

# A CLOUD ON THE HORIZON: FORECASTING THE PRACTICAL AND LEGAL IMPLICATIONS OF THE CLEAN POWER PLAN

Comment\*

*Mariah Mauck\*\**

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\*\* J.D. Candidate, Texas Tech University School of Law, 2017; B.S. Renewable Natural Resources, Texas A&M University—College Station, 2013. The Author would like to thank her family and friends for the constant support and encouragement throughout law school and this writing process.

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I.	AN INTRODUCTION TO THE CLEAN POWER PLAN DISCUSSION: LEAVING COAL OUT IN THE COLD	

The opening of Thomas Edison’s coal-powered Pearl Street Station on September 4, 1882, revolutionized the power generation industry.<sup>1</sup> Edison’s “central power plant” design was the first of its kind, separating the energy user from the energy source.<sup>2</sup> Electricity from power plants allowed people to light their homes and businesses without directly burning fuels.<sup>3</sup> Coal played a major role in powering the industrial revolution and, by 1961,

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1. See *Electricity Generation*, INST. FOR ENERGY RES. (Sept. 2, 2014), <http://instituteforenergyresearch.org/electricity-generation>.

2. *Id.*

3. *Id.* (“Before electricity, people burned vegetable oil, wax, tallow, whale oil, kerosene, and gasified coal to light their homes and businesses.”).

became the major fuel used to generate electricity—a cornerstone of the nation’s energy mix.<sup>4</sup>

Coal became an even more valuable source of fuel during the perceived oil and natural gas crisis of the late 1970s.<sup>5</sup> Shortages of natural gas were a common occurrence in the mid and late 1970s, prompting the United States Congress to pass the Powerplant and Industrial Fuel Use Act of 1978 (FUA).<sup>6</sup> The FUA placed restrictions on using natural gas for electricity generation, leading to the construction of more coal-fired power plants.<sup>7</sup> Ironically, as part of the war on coal and fight against climate change, the Obama Administration and the Environmental Protection Agency (EPA) are now attempting to shut down some of the same power plants built as a result of the congressional limitations on natural-gas-fired electricity production.<sup>8</sup>

In a move designed to cement the President’s environmental legacy, the Obama Administration issued “rules to cut carbon emissions from U.S. power plants.”<sup>9</sup> The highly controversial rules, referred to as the Clean Power Plan (the Plan or CPP), aim to reduce carbon emissions from power plants by 32% (as compared to 2005 levels) by 2030.<sup>10</sup> The rules shine a spotlight on the debate between the need to address climate change at the national and global level versus the preservation of state sovereignty as well as the desire to maintain affordable and reliable energy.<sup>11</sup>

The Plan upends a century’s worth of electrical power generation as it encourages states and utilities to use wind, solar, and natural gas instead of coal.<sup>12</sup> Notwithstanding the economic and practical implications, the Plan presents a host of legal issues concerning whether the EPA is “acting as though it has the legislative authority to re-engineer the nation’s electric generating system and power grid.”<sup>13</sup>

4. See *Source & Reliable Energy Supplies - History of U.S. Coal Use*, NAT’L ENERGY TECH. LABORATORY, <http://energybc.ca/cache/historyofenergyuse/www.netl.doe.gov/KeyIssues/historyofcoaluse.html> (last visited Nov. 15, 2016).

5. See Nat’l Review Online, *The Ongoing War on Coal*, ROBERT BRYCE (June 3, 2014), <http://www.robertbryce.com/articles/560-the-ongoing-war-on-coal-remains>.

6. *Id.* It is difficult to imagine a time when shortages of natural gas were frequent, given the record quantities of natural gas that are now being produced in the United States. *Id.*

7. *Id.* (“In April 1977, President Jimmy Carter declared that an ‘energy crisis’ was at hand, that we were running out of oil and gas, and that ‘too few’ domestic electric utilities ‘have switched to coal, our most abundant energy source.’”)

8. *Id.* On page nineteen of his Climate Action Plan, President Obama stated, “Going forward, we will promote fuel-switching from coal to gas for electricity production . . . .” EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT’S CLIMATE ACTION PLAN 19 (2013), <http://www.theguardian.com/environment/interactive/2013/jun/25/barack-obama-climate-action-plan>.

9. See Mark Drajem, *Obama’s Climate Legacy Takes Shape with Move on Power Plants*, BLOOMBERG (Aug. 2, 2015, 7:05 AM), <http://www.bloomberg.com/news/articles/2015-08-02/obama-to-boost-goal-in-climate-rule-with-new-solar-wind-push>.

10. *Id.*

11. *Id.*; see also *infra* Parts III–IV.

12. Drajem, *supra* note 9.

13. Kathryn Alfisi, *EPA’s Clean Power Plan: Executive Overreach or Environmental Necessity?*, 29 WASH. LAW., June 2015, at 21, 22 (quoting Laurence H. Tribe, *The Clean Power Plan Is*

The purpose of this Comment is to provide an overview of the major issues surrounding the CPP, including a look into both practical and legal concerns associated with the Plan.<sup>14</sup> Laying the foundation for the EPA's new carbon dioxide emission guidelines, Part II discusses a brief history of the Clean Air Act (the Act or CAA) and recent events leading to regulation of greenhouse gases, such as carbon dioxide. Additionally, Part II outlines and explains the CPP in terms of its goals and how states are expected to meet those goals. Part III then details the disparate impacts of the Plan on Texas and provides a holistic overview of the negative impacts of the Plan on all states. Part IV introduces the legal issues associated with the Plan and presents a comparison to significant and applicable litigation. Finally, Part V concludes the discussion, examines the current legislative responses to the Plan, and considers alternative approaches.

## II. COME RAIN OR SHINE: THE REGULATION OF GREENHOUSE GASES

### A. *The Importance and Structure of the Clean Air Act*

Terror struck the small town of Donora, Pennsylvania, in late October 1948.<sup>15</sup> A deadly smog covered the area, killing twenty citizens and leaving a third of the town's population—about 6,000 people—sick.<sup>16</sup> The cause of this deadly smog was later attributed to the combination of emissions from the city's two factories and a temperature inversion that lasted five days.<sup>17</sup> A similarly strange fog fell over the city of London, England, four years later in December 1952.<sup>18</sup> London's week-long "Killer Smog"—caused by coal ovens—left 4,000 people dead.<sup>19</sup> "The smog was so thick that buses could not run without guides walking ahead of them carrying lanterns."<sup>20</sup>

The United States' air pollution policy changed dramatically as a result of those two events, beginning with the Air Pollution Control Act of 1955, which was the first federal legislation recognizing air pollution as a problem.<sup>21</sup> Then, President Lyndon B. Johnson signed the CAA of 1963, creating the first federal law addressing standards for air quality and

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*Unconstitutional*, WALL STREET J. (Dec. 22, 2014, 7:06 PM), <http://www.wsj.com/articles/laurence-tribe-the-epas-clean-power-plan-is-unconstitutional-1419293203>).

