (such as a coal-fired power plant) and establishing emission limits achievable either through add-on pollution controls or superior technological designs. The Clean Power Plan operates very differently by giving states the flexibility to achieve emission reductions not only by directly curbing pollution from individual power plants, but by replacing generation from those plants with other, cleaner resources in electricity-generating sector – for example, by increasing efficiency or bringing new renewables online that displace generation from fossil-fired plants. Yet this approach is much less flexible than the 2009-2010 climate bills (also known as the Waxman-Markey bill), which included provisions for cap-and-trade, international forest conservation, agricultural sequestration and more.

It is critical to bear in mind that the features described above refer only to EPA’s *proposed* Clean Power Plan. The final rule, which will be published sometime this summer, will likely include a number of changes from the initial proposal. Therefore, our commentary on any given aspect of the proposed rule will remain relevant to the extent that the final rule also includes that feature. In any event, it is highly likely that the final guidelines will retain the proposal’s signature flexibility, basing each state’s emission target not only on efficiency improvement measures at individual fossil plants in that state, but also on other activities or resources in the electric sector that can displace or remove the need for fossil-fired generation and thus reduce emissions.

Legal Risks and Challenges

As the administration’s flagship initiative to fight climate change, the Clean Power Plan is the most high profile effort to limit emissions from the nation’s largest source of GHG emissions. Not surprisingly, it faces challenges from opponents who argue against its

legality and question the authority of the EPA to mandate such actions. These arguments tend to focus on how this plan differs from EPA's historical actions under the CAA to regulate air quality and limit the use of dangerous pollutants.¹³

Arguments against the Clean Power Plan's legal footing focus on the same elements that provide for its flexibility—namely, its sector-wide approach to regulating power plant emissions. The irony of these arguments is that the program's flexibility is what allowed EPA to increase its scope and ambition, as well as garner support from states and utilities, and the plan is the result of extensive consultation with businesses and other stakeholders on all sides of the climate issue. Four legally controversial aspects of the Clean Power Plan include the following:

- 1. Sector-wide (as opposed to source-by-source) emission reduction targets are novel under section 111(d).** EPA has never before set statewide (as opposed to source-specific) emissions reduction targets under section 111(d). Historically, the agency has used its standard-setting authority under the Clean Air Act to establish specific pollution control requirements for particular types of sources – for example, under most section 111(d) regulations, every smokestack for a certain type of industrial facility must achieve a certain performance standard.

The Clean Power Plan is different. Although EPA's proposed approach offers greater flexibility, reduced costs, and accommodations to the electricity sector, some in industry have characterized the proposed approach as illegal under the Clean Air Act. For instance, some industry advocates have argued that the flexibility option chooses winners and losers within the state's electricity market, giving an economic advantage to gas plants over coal plants and unlawfully driving business to one company from another. These advocates acknowledge, however, that in practice, the rule will usually not drive business away from companies, but rather will change which plants within a single company's fleet are used at a given time.

At the same time, courts have never held that EPA may not set state-level emission standards, nor have they ruled that section 111(d) guidelines may not consider emission reduction opportunities that exist through off-site activities (such as demand-side energy efficiency or new renewable build-out). Indeed, the language of section 111(d) is broadly applicable to "systems" of emission reduction, and the agency has previously used off-site methods of emission reduction to support 111(d) guidelines. Furthermore, EPA may premise its final guidelines for the Clean Power Plan on a system of emission reduction that depends upon improved efficiency at power plants and reduced utilization of those units, an entirely "inside-the-fence" approach. This methodology would *quantify* the extent to which fossil plants can curtail how frequently they operated based on the availability of efficiency and lower- or zero-emitting resources, but the performance standards themselves would still apply only to fossil-fired power plants. In short, it is far from

¹³ Marlo Lewis, 2014. "How Unlawful is EPA's Clean Power Plan?" In *GlobalWarming.org*, October 2, 2014. Available at: <http://www.globalwarming.org/2014/10/06/how-unlawful-is-epas-clean-power-plan/>.

certain that industry attacks on EPA's system-based approach will succeed in court, nor is it clear what the parameters of EPA's final rule will be.

