

# Response of the Coal-Dependent States to the Clean Power Plan: Litigate, Legislate, Retaliate or Innovate?

## **Pittsburgh Coal Conference**

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**James M. Van Nostrand**

Associate Professor of Law

Director, Center for Energy & Sustainable Development

WVU College of Law

- Overview of regulation of greenhouse gases (GHGs) under the Clean Air Act
- Possible strategies
  - **Litigate:** Sue the EPA
  - **Legislate:** Adopt legislation limiting compliance options
  - **Retaliate:** Refuse to cooperate with EPA or to submit compliance plans
  - **Innovate:** Invest in technology that reduces GHG emissions

# Regulating CO<sub>2</sub> Emissions Under the Clean Air Act

- 2007 – *Massachusetts v. EPA*
- 2009 – Endangerment finding
- 2009 – U.S. House passes ACES, ACES not acted on by Senate
- 2010 – EPA issues GHG standards for cars and trucks under the CAA
- 2010 – EPA enters settlement agreement to set GHG standards for stationary sources
- 2011 – *American Electric Power v. Connecticut*
- 2013 – EPA proposes uniform national CO<sub>2</sub> emission standards for power plants under Section 111(b) of the CAA
- 2014 – EPA proposes state specific CO<sub>2</sub> emission standards for existing power plants under Section 111(d) of the CAA

# Clean Power Plan

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## Timeline:

June 2, 2014: EPA issues proposed rule

December 1, 2014: Comment period ends for proposed rule

August 3, 2015: EPA publishes final rule

September 6, 2016: States submit complete plan or initial submittal with request for extension

September 6, 2017: If state received an extension, state submits a progress update

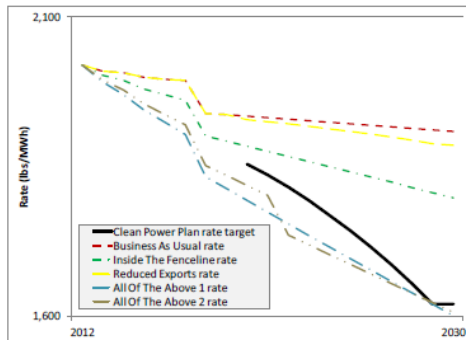
September 6, 2018: If state received an extension, state submits final plan

2022 -2029: Interim compliance period

2030 and thereafter: Final compliance period – achieve final target

## The Clean Power Plan and West Virginia:

Compliance Options and New Economic Opportunities



James Van Nostrand  
Evan Hansen  
Beren Argetsinger  
Joseph James

WVU College of Law  
Center for Energy &  
Sustainable Development

101 Law School Drive  
Suite 270  
Morgantown, WV 26505  
[www.energy.law.wvu.edu](http://www.energy.law.wvu.edu)

Downstream Strategies

295 High Street  
Suite 3  
Morgantown, WV 26505  
[www.downstreamstrategies.com](http://www.downstreamstrategies.com)

June 15, 2015

**WVU<sup>LAW</sup>**  
CENTER FOR ENERGY &  
SUSTAINABLE DEVELOPMENT

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[NOTE: Based on Proposed Rule]

Available at:

[http://energy.law.wvu.edu/research\\_publications](http://energy.law.wvu.edu/research_publications)

- More aggressive target: 32% reduction by 2030
- Extension of compliance timeline
  - States have 2 additional years to begin achieving reductions
- Elimination of energy efficiency as a building block
  - Best System of Emission Reduction (BSER) calculated on the basis of “ranges of reduction that can be achieved at coal, oil and gas plants at reasonable cost”
  - EPA considered interconnectedness of generation and distribution of power within grid, and analyzed the 3 regional electricity interconnects (e.g., Eastern interconnection, which includes PJM)

- “Flattening” of the BSERs across the states
  - Narrows the spread between lowest and highest, resulting in more aggressive targets for coal-dependent states
  - For West Virginia, rate-base goal changes from a 20% reduction to a 37% reduction (2064 lbs/MWh to 1305 lbs/MWh); mass-based goal is a 29% reduction (72.3 million tons to 51.3 million tons)
  - For Pennsylvania, new rate-base goal is a 35% reduction (1682 lbs/MWh to 1095 lbs/MWh), while mass-based goal is a 23% reduction (116.7 million tons to 89.8 million tons)
- Includes mass-based targets for each state