14. See *infra* Parts III–IV.

15. See Erin Peterman, *A Cloud with a Silver Lining: The Killer Smog in Donora, 1948*, PA. CTR. FOR BOOK (2009), <http://pabook.libraries.psu.edu/palitmap/DonoraSmog.html>.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. U.S. ENVTL. PROT. AGENCY, *THE PLAIN ENGLISH GUIDE TO THE CLEAN AIR ACT 2* (2007), <https://www.epa.gov/sites/production/files/2015-08/documents/peg.pdf>.

21. Peterman, *supra* note 15.

emissions control.<sup>22</sup> Finally, President Richard Nixon signed a stricter version of the Act in December 1970, which required rigid air quality standards.<sup>23</sup> Congress created the EPA that same year to enforce the standards and implement programs to reduce air pollution nationwide.<sup>24</sup> The Act “authorizes EPA to establish National Ambient Air Quality Standards (NAAQS) to protect public health and public welfare and to regulate emissions of hazardous air pollutants.”<sup>25</sup> Subsequently, the Act was amended in 1977 and 1990, largely as a result of many parts of the country failing to achieve compliance with NAAQS by the deadlines.<sup>26</sup> These amendments primarily set new goals and dates for achieving NAAQS attainment.<sup>27</sup>

While arguably one of the most successful pieces of environmental legislation drafted, the CAA is also one of the longest and most complex federal environmental statutes.<sup>28</sup> The Act employs a variety of regulatory techniques to address air quality concerns.<sup>29</sup> Harm-based ambient standards are the foundation for the NAAQS program, which addresses the most harmful and pervasive pollutants, officially designated as “criteria pollutants.”<sup>30</sup> Once the EPA establishes NAAQS, states must develop enforceable plans, called State Implementation Plans (SIPs), to achieve and maintain the air quality standards.<sup>31</sup> States must allow for public and industry involvement in the development of a state plan through hearings and opportunities to comment.<sup>32</sup> Additionally, SIPs must address drifting emissions that harm air quality in downwind states.<sup>33</sup>

The CAA also contains provisions targeting pollution from motor vehicles as well as from new or expanded industrial plants.<sup>34</sup> The Act requires new stationary sources, such as power plants and factories, to

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22. *Id.*; *Evolution of the Clean Air Act*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act> (last updated Aug. 8, 2016).

23. Peterman, *supra* note 15.

24. *See* U.S. ENVTL. PROT. AGENCY, *supra* note 20, at 11.

25. *See Summary of the Clean Air Act*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/laws-regulations/summary-clean-air-act> (last updated Oct. 17, 2016).

26. *Id.*

27. *Id.*

28. Michael B. Gerrard, *Legal Challenges to Obama Administration’s Clean Power Plan*, 252 N.Y. L.J., Sept. 11, 2014.

29. *Id.*

30. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 470–71 (4th ed. 2010). Criteria pollutants—carbon monoxide, lead, nitrogen dioxide, particulate matter, ozone, and sulfur dioxide—have been heavily studied and determined to pose great risks to human health, welfare, and the ecosystem. *Id.* The health-based indications of these pollutants include increased respiratory illness, increased susceptibility to infection, mortality increase, and adverse health effects on the central nervous system, blood cells, and kidneys. *Id.*

31. *Clean Air Act Requirements and History*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/clean-air-act-overview/clean-air-act-requirements-and-history> (last updated July 12, 2016).

32. U.S. ENVTL. PROT. AGENCY, *supra* note 20, at 1, 3.

33. *See Clean Air Act Requirements and History*, *supra* note 31.

34. *Id.*

employ the best available technology to minimize pollution.<sup>35</sup> Existing sources, however, require less stringent standards.<sup>36</sup> Additionally, the Act includes specific provisions to address other air pollution concerns, such as hazardous or toxic air pollutants, ozone-depleting chemical emissions, acid rain, and regional haze.<sup>37</sup> These additional air pollution problems pose great health and environmental threats.<sup>38</sup>

Lastly and perhaps most relevant to this discussion, Congress drafted the CAA not only with the intention of solving identified pollution problems but also with the general authority to address pollution problems that emerged after the Act's enactment.<sup>39</sup> More specifically, the EPA has the authority to regulate greenhouse gases (GHGs), which contribute to climate change.<sup>40</sup>

### B. *Massachusetts v. Environmental Protection Agency and the Endangerment Findings*

GHGs pose a different kind of threat than the current criteria pollutants.<sup>41</sup> While criteria pollutants can cause explicit physiological harm to the human body, GHGs can potentially alter Earth's climate in disastrous ways.<sup>42</sup> GHGs, such as methane, nitrous oxide, carbon dioxide, and fluorinated gases, trap heat in the atmosphere like the ceiling of a greenhouse.<sup>43</sup>

The regulation of GHGs has faced an extensive legal history, resulting in the 2007 United States Supreme Court decision of *Massachusetts v. Environmental Protection Agency*, which ruled that the EPA must regulate GHGs if it determines they endanger public health and welfare.<sup>44</sup> In 1999, a group of nineteen private organizations subjected the EPA to a rulemaking petition requesting the regulation of "greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act."<sup>45</sup> The EPA denied the petition in 2003, providing two reasons: (1) the CAA does not authorize the EPA to regulate GHGs, and (2) even if the EPA had the authority to do so, the regulation of GHGs would be unwise.<sup>46</sup> Enter *Massachusetts*: "[A] group

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35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. PLATER ET AL., *supra* note 30, at 470–71, 481.

42. *Id.* at 481.

43. *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. 497, 505 (2007); *Air Pollution: Current and Future Challenges*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/clean-air-act-overview/air-pollution-current-and-future-challenges> (last updated July 12, 2016).

44. *Massachusetts*, 549 U.S. at 532–35.

45. *Id.* at 510.