- 2. Disparities among states invite legal challenge.** EPA has never before set separate standards for each state. Any state can challenge (either administratively or in federal court) the goal that EPA has established for it if it feels the goal is too strict. This is especially likely to happen where neighboring states have dramatically different goals, which occurs in some cases due to the unique factors of each state's electricity sector. Again, there is no legal authority indicating that state-based standards are inappropriate or unlawful under section 111(d). In addition, EPA has signaled that, in response to public comments, it may adjust the final goals to provide for more equity across the states.
- 3. Implementation fights are certain.** EPA and individual states are likely to disagree on whether a plan submitted by a state will achieve the required emissions reductions. The Supreme Court recently reaffirmed EPA's right to reject state plans under a separate air pollution rule designed to address regional haze. If EPA does reject a state plan, it is required to develop a federal plan in its stead. The administration is releasing a draft model federal implementation plan (FIP) along with the final rule and will be accepting comments in 2015 before issuing a final model FIP in 2016. EPA will rely on this model FIP to propose and finalize a FIP for any state that fails to submit an approvable plan by the CPP deadline. It will then be up to the next administration to administer the federal implementation plan. Despite a clearly established process for implementing these plans, any top-down approach to impose a strong federal plan would generate serious opposition from Republicans and some Democrats, although the legal ramifications of any such action may be less significant than the political blowback.¹⁴

Adding to the implementation challenge, some states (those with conservative governors and state legislators, for example) may simply refuse to submit state plans. Indeed, the governor of Oklahoma has already issued an executive order prohibiting state agencies from developing a plan.¹⁵ Something similar happened during implementation of the Affordable Care Act, where a number of states declined to establish their own exchange markets for health insurance policies and the federal government stepped in to create a federal exchange for those states. If EPA were to move forward with a federal plan to cover a state that has opted out of the program, that decision would likely be challenged in court by states and polluters. Senate Minority Leader Mitch McConnell (R-Ky) has initiated a campaign advocating this approach, urging state governors to refuse to comply with the Clean Power Plan on the basis that it has no sound legal footing. Despite this highly vocal opposition, most states have indicated that they will move forward with state

¹⁴ Adler B, 2014. "Will EPA's power plant regulations be stopped in the courts?" *Grist*. June 13, 2014. Available at: <http://grist.org/climate-energy/will-epas-power-plant-regulations-be-stopped-in-the-courts/>.

¹⁵ Gov. Fallon, M., Executive Order 2015-22 (Apr. 28, 2015), available at <https://www.sos.ok.gov/documents/Executive/978.pdf>.

plans,¹⁶ and opposition to Mr. McConnell's actions have come from a range of voices, including former EPA head and Republican governor of New Jersey Christine Todd Whitman, Vermont governor Peter Shumlin (Democrat), and California governor Jerry Brown (Democrat).

4. The rule for existing power plants depends on the rule for new power plants.

Under section 111 of the Clean Air Act, when the EPA moves to limit emissions of a pollutant, it must regulate emissions from new or newly modified sources before it can address emissions from existing sources. EPA released its proposed 111(b) regulation for new fossil fuel-fired power plants in January 2014, and a legal challenge by industry to the final rule (which will be issued alongside the final Clean Power Plan) is certain. As currently proposed, that regulation effectively prohibits the construction of new coal plants without partial carbon capture and storage (CCS) technology, although this could potentially change with the issuance of the final rule. Industry parties have indicated they will contest the legality of the rule in court on the grounds that CCS technology is too expensive and unproven.¹⁷ A successful court challenge to a 111(b) rule may jeopardize the legality of the Clean Power Plan as well, but it remains to be seen what the final 111(b) rule will look like and whether industry's arguments would have any legal merit in light of the final rule's design. Furthermore, the market for new coal-fired units has largely collapsed due to economic factors unrelated to the rule, and few (if any) new coal plants are slated for construction in the near future. Therefore, it is not clear whether industry litigants will be able to show that they will suffer any concrete and imminent injury on account of the new source performance standards, a prerequisite to bringing a lawsuit in federal court.

Political landscape

A. Federal Level

Political opponents to climate action in the United States intend to pursue a number of different strategies to achieve their goals. One such strategy involves lobbying state-level officials to mandate state legislative review to bar the development of an implementation plan, to initiate legal challenges to the rule, and to refuse to develop state plans. At the federal level, if a Republican candidate for president is elected in 2016, he or she may attempt to roll back climate action taken by the Obama administration, and the Clean Power Plan will be the main target.