- Attempts to address regional impacts
  - Recognition of local impacts
  - Clean Power Plan Communities web page with resources
- Incentives for renewable energy and energy efficiency
  - Clean Energy Incentive Program
  - Issuance of Emission Rate Credits (ERCs) for wind or solar projects
  - Encourages early action (2020 and 2021)
  - Enhanced incentives for EE projects in low-income communities
    - 2 ERCs instead of 1 for each MWh of avoided generation



- Issuance of federal implementation plan
  - Would be imposed on states in the absence of submittal of acceptable compliance plan
  - Emissions trading program under either a rate-based or mass-based approach
  - Includes model trading rules (to be finalized in summer 2016)

- Thirteen states joined Murray Energy suit asking the courts to block proposed rule
  - *Murray Energy Corp. v. EPA*, D.C. Cir. Case Nos. 14-1112 and 14-1151
  - Sought “extraordinary writ” to bar EPA from finalizing rule
  - Alabama, Alaska, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Dakota, West Virginia, Wyoming

- Twelve states in separate action challenging December 2010 settlement agreement
  - *West Virginia v. EPA*, D.C. Cir., Case No. 14-1146
  - West Virginia, Alabama, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Dakota, South Carolina, Wyoming
  - Cases joined, and both dismissed on June 9, 2015
  - Rehearing *en banc* denied on September 29, 2015

“They want us to do something that they candidly acknowledge we have never done before: review the legality of a proposed rule. But a proposed rule is just a proposal. . . . We do not have authority to review proposed agency rules. In short, we deny the petitions for review and the petition for a writ of prohibition because the complained-of agency action is not final.”

- Challenges to Final Rule
  - Request for administrative stay filed August 5 in U.S. D.C. Circuit Court of Appeals by 15 states, led by West Virginia
  - Followed by emergency petition for extraordinary writ filed August 13
  - Complaint filed prior to publication of final rule in Federal Register
    - Clean Air Act provides 60-day window **after** Federal Register publication to file legal challenges
    - Final rule sent to Federal Register on September 4, expected to be published in October

- Challenges to final rule (continued)
  - Emergency petition dismissed on September 9
  - Challengers “have not satisfied the stringent standards that apply” for “extraordinary writs that seek to stay agency action”
  - FOIA request filed this week regarding process for publication in Federal Register

- Legal Theories
  - Legislative “glitch” (i.e., language discrepancy in changes made to the Clean Air Act by the House and Senate in the 1990 Amendments)
    - Two versions of an amendment were enacted
    - House version bars EPA from using §111(d) to regulate an emission source subject to §112 rules
    - Senate version prohibits EPA from writing a second rule that would control a pollutant already regulated



- Legal Theories (continued)
  - Regulating “outside the fence”
    - Measures that fall outside the fence line of a power plant (increased use of natural gas, non-carbon sources) are outside of EPA’s authority to enforce
  - Requires §111(b) rules regulating emissions from new power plants to be in place
    - If §111(b) rules are overturned, affects validity of proposed §111(d) rules

- Model bills produced by American Legislative Exchange Council (ALEC) Task Force
  - Limits state plan to requiring energy efficiency upgrades at coal-fired power plants (“inside-the-fence”) options
  - Prohibits mandated fuel switching, renewable energy or other system-wide (“outside-the-fence”) policies
  - Kentucky HB 388 signed by Gov. Beshear in 2014, West Virginia HB 4346 signed by Gov. Tomblin in 2014

- Model bills (continued)
  - State agencies required to produce study examining impacts of rules
  - Compliance strategies limited to “inside-the-fence” options
  - Legislative approval required before any compliance plan can be submitted to EPA
  - West Virginia HB 2004 signed by Governor Tomblin March 2015
  - Similar bills introduced in Arizona, Kansas, Mississippi, Missouri, Oklahoma and Tennessee

- Proposed federal legislation
  - Affordable Reliable Energy Now Act (ARENA)
  - Other measures to roll back 111(b) rules, delay implementation of Clean Power Plan, allow states to “opt out” of submitting compliance plans

- Senator Mitch McConnell (R.-KY), Majority Leader
  - “States Should Reject Obama Mandate for Clean-Power Regulations”
    - Op-Ed in LEXINGTON HERALD-LEADER, March 3, 2015
    - “Don't be complicit in the administration's attack on the middle class. Think twice before submitting a state plan — which could lock you in to federal enforcement and expose you to lawsuits — when the administration is standing on shaky legal ground and when, without your support, it won't be able to demonstrate the capacity to carry out such political extremism.”