46. *Id.* at 511.

of States [including Massachusetts], local governments, and private organizations alleged in a petition for certiorari that the Environmental Protection Agency (EPA) has abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide.”<sup>47</sup>

After concluding that Massachusetts had standing to bring the action, the Court addressed the substantive issue: whether the EPA abused its agency discretion in its denial of the rulemaking petition.<sup>48</sup> The Court concluded that the EPA’s two arguments were unpersuasive.<sup>49</sup> First, the Court held that the broad language within the CAA reflects a congressional intent for the Act to be flexible enough to address unforeseen possibilities, such as climate change concerns.<sup>50</sup> The Court also described the CAA’s definition of “air pollutant” as “capacious” and said that “greenhouse gases fit well within . . . [that] definition.”<sup>51</sup> The Court then rejected the EPA’s second argument that it would be unwise to regulate GHGs.<sup>52</sup> In fact, the Court determined that the EPA must regulate GHGs if its findings show that they endanger public health and welfare.<sup>53</sup> The Court reasoned that the EPA “certainly has latitude to make the scientific judgments required to enforce the CAA, but it equally lacks latitude to ignore what the Court saw as an unambiguous statutory mandate to regulate dangerous air pollutants.”<sup>54</sup> The Court concluded that although its ruling did not require the EPA to make an endangerment finding, the “EPA must ground its reasons for action or inaction in the statute.”<sup>55</sup>

Following the Court’s ruling in *Massachusetts*, the EPA’s 2009 endangerment finding concluded that GHGs may reasonably be expected to threaten public health and welfare under the CAA.<sup>56</sup> In its findings, the EPA evaluated the potential effects of elevated concentrations of GHGs and related climate change in regard to “risks associated with changes in air quality, increases in temperatures, changes in extreme weather events, increases in food- and water-borne pathogens, and changes in aeroallergens.”<sup>57</sup> Notably, the EPA found that GHGs threaten public health and welfare in numerous ways, including potential heat waves and other

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47. See *id.* at 505–35 (footnotes omitted).

48. *Id.* at 526 (“[T]he rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. . . . That risk would be reduced to some extent if petitioners received the relief they [sought in the regulation of CO<sub>2</sub> under the CAA].”).

49. *Id.* at 532.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 532–33.

54. *Id.* at 533; Chase Porter with Michael Weller, Development, *Washington Update*, 45 TEX. ENVTL. L.J. 421, 424 (2015).

55. See *Massachusetts*, 549 U.S. at 534–35.

56. See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,496 (Dec. 15, 2009) (codified at 40 C.F.R. ch. I).

57. *Id.* at 66,497.

instances of extreme weather, reduced water supplies, and detrimental effects to coastal communities.<sup>58</sup>

Additionally, carbon dioxide is the most predominant GHG pollutant.<sup>59</sup> It makes up approximately three-fourths of global GHG emissions and 82% of United States GHG emissions.<sup>60</sup> In the United States, fossil-fuel-fired power plants account for the largest source of carbon dioxide emissions—31% of total GHG emissions.<sup>61</sup>

### *C. A Storm Brewing: The Environmental Protection Agency's Clean Power Plan*

In response to the 2009 endangerment findings, in June 2014, the Obama Administration and the EPA proposed the Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (referred to as the CPP).<sup>62</sup> After receiving more than 4.3 million public comments on the proposed rule, President Obama and the EPA announced the final CPP on August 3, 2015, setting the first ever national standards addressing carbon pollution from power plants.<sup>63</sup> The Plan aims to reduce carbon pollution from the power sector by 32% from 2005 levels by the year 2030.<sup>64</sup> It further aims to secure progress in reducing carbon dioxide emissions as well as ensure that such progress continues.<sup>65</sup>

#### *1. What Is the Clean Power Plan?*

The final Plan authorizes the EPA to establish “interim and final carbon dioxide (CO<sub>2</sub>) emission performance rates for two subcategories of fossil fuel-fired electric generating units (EGUs): Fossil fuel-fired electric steam generating units (generally, coal- and oil-fired power plants) [and n]atural gas-fired combined cycle generating units.”<sup>66</sup> The EPA assigned a unique emission-reduction goal to each state that must be achieved to result in an overall nationwide reduction of carbon emissions by 32% by 2030.<sup>67</sup> To maximize flexibility for states implementing the standards and utilities

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58. *Id.* at 66,497–98.

59. *Fact Sheet: Overview of the Clean Power Plan*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/cleanpowerplan/fact-sheet-overview-clean-power-plan> (last updated June 27, 2016).

60. *Id.*

61. *Id.*

62. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,829 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

63. *Fact Sheet: Overview of the Clean Power Plan*, *supra* note 59.

64. *Id.*

65. *Id.*

66. *Id.*

67. See *id.*; Jocelyn Durkay, *States' Reactions to EPA Greenhouse Gas Emissions Standards*, NAT'L CONF. ST. LEGISLATURES (Apr. 18, 2016), <http://www.ncsl.org/research/energy/states-reactions-to-proposed-epa-greenhouse-gas-emissions-standards635333237.aspx>.



meeting the standards, the EPA establishes interim and final state goals in three ways: (1) a rate-based state goal, which is measured in pounds per megawatt hour, (2) a mass-based state goal, which is measured in total short tons of carbon dioxide, and (3) a mass-based state goal, which includes a new source complement measured in total short tons of carbon dioxide.<sup>68</sup>

## 2. *How Did the Environmental Protection Agency Determine Emission Standards?*

Section 111(d) of the CAA provides for the determination of the best system of emission reductions (BSER) by the EPA for a certain pollutant and certain group of sources based on current technologies and procedures being used to reduce emissions of that pollutant and group of sources.<sup>69</sup> Thus, in the BSER determinations for the Plan, the EPA looked to the strategies, technologies, and procedures that states and utilities already utilize to reduce carbon dioxide from fossil fuel-fired power plants.<sup>70</sup> The BSER in the final Plan consists of three “building blocks”: (1) “improving the heat rate of existing coal-fired power plants” so that they operate more efficiently, (2) shifting to lower emitting natural gas powered plants from higher emitting coal-powered plants, and (3) increasing electricity generation from zero-emitting renewable energy sources, such as wind and solar power.<sup>71</sup>

Power plants function through extensive, interconnected regional grids that regulate power generation and distribution.<sup>72</sup> Recognizing this fact, the EPA based its analysis of BSER on the three established regional electricity interconnects: the Eastern and Western Interconnections and the Electricity Reliability Council of Texas (ERCOT).<sup>73</sup> To obtain regional emission performance rates, the EPA applied the three building blocks to all coal and natural gas power plants in the region.<sup>74</sup> The EPA chose the achievable rates from the three regional coal and natural gas power plant rates to arrive at equitable carbon dioxide emission performance rates for the country, which exemplify the BSER.<sup>75</sup> Individual, statewide rate-based and mass-based goals were determined by applying the same carbon dioxide emission performance rates to all impacted sources in each state.<sup>76</sup>

For the first building block, the EPA assumed the following heat-rate improvements: 2.1% for the Western Interconnection, 4.3% for the Eastern

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68. *Fact Sheet: Overview of the Clean Power Plan*, *supra* note 59.