The United States has been unable to enact comprehensive climate legislation, as evidenced by the failure of the Waxman-Markey bill to pass the Senate in 2009 and the deep partisan divide on the issue in the years following. This legislative failure has provided the EPA with the impetus to address climate change through its executive

¹⁶ Holden, Emily (2015) "Despite Political Rhetoric, 41 States Exploring Clean Power Plan Options." In *ClimateWire*, May 18, 2015. Available at: <http://www.eenews.net/climatewire/2015/05/18/stories/1060018680>.

¹⁷ Martinson E, 2014. "EPA carbon proposal faces major hurdles." *PoliticoPro*. June 2, 2014. Online at: <http://www.politico.com/story/2014/06/epa-carbon-proposal-global-warming-climate-107348.html>.

authority under the Clean Air Act and to develop the Clean Power Plan's broad-based approach to CO₂ reduction. However, as noted above, various aspects of the Clean Power Plan are unique applications of section 111. As such, EPA is operating in largely uncharted legal waters, a fact industry opponents will seek to use to their advantage when challenging the rule in court.

Congress is expected to be a major source of opposition to the Clean Power Plan. In particular, the House is the base of the strongest opposition while the Senate is much more nuanced and closely divided. House Speaker John Boehner (R-Ohio) and Senate Minority Leader Mitch McConnell (R-Ky.) have spoken out against the EPA's proposed regulation, as have other influential members of Congress. Just as they tried (unsuccessfully) over 50 times to repeal the Affordable Care Act, conservatives in Congress are likely to use Congressional hearings, votes, and investigations to broadcast their opposition to EPA action. When the Clean Power Plan becomes final later this year, House and Senate Republicans are likely to invoke a rarely-used law called the Congressional Review Act, which allows Congress to pass a joint resolution striking down a regulation, and only requires a simple majority-vote in the Senate rather than a filibuster-proof 60-vote majority. President Obama would certainly veto any such resolution, sending it back to Congress, where it is unlikely to get the approval of two-thirds of the members of each chamber of Congress needed to overturn the President's veto. Therefore, while President Obama remains in office, Congress will likely be unable to overturn the rule.

In particular, political analysis on the key players is as follows:

- **The President:** The Clean Power Plan is the signature piece of President Obama's Climate Action Plan, but a future President may seek to revoke the rule or allow Congress to weaken it, and a hostile administration may choose to slow implementation efforts or choose not to enforce them. This is very likely to be on the agenda of any viable Republican candidate for the presidency in 2016. In this case, section 111(d)'s state-by-state approach for implementation may insulate the rule from interference by a hostile President: by the time the next President enters office in 2017, implementation of the rule will be far along at the state level. With a great deal of effort and time invested in implementation, as well as compliance planning on the part of industry, governors and business leaders may urge the administration not to displace the rule and require them to start over.
- **Congress:** Most political observers view the House of Representatives as unlikely to revert to Democratic control in the next several election cycles short of a so-called "wave election" that would massively rewrite the political dynamics nationwide. Indeed, Republican control in 2010 of a majority of state legislatures, which are responsible for drawing Congressional districts during each census year, resulted in a locked-in Republican advantage in the House of up to 5 points in a general election, making Democratic control extremely

unlikely before 2022 at the earliest. However, regardless of which party controls the House, meaningful action is unlikely to come out of Capitol Hill on account of the Senate.

Today, the Senate is experiencing such a level of partisan division that very little legislation can be passed that cannot gain a supermajority of 60 votes— the number needed to overcome the threat of a filibuster and allow for a straight up-or-down vote. On climate issues, this means that even when Republicans control the Senate, as few as 40 Democrats can block legislation to weaken the Clean Power Plan. By the same token, even if Democrats regain control of the Senate and seek to pass legislation strengthening the Clean Power Plan, Republicans need only 40 votes to oppose and block it. The only scenario that would permit legislation weakening the Clean Power Plan would be a wave election giving Republicans at least 60 seats in the Senate and the Presidency (under a Democratic presidency, Senate Republicans would need over 66 votes to overturn an inevitable veto). This is an extremely low-probability event.

In addition to legal challenges in court, indirect attacks on the Clean Power Plan are also likely through two factors that Congressional majority leadership can control: the bully pulpit and the power of the purse. With the bully pulpit, Senate and House committees can act as grand inquisitors, pursuing investigations and calling EPA officials to testify in hearings as the agency moves forward with the Clean Power Plan. Congressional leaders use the bully pulpit both to try and shape public opinion and to put an informal brake on the regulatory process. Through the power of the purse, the House and Senate are likely to pass a budget for EPA that restricts funds for implementing the Clean Power Plan. While too strong of an attack would ensure a veto from President Obama (or a future President supportive of climate action), Congressional leaders are very likely to have some effect on the regulatory process by reducing appropriations.