- States following the “just say no” strategy
  - Oklahoma, Indiana, Wisconsin, Louisiana
    - Oklahoma Governor Mary Fallin issued executive order prohibiting her state's environmental agency from even beginning to develop a state compliance plan
  - “At least half of the states are weighing challenging the Clean Power Plan in court, but many of them are already reaching out to the public and beginning the planning process among agencies.”
    - Executive directors of the National Association of Clean Air Agencies, National Association of Regulatory Utility Commissioners and National Association of State Energy Officials

- Perils of the “just say no” strategy
  - Authority of the EPA under the Clean Air Act to impose a Federal Implementation Plan
  - Final rule issued on August 3 included Federal Implementation Plan, model trading rules



- “Litigate, legislate, retaliate” strategy is successful?
- EPA ceases to regulate GHG emissions under the Clean Air Act
- Then common law public nuisance claims would spring back
  - *American Electric Power v. Connecticut*, U.S. Sup. Ct. (2014)

- *AEP v. Connecticut* (continued)
  - Federal common law claims by eight states, a municipality, and three private land trusts against electric utilities, demanding an injunction requiring defendants to reduce emissions over the next decade
  - U.S. Supreme Court affirmed dismissal of the claims, holding they are displaced by provisions of the Clean Air Act authorizing EPA to address greenhouse gas regulation of power plant emissions

- *AEP v. Connecticut* (continued)
  - “The lawsuits we consider here began well before the EPA initiated the efforts to regulate greenhouse gases . . . .”
  - “[I]t is an academic question whether, in the absence of the Clean Air Act and the EPA actions the Act authorizes, the plaintiffs could state a federal common law claim for curtailment of greenhouse gas emissions because of their contribution to global warming. Any such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions.”

- *AEP v. Connecticut* (continued)
  - “The Act itself . . . provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track.”
  - “The Clean Air Act and the Environmental Protection Agency action the Act authorizes, we hold, displace the claims the plaintiffs seek to pursue.”

- Regulation of GHG Emissions from new power plants under §111(b)
  - Final rule adopts much less stringent standard for coal-fired power plants than proposed rule
  - 1400 lbs CO<sub>2</sub>/MWh versus 1100 lbs CO<sub>2</sub>/MWh
  - Still requires carbon capture and sequestration (CCS), but effectively requires about 20% capture versus 90% capture
  - Opens up significant new opportunities for new or repowered coal plants

- Final §111(b) rules (continued)
  - Potential use of CO<sub>2</sub> for enhanced oil recovery (EOR) and enhanced gas recovery (EGR) in Marcellus, Utica shale plays
    - Requires pipeline infrastructure
    - Final rule provides longer lead time (2022) before required emissions reductions

- Final §111(b) rules (continued)
  - Quadrennial Energy Review, Energy Transmission, Storage, and Distribution Infrastructure (April 2015)
    - “U.S. has 4500 miles of CO<sub>2</sub> transportation pipelines that can be critical component of low carbon future.”
    - “[N]ew projects are increasingly linking captured CO<sub>2</sub> from electric power plants and other industrial sources to a productive use in oil fields (through CO<sub>2</sub> enhanced oil recovery) and potentially safe storage in deep saline formations.”
  - Partial capture opens up new possibilities
    - Combining Pressurized Fluidized Bed Combustion (PFBC) boiler technology with Benfield CO<sub>2</sub> capture technology



- Final §111(b) rules (continued)
  - Partial capture opens up new possibilities
    - 600 coal plants in U.S. of 300 MWs or less
    - Many located in regions that need CO<sub>2</sub> for enhanced oil or gas recovery

# Concluding Thoughts

- Exercise legal, legislative, administrative remedies to challenge Clean Power Plan
- Remedies fail, however, to address underlying climate change challenges
- More attention should be devoted to innovation

# Questions?

**James M. Van Nostrand**

Associate Professor of Law

Director, Center for Energy and Sustainable Development

West Virginia University College of Law

[james.vannostrand@mail.wvu.edu](mailto:james.vannostrand@mail.wvu.edu)

(304) 293-4694

[energy.law.wvu.edu](http://energy.law.wvu.edu)

[law.wvu.edu](http://law.wvu.edu)