69. *Id.*; see also 42 U.S.C. § 7411(d) (2016) (proscribing standards for existing sources).

70. *Fact Sheet: Overview of the Clean Power Plan*, *supra* note 59.

71. *Id.*; Durkay, *supra* note 67.

72. *Fact Sheet: Overview of the Clean Power Plan*, *supra* note 59.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

Interconnection, and 2.3% for ERCOT.<sup>77</sup> In applying the second building block, the EPA assessed the ability for existing natural gas plants to operate to offset coal use.<sup>78</sup> The EPA assumed the plants could ramp up to a level of 75% capacity over a number of years.<sup>79</sup> Finally, for the third building block, the EPA examined historical trends for renewable power to determine what level of zero-carbon energy development was feasible.<sup>80</sup> Because each state has its own mix of impacted sources, each state has a different goal.<sup>81</sup>

### 3. *What Decisions Must States Make?*

States have the choice of implementing an emission standards plan or a state measures plan to meet their state rate- or mass-based goal.<sup>82</sup> Emission standards plans apply specific standards to generators.<sup>83</sup> State measures plans include a combination of enforceable emission limits and additional programs that states can implement.<sup>84</sup> The federally enforceable components of the Plan do not include the additional programs, such as renewable energy and energy efficiency standards.<sup>85</sup> Federally enforceable, source-specific requirements can also be included in a state measures plan.<sup>86</sup> The state measures or techniques, either by themselves or along with federally enforceable requirements, must result in impacted power plants achieving the state's mass-based goal.<sup>87</sup>

The final CPP allows states to coordinate their efforts with other states to achieve a multi-state approach.<sup>88</sup> This includes emissions trading, allowing for “power plants to integrate their interconnected operations within their operating systems and their opportunities to address carbon pollution.”<sup>89</sup> Furthermore, the EPA believes the “flexibility of the rule allows states to reduce costs to consumers, minimize stranded assets and spur private investments in renewable energy and energy efficiency technologies and businesses.”<sup>90</sup>

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77. *Rule Summary*, E&E NEWS, [http://www.eenews.net/interactive/clean\\_power\\_plan/fact\\_sheets/rule](http://www.eenews.net/interactive/clean_power_plan/fact_sheets/rule) (last visited Nov. 17, 2016).

78. *Id.*

79. *Id.*

80. *Id.*

81. *See Fact Sheet: Overview of the Clean Power Plan*, *supra* note 59.

82. *Id.*

83. *Id.*; *see also Rule Summary*, *supra* note 77 (identifying specific generator plans).

84. *See Fact Sheet: Overview of the Clean Power Plan*, *supra* note 59.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

#### 4. *When Must States Comply?*

Initially, the CPP required states to submit either a final plan or an initial plan (with a request for an extension until September 2018) by September 2016.<sup>91</sup> In 2022, states will begin working toward an average emissions rate for the 2022 to 2030 time period.<sup>92</sup> The EPA divided the interim emissions rate into two-year “step” periods for 2022 to 2024, 2025 to 2027, and 2028 to 2029.<sup>93</sup> During each of those periods, states should reach a specific emissions rate unless they have created their own steps and explained how they plan to achieve them.<sup>94</sup> Each step equates to an average interim emissions rate assigned by the EPA.<sup>95</sup>

However, the United States Supreme Court has stayed the Plan while the legal merits of the rule are litigated.<sup>96</sup> Consequently, the deadlines or other compliance obligations will not be enforced while the stay is in effect.<sup>97</sup>

#### 5. *How Does the Plan Ensure Reliability?*

The final Plan includes various provisions that reflect the EPA’s desire to ensure that compliance with the rule does not create unreliability within the nation’s electricity supply.<sup>98</sup> For example, the reliability safety valve addresses the possibility of unanticipated events or other extraordinary circumstances causing power plants to provide critical reliability generation not in compliance with carbon dioxide emission restrictions.<sup>99</sup> Additionally, the Department of Energy and the Federal Energy Regulatory Commission will coordinate with the EPA “to monitor the implementation of the final rule to help preserve continued reliable electricity generation and transmission.”<sup>100</sup>

### III. MELTING ICEBERGS ARE JUST THE TIP OF THE ICEBERG: IMPACTS OF THE PLAN

As a whole, the Plan has elicited a great range of responses from individual states.<sup>101</sup> While some praise the Plan for its effort to proficiently address climate change, a large number of states oppose the Plan on

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91. *See Rule Summary, supra* note 77.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *See* discussion *infra* Part IV.

97. *Id.*

98. *See Fact Sheet: Overview of the Clean Power Plan, supra* note 59.

99. *Id.*

100. *Id.*

101. *See* discussion *infra* Parts III–IV.

numerous grounds.<sup>102</sup> This Part will first discuss the practical challenges the Plan will impose on Texas specifically and will then focus on problems all the states will encounter as a result of the Plan.

### A. Texas Will Feel the Heat

Texas stands as the leading energy consuming and producing state in the country.<sup>103</sup> Reliable and affordable electricity comprises the backbone of Texas's growing economy.<sup>104</sup> Furthermore, as the sole state with its own power grid, Texas possesses one of the most vigorous electric generation and transmission systems in not only the country but also the world.<sup>105</sup> Texas's competitiveness and economic success—as well as its consumers—depend on free market principles and an abundant, diverse, and inexpensive energy portfolio.<sup>106</sup>

The Plan endangers the success of Texas's economy by increasing the electricity bills of middle-class families and limiting job opportunities for its citizens.<sup>107</sup> Additionally, the EPA's carbon dioxide emission reduction goals threaten to disrupt the electricity market and undercut Texas's control of its electricity generation markets.<sup>108</sup> Furthermore, the Plan requires Texas to shoulder a huge portion of the nation's carbon dioxide reductions.<sup>109</sup> According to *Balanced Energy for Texas*, Texas's carbon dioxide emission rate is lower than that of thirty-two other states; however, its reductions under the Plan amount to more than those of nineteen other states combined.<sup>110</sup>