B. State Level

Just as in Congress, supporters and opponents of the Clean Power Plan are divided at the state level. Of the 50 state governments, approximately one-third strongly support the rule, one-third strongly oppose the rule and the remaining third are divided in their approach to the rule. Despite the legal challenges and political opposition the Clean Power Plan will no doubt face, well over half of states are in the process of developing state implementation plans. EPA expects almost all of the states to submit plans after the rule is finalized, and a number of states have joined regional groups exploring options to comply with the rule and determine the best options to take at a technical level. The supportive states have been vocal in their support for aggressive climate action and their willingness to adopt strong and effective implementation plans. These states include those on the west coast, those in the northeast, and a number of others

scattered around the country.¹⁸ Another group of states are quietly pursuing their own compliance plans and include most of the politically strategic or swing states in the United States. The opposition states are generally either coal-producing states or those currently controlled by Republican legislatures, governors, and/or attorneys general. These states are currently at the forefront of the opposition to the rule.

Should the political landscape change in 2017, one can expect a similar shift at the state level with the supportive states leading the opposition to any efforts to relax or repeal the rule.

Conclusion

The Clean Power Plan is one of the most ambitious environmental regulations ever promulgated by EPA, significantly affecting some of the most entrenched interests in the American political system. The environmental community should expect an ongoing legal and political battle over the next several years to implement this vision and should anticipate both wins and losses. But in the end there is solid reason for optimism.

Opposition to the Clean Power Plan will be powerful, and serious legal challenges will be brought before the courts. The Obama administration will have to defend its interpretation of 111(d), notably the legal and political legitimacy of a system-based approach to emission reductions (if, indeed, the final rule retains the four building blocks rather than a reduced-utilization framework). Republican politicians and industry voices will join in questioning the role of the EPA and the Clean Air Act itself in tackling GHG emissions from the electric sector, and will challenge the agency's authority to take aggressive climate action under the statute. It is true that the Clean Power Plan applies section 111(d) in a number of new ways, and while we believe the rule is on sound legal footing, it is hard to predict the outcome of the expected legal challenges. This is especially true given that the final rule remains to be published.

Despite these challenges, there is reason for cautious optimism that the Clean Power Plan will endure once President Obama leaves office in 2016.

- As stated throughout this brief, the U.S. government has a legal obligation to regulate greenhouse gas emissions as determined by *Massachusetts v. EPA*. This GHG endangerment finding means that EPA is required to regulate GHG emissions, and any U.S. President will be legally obligated to implement the Clean Air Act, including its GHG emission reduction provisions and regulations. The Supreme Court also affirmed in *AEP v. Connecticut* the agency's authority to regulate fossil fuel-fired power plants under section 111(d).
- In addition, EPA climate regulations are required by law to be science-based, and any subsequent administration would need to proffer a valid scientific justification for reversing or withdrawing any existing final regulations. In

¹⁸ Sadasivam, Naveena (2015) "49 States Making Plans for EPA Carbon Rule – Even the Ones that Hate It." In *InsideClimate* News. Available at: <http://insideclimatenews.org/news/03062015/clean-power-plan-coal-obama-49-states-making-plans-epa-carbon-rule-even-ones-hate-it>.

addition, the many procedural steps involved in rulemaking—scientific assessment, economic analysis, publication and consultation of the proposed rule, review of public comments, submission to the Office of Management and Budget (OMB)—could take several years for a new president to undo.

- Litigation by environmental advocates would also further delay efforts to weaken regulations. These types of lawsuits are frequently successful and at a minimum can create several more years of delay before new rules take full effect.
- Finally, the structure of the Clean Power Plan and the role that states play in implementing section 111(d) standards will help ensure regulations endure. Where states refuse or are unable to implement their own plans, EPA will step in with a federal implementation plan to ensure compliance by affected sources in those states.

By the time the next President enters office in 2017, implementation of the rule will be far along at the state level. With a great deal of effort and time invested in implementation, governors, and business leaders may decide to remain on course rather than start over. And so, despite the legal and political challenges the Clean Power Plan will likely face over the coming years, there will likely be progress toward implementation and reason to be hopeful that Obama-era climate policies will have a lasting effect on U.S. emissions.