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102. See generally Heath Knakmuhs, *Winners and Losers from EPA Carbon Regulations*, INST. FOR 21ST CENTURY ENERGY, <http://www.energyxxi.org/winners-and-losers-epa-carbon-regulations> (last visited Nov. 17, 2016). “[W]e have asserted that the EPA’s recently finalized carbon rules will increase electricity costs for businesses and consumers, impose tens of billions in annual compliance costs, and reduce our nation’s global competitiveness . . .” *Id.*

103. BALANCED ENERGY FOR TEX., <http://www.balancedenergyfortexas.org> (last visited Nov. 15, 2016).

104. *Id.* The Texas economy has benefitted tremendously from the availability of affordable and reliable energy; out of the top ten fastest growing metropolitan regions in the country, five, including the top two, are located in Texas. Ed Ireland et al., *Commentary: EPA’s Assault on the Texas Energy Economy*, MYSTATESMAN (Oct. 15, 2015, 12:00 AM), <http://www.mystatesman.com/news/news/opinion/commentary-epas-assault-on-the-texas-energy-econom/nn3Lt/>.

105. See BALANCED ENERGY FOR TEX., *supra* note 103.

106. *Id.*

107. See Ireland et al., *supra* note 104. Particularly, those on fixed incomes, schools, nursing homes, families, and small businesses are vulnerable to increased energy costs. Forum News Serv., *GOP Wants Minnesota to Join EPA Challenge*, BEMMIDJI PIONEER (Sept. 29, 2015, 2:10 PM), <http://www.bemidji.pioneer.com/news/region/3849782-gop-wants-minnesota-join-epa-challenge>.

108. *Impact of the EPA’s Clean Power Plan*, BALANCED ENERGY FOR TEX., <http://www.balancedenergyfortexas.org/epas-cpp-impact/> (last visited Nov. 17, 2016).

109. *Id.*

110. *Id.* “Balanced Energy for Texas is a statewide coalition of energy consumers, producers, and providers committed to supporting policies that preserve and promote our state’s leading role in energy and economic development.” BALANCED FOR ENERGY TEX., *supra* note 103.

Coal amounts to 36% of electricity generated by ERCOT.<sup>111</sup> Under the final CPP, Texas must reduce carbon dioxide emissions by a rate of 33% by 2030.<sup>112</sup> This means that ERCOT will have to retire at least 4,000 megawatts of coal generation capacity, creating potential implications and challenges for grid reliability and the resource mix in the region.<sup>113</sup> What does this, in turn, mean for Texas consumers? According to ERCOT's analysis, it means energy costs could increase by up to 16% by 2030.<sup>114</sup> However, this estimate does not account for the "associated costs of transmission upgrades, higher natural gas prices caused by increased gas demand, procurement of additional ancillary services, and other costs associated with the retirement or decreased operation of coal-fired capacity in the ERCOT Region."<sup>115</sup> Consideration of those additional factors would result in even greater increases in energy costs for consumers.<sup>116</sup> Moreover, impacts from the initial compliance with the Plan will occur earlier and intensify the increases in consumer power costs.<sup>117</sup> By 2020, costs in Texas could increase by \$29.4 billion, or 93%, resulting in a 48% increase in household electricity bills, causing the average family in Texas to spend \$747 more on their power bill per year.<sup>118</sup> Naturally, these increases could cause financial strains and burdens on many Texas families.<sup>119</sup>

These pains will be felt throughout the economy and the job market.<sup>120</sup> Economic growth and development in Texas has resulted greatly from lignite coal mining, coal-fired electric power generation, and associated industries.<sup>121</sup> Coal-fired power generation as well as coal mining contributes more than \$7 billion to the Texas economy annually.<sup>122</sup> Also, those industries "support more than 24,000 jobs that pay over \$1.8 billion in salaries, wages and benefits."<sup>123</sup> In Texas, mining alone employs over 10,400 people—a

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111. See *Impact of the EPA's Clean Power Plan*, *supra* note 108. ERCOT manages the flow of electric power to twenty-four million Texas customers, which represents about 90% of the state's electric load. *About ERCOT*, ERCOT, <http://www.ercot.com/about> (last visited Nov. 17, 2016).

112. See Steven Johnson, *EPA Plan Means Higher Prices, Grid Issues in Texas*, ELECTRIC CO-OP TODAY (Oct. 26, 2015), <http://www.ect.coop/industry/trends-reports-analyses/electric-reliability-council-of-texas-clean-power-plan86210/86210>; see also ERCOT, ANALYSIS OF THE IMPACTS OF THE CLEAN POWER PLAN: FINAL RULE UPDATE 1, 2 (2015), [http://www.ercot.com/content/news/presentations/2015/ERCOT\\_Analysis\\_of\\_the\\_Impacts\\_of\\_the\\_Clean\\_Power\\_Plan-Final\\_.pdf](http://www.ercot.com/content/news/presentations/2015/ERCOT_Analysis_of_the_Impacts_of_the_Clean_Power_Plan-Final_.pdf) (providing information on the effect of the Plan). This amounts to 1,042 pounds of carbon dioxide per megawatt-hour, or 190 million tons of carbon dioxide. *Id.*

113. *Id.* at 1.

114. *Id.* at 1, 2.

115. *Id.* at 1.

116. *Id.*

117. See Ireland et al., *supra* note 104.

118. *Id.*

119. *Id.*

120. See *Impact of the EPA's Clean Power Plan*, *supra* note 108.

121. *Id.*

122. *Id.*

123. *Id.*

majority of whom desperately need their jobs.<sup>124</sup> Additionally, the EPA recognizes a nationwide average loss of 47,000 to 49,000 jobs annually from 2017 to 2030 for the coal mining, electric power, and natural gas production sectors.<sup>125</sup>

Texas will also not fare well under the Plan due to investments made by the state in maintaining and developing pollution-control equipment and renewable energy generation.<sup>126</sup> No commercially demonstrated fossil fuel technologies in the country—and the world—can achieve the EPA’s emission requirements at this time.<sup>127</sup> Thus, the emission limit for Texas cannot be met by even the most efficient, state-of-the-art coal or gas power plant.<sup>128</sup> And with that in mind, the EPA derived its target rates knowing that states would have to look “beyond the fence” of power plants to be in compliance.<sup>129</sup> Therefore, Texas must greatly increase its renewable electricity generation in order to comply.<sup>130</sup> From 2013 to 2030, ERCOT expects to increase its renewable energy production by three times what it produced in 2012, which was the baseline year of the Plan.<sup>131</sup> In regard to statewide wind and solar generation alone, Texas would be expected to generate more power from these sources than every other country, excluding the United States, generated in 2012.<sup>132</sup>

### B. Chilling Effects Throughout the Country

States have taken polarized stances in regards to the CPP as a result of the dramatic changes in the EPA’s final rule requirements as compared to the proposed rule requirements.<sup>133</sup> While some states enthusiastically support the Plan, more than half strongly oppose it for various reasons.<sup>134</sup> The Plan

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* The new source emission guidelines make it almost impossible to build a new coal plant that does not include carbon capture and storage—an evolving technology that is not yet commercially viable. Jude Clemente, *The Clean Power Plan Ignores Clean Coal Success -- and Our Real Chance to Lead the World*, FORBES (Sept. 27, 2015, 5:48 PM), <http://www.forbes.com/sites/judeclemente/2015/09/27/the-clean-power-plan-ignores-clean-coal-success-and-our-real-chance-to-lead-the-world/>. By unfairly applying a technology standard that cannot be met, the EPA is interfering with marketplace decisions by disfavoring coal as a fuel source. See *Impact of the EPA’s Clean Power Plan*, *supra* note 108.

129. See *id.*; see also *States Prepare Legal Challenges to EPA’s Clean Power Plan*, ENGIE RESOURCES (Aug. 17, 2015), <http://www.engieresources.com/index.php?id=1489> (referring to the fact that the second and third building blocks do not regulate emissions directly at the affected power plant unit).

130. See *Impact of the EPA’s Clean Power Plan*, *supra* note 108.

131. *Id.*

132. *Id.*

133. Elizabeth Harball, *EPA’s Final Climate Rule Made Compliance Easier for Some State Regulators, Harder for Others*, E&E NEWS: CLIMATEWIRE (Oct. 21, 2015), <http://www.eenews.net/stories/1060026662>.

134. *Id.*

fails the states in three important ways. First, the unique state goals set by the EPA along with the states' choice between the mass-based or rate-based approach in meeting those goals creates interesting and concerning effects on the states individually.<sup>135</sup> Second, the Plan is expected to adversely affect minorities and the very poor.<sup>136</sup> Finally, the EPA's claimed benefits of the Plan regarding human health and climate change effects are misleading and disproportionate to the costs associated with the Plan.<sup>137</sup>

### *1. A Fair-Weathered Friend: Disparate Impact of the Plan*

One problem with the Plan is that the state-specific emission reduction goals create disparities between the states and are inherently unfair.<sup>138</sup> A comparison of the EPA's state-specific carbon regulation fact sheets shines light on the fact that under the CPP regulations, "nine states are actually permitted to *increase* their emissions rates from 2020 to 2030 while still achieving compliance with the agency's carbon mandate" and are deemed "winners."<sup>139</sup> This is noteworthy because the aim of the Plan is to reduce carbon emissions from the nation's power sector.<sup>140</sup> These "winning" states would then be able to act as "credit banks" under the Plan's rate-based emission trading program and mass-based emission trading program.<sup>141</sup> The majority "debtor" states would then be burdened with tough emission reduction targets.<sup>142</sup>

The EPA created a situation that has very practical implications.<sup>143</sup> Creditor states will face less pressure to minimize affordable gas- and coal-powered electricity, which would allow them to soften the impact of electricity price increases expected from the rule.<sup>144</sup> Economic development will continue to proceed in those states with the ability to increase emission rates while the rest of the states with stricter targets will have to curtail affordable energy to be in compliance with the EPA.<sup>145</sup> Lastly, for states choosing to participate in the cap-and-trade programs, those creditor states

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135. *Id.*

136. *See infra* Section III.B.2.

137. *See* Chuck DeVore, *The EPA's Clean Power Plan Won't Save the World, but It Will Cause Human Suffering*, DAILY CALLER: OPINION (Oct. 19, 2015, 9:26 AM), <http://dailycaller.com/2015/10/19/the-epas-clean-power-plan-wont-save-the-world-but-it-will-cause-human-suffering/>.

138. *See Clean Power Plan State-Specific Fact Sheets*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/cleanpowerplantoolbox/clean-power-plan-state-specific-fact-sheets> (last updated Sept. 16, 2016); Knamuhs, *supra* note 102.

139. *See Clean Power Plan State-Specific Fact Sheets*, *supra* note 138; Knamuhs, *supra* note 102.

140. *See* Knamuhs, *supra* note 102. This scheme also raises concerns about whether redistribution is a concurrent goal or an unintended result of complex formulas and projections. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

can opt to sell credits to debtor states, “effectively cashing checks on the backs of states with steeper emissions reduction mandates.”<sup>146</sup>

Moreover, this scheme of winners and losers under the CPP creates a problem of transfers of wealth between the states.<sup>147</sup> In fact, Dr. Bryan Shaw, chairman of the Texas Commission on Environmental Quality (TCEQ), spoke on the issue at a congressional Committee on Science, Space, and Technology’s Subcommittee on Environment hearing.<sup>148</sup> He noted that Texas will have to reduce emissions by 33% and that reduction will come at a cost.<sup>149</sup> He attributed much of the prosperity and growth in Texas to the low cost of energy in the state and prior investments made by the state.<sup>150</sup> States not needing to reduce emissions will not have to make any further investments to be in compliance and will thus be at an advantage.<sup>151</sup> Additionally, the director of the Ohio Environmental Protection Agency described the two costly alternatives presented to states to be in compliance with the Plan.<sup>152</sup> In his opinion, states can shut down existing coal assets and buy more expensive power or just buy credits.<sup>153</sup> These costs, again, would put certain states at an advantage and others at a disadvantage.<sup>154</sup>

## 2. *When It Rains, It Pours: Effect on Minorities and the Economically Disadvantaged*

The CPP also has serious implications for minorities and the economically disadvantaged.<sup>155</sup> According to the National Black Chamber of Commerce’s analysis of the proposed Plan, the EPA’s regulations will have significant and disproportionate economic, employment, and energy market impacts nationwide on low-income groups, specifically blacks and Hispanics.<sup>156</sup> Minorities, in particular, will be disproportionately impacted

146. *Id.* (“For example, between 2020 and 2030, EPA’s final rule allows Oregon to *increase* carbon emissions by 3.1 million tons of CO<sub>2</sub> annually—a whopping 63% jump. If the state so chooses, it could monetize that allowance which, at a reasonably expected price of \$40 per ton, could provide the state of Oregon \$125 million in annual revenue—paid for by losing states seeking to comply with the EPA’s regulatory mandate.”) (internal citation omitted).

147. *State Perspectives: How EPA’s Power Plan Will Shut Down Power Plants: Hearing Before the Subcomm. on Env’t of the H. Comm. on Sci., Space, & Tech.*, 114th Cong. (2015) (statement of Lamar Smith, Chairman, House Comm. on Sci., Space, & Tech.).

148. *Id.* (statement of Bryan Shaw, Chairman, Tex. Comm’n on Env’tl. Quality).

149. *Id.*

150. *Id.* Texas has invested \$7 million in transmission lines for its 13,000 megawatts of wind energy. *Id.*

151. *Id.*

152. *Id.* (statement of Craig Butler, Director, Ohio Env’tl. Prot. Agency).

153. *Id.*

154. *See id.* (statement of Lamar Smith, Chairman, House Comm. on Sci., Space, & Tech.).

155. *See* NAT’L BLACK CHAMBER OF COMMERCE, POTENTIAL IMPACT OF PROPOSED EPA REGULATIONS ON LOW INCOME GROUPS AND MINORITIES vii, 1 (2015), <http://ieca-us.com/wp-content/upload/NBCC-minority-impacts-report-June-2015-final.pdf>.

156. *Id.*



not only because they generally have lower incomes to begin with but also because they have to expend proportionately more of their incomes on energy.<sup>157</sup> Additionally, increases in energy costs will spread throughout the economy, and (as a result of the Plan's varied impact on states) states will experience impacts at varying degrees.<sup>158</sup> On top of everything, black and Hispanic populations are disproportionately greater in certain states, particularly those states the Plan most severely impacts.<sup>159</sup>

### 3. *The Clean Power Plan's Benefits: Like Waiting for Rain in a Drought*

Those in opposition to the Plan view the health and climate change benefits touted by the EPA as too minute to justify the costs imposed on the public.<sup>160</sup> The EPA and President Obama promote the Plan by asserting that it will help combat climate change.<sup>161</sup> Based on the EPA's own data, however, the Plan would only decrease the rise of sea levels by 1/100th of an inch, which amounts to the thickness of three sheets of paper.<sup>162</sup> Even Gina McCarthy, the EPA Administrator, agreed that this regulation would have a minimal impact on climate change.<sup>163</sup> When questioned about the CPP's contribution to halting climate change (an estimated offset of 0.01°C), Administrator McCarthy indicated that the Plan is intended to encourage other nations to act to reduce their own emissions.<sup>164</sup>

Some have the opinion that the United States has a small role to play in climate change mitigation overall.<sup>165</sup> Many argue that "the Clean Power Plan is nothing more than a global PR scheme"—as demonstrated at the Paris climate conference this past December, when it was used to show the United

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157. *Id.* at ix.

158. *Id.* at xiv. Because the vast majority of businesses rely on electricity to produce and sell their goods and services, the economic impacts of coal-based energy regulations extend beyond the generation and sale of electricity. *Id.*

159. *Id.* at xv.

160. *See* DeVore, *supra* note 137.

161. *Climate Change and President Obama's Action Plan*, WHITE HOUSE, <https://www.whitehouse.gov/president-obama-climate-action-plan> (last visited Nov. 15, 2016) (time markers 2:00 to 2:45).

162. Press Release, Lamar Smith, Congressman, Texas ERCOT Official Testifies at Smith Hearing on Paris Climate Conference CONGRESSMAN LAMAR SMITH (Nov. 19, 2015), <https://lamarsmith.house.gov/media-center/press-releases/texas-ercot-official-testifies-at-smith-hearing-on-paris-climate>.

163. Press Release, House Comm. on Sci., Space, & Tech., Members Question EPA Administrator on Lack of Transparency, Independence (July 9, 2015), URL <https://science.house.gov/news/press-releases/members-question-epa-administrator-lack-transparency-independence>.

164. *Id.*

When asked if she considers 0.01 degrees to be a significant contribution to halting climate change, Administrator McCarthy said, "No, the value of this rule is not measured in that way. It is measured in showing strong domestic action which can actually trigger global action to address what is necessary action."

*Id.*

165. *See* Chip Knappenberger, *The Trouble with Obama's Clean Power Plan*, CNN, <http://www.cnn.com/2015/08/04/opinions/knappenberger/> (last updated Aug. 4, 2015).

States' credibility as a global leader.<sup>166</sup> By the end of the century, however, mainstream scientific projections expect approximately 2.5°C warming due to carbon dioxide emitted from the burning of fossil fuels, such as coal, oil, and natural gas.<sup>167</sup> Developing nations, including India, China, and sub-Saharan African countries, are expected to contribute almost 90% of this warming.<sup>168</sup> Only about half of the remaining warming, amounting to about 0.3°C, will come from the United States.<sup>169</sup> So, if the United States were to eliminate all carbon dioxide emissions starting today, future warming would only be decreased by about 0.15°C by the end of the century.<sup>170</sup> Thus, incremental actions, such as the CPP, will not have an appreciable impact on the future progression of climate change.<sup>171</sup>

Additionally, carbon dioxide (as natural atmospheric gas) does not cause health implications for humans.<sup>172</sup> Nonetheless, the EPA claims that the forced reduction of carbon dioxide will have “co-benefits.”<sup>173</sup> Co-benefits refer to the reduction of other forms of air pollution emitted when fossil fuels are burned.<sup>174</sup> However, some consider these by-product emissions to be double counted by the President and the EPA because they are already subject to existing regulations.<sup>175</sup>

Finally, major global problems could result from President Obama's eagerness to impress the importance of reducing carbon dioxide emissions on world leaders.<sup>176</sup> Developing countries could experience a reduction in economic growth and human progress as a result of a reduction in carbon dioxide emissions.<sup>177</sup> Renewable technologies may be grossly inadequate to satisfy the urgent and increasing needs of developing countries, which may not even have access to electricity—much less abundant and reliable electricity.<sup>178</sup> Limiting carbon dioxide emissions through restrictions in fossil fuel use may dramatically impact the developing parts of the world and could have serious consequences for human health and well-being.<sup>179</sup>

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166. See Ashley Alman & Daniel Marans, *Barack Obama Praises Paris Climate Change Agreement*, HUFFINGTON POST (Dec. 12, 2015, 5:36 PM), [http://www.huffingtonpost.com/entry/obama-paris-climate-agreement\\_us\\_566c8cf1e4b0fcee16ed503](http://www.huffingtonpost.com/entry/obama-paris-climate-agreement_us_566c8cf1e4b0fcee16ed503); DeVore, *supra* note 137.

167. See Knappenberger, *supra* note 165.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. See DeVore, *supra* note 137. Humans breathe 2.3 pounds of carbon dioxide daily. *Id.*

173. *Id.* According to the White House website, in 2030, the Plan will “[p]revent up to 3,600 premature deaths[, p]revent 1,700 non-fatal heart attacks[, p]revent 90,000 asthma attacks in children[, and p]revent 300,000 missed workdays and schooldays.” *Climate Change and President Obama's Action Plan*, *supra* note 161.

174. See Knappenberger, *supra* note 165.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

## IV. THE SUPER STORM: LEGAL CHALLENGES TO THE CARBON POLLUTION EMISSION GUIDELINES

The CPP has faced legal attacks from its inception.<sup>180</sup> Murray Energy, the State of West Virginia, and others brought early challenges to the proposed Plan based on the argument that the EPA could not regulate power plants under CAA § 111—no matter the substantive content of the rule—because power plants are already regulated under § 112.<sup>181</sup> Though the D.C. Circuit did not reject that argument, the court held that their challenge was premature because no final action by the EPA had yet occurred.<sup>182</sup> The CAA provides that any challenge to the EPA's standards must be filed in the D.C. Circuit no later than sixty days following the publication of the rule in the *Federal Register* and no earlier than the publication date.<sup>183</sup> After the final rule was announced in early August 2015 (but before it was published almost two months later in late October), fifteen states jumped the gun again when they filed for an emergency stay of the Plan on August 13, 2015.<sup>184</sup>

Unsurprisingly, fewer than twelve hours after being published in the *Federal Register*, the CPP became the most heavily litigated environmental regulation in history.<sup>185</sup> Twenty-seven states and numerous industry groups have filed more than fifteen independent cases in opposition to the Plan.<sup>186</sup> Texas and West Virginia led the charge of twenty-four states in one case, while Mississippi, Oklahoma, and North Dakota filed individual lawsuits.<sup>187</sup> The United States Chamber of Commerce also led the charge in suing for a number of trade associations, while coal companies, utilities, mining interests, and other sectors filed their own cases.<sup>188</sup> On the other side, however, eighteen states, including New York and California, have announced their support of the Plan and will help defend the EPA in

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180. See Michael J. Nasi et al., *Texas: A Case Study in the Clean Power Plan's Disparate Impact on States* 1, 14 (2015) (presented at the 27th Annual Environmental Superconference Aug. 6–7, 2015).

181. See *id.* (discussing the legal challenges the Plan has faced); *In re Murray Energy Corp.*, 788 F.3d 330, 338 (D.C. Cir. 2015).

182. See *In re Murray Energy Corp.*, 788 F.3d at 335–36; see also Nasi et al., *supra* note 180.

183. 42 U.S.C. § 7607(b)(1) (2016) (“A petition for review of action of the Administrator in promulgating . . . any standard of performance or requirement under section [1]11 . . . may be filed only in the United States Court of Appeals for the District of Columbia. . . . Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register . . .”).

184. See *Clean Power Plan for Existing Power Plants*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants> (last updated Sept. 14, 2016); Brian Palmer, *Just About Everyone vs. Gina McCarthy*, NAT'L RESOURCES DEF. COUNCIL (Oct. 14, 2015), <http://www.onearth.org/earthwire/clean-power-plan-legal-challenge>.

185. See *The Fate of the Obama Administration's Signature Climate Change Is in the Hands of the Courts*, E&E NEWS, [http://www.eenews.net/interactive/clean\\_power\\_plan/fact\\_sheets/legal](http://www.eenews.net/interactive/clean_power_plan/fact_sheets/legal) (last visited Nov. 15, 2016) [hereinafter *Fate of Climate Change Rule*].

186. *Id.*

187. *Id.*

188. *Id.*

court.<sup>189</sup> As expected, a number of environmental groups will also intervene in support of the EPA.<sup>190</sup>

The lawsuits have been consolidated into a single case at the United States Court of Appeals for the D.C. Circuit.<sup>191</sup> Before addressing the merits of the challenges, a three-judge panel considered motions asking the court to grant a stay of the Plan while the litigation plays out.<sup>192</sup> The D.C. Circuit Court of Appeals denied the motions for stay on January 21, 2016, and scheduled oral argument for June 2, 2016.<sup>193</sup> Having “not satisfied the stringent requirements for a stay” states had until September 6, 2016, to submit a final plan or request an extension.<sup>194</sup> The D.C. Circuit did, however, order that consideration of the appeals “be expedited” so that the court can issue a final decision before the Plan’s compliance deadline passes.<sup>195</sup>

A few days later, on January 26, twenty-nine states petitioned the United States Supreme Court to immediately block the Plan from taking effect.<sup>196</sup> In the states’ application, directed to Chief Justice John Roberts, Jr., they noted that they filed petitions for review of the carbon rule with the D.C. Circuit on the day of publication in the *Federal Register* “due to the immediate harm from the Plan.”<sup>197</sup> On February 9th, the Supreme Court unexpectedly put the Plan on ice when it issued a stay on the implementation of the Plan until the completion of judicial review.<sup>198</sup> The order, issued in a 5–4 decision of the Court, is unprecedented.<sup>199</sup> The Supreme Court has never stayed regulations before an initial federal court hearing.<sup>200</sup> Furthermore, on May 16th the D.C. Circuit Court of Appeals announced that the scheduled June 2nd oral

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189. *Id.*

190. *Id.*

191. *Id.*; *West Virginia v. Envtl. Prot. Agency*, No. 15-1363 (D.C. Cir. Oct. 23, 2015).

192. *Fate of Climate Change Rule*, *supra* note 185.

193. *See id.*

194. Jim Malewitz, *Texas Loses Bid to Block Obama’s Clean Power Plan*, TEX. TRIB. (Jan. 21, 2016, 5:07 PM), <http://www.texastribune.org/2016/01/21/court-denies-texas-request-block-clean-power-plan/> (quoting *West Virginia*, No. 15-1363).

195. Sonal Patel, *Halt the EPA’s Clean Power Plan Now, 26 States Urge Supreme Court*, POWER (Jan. 27, 2016), <http://www.powermag.com/halt-the-epas-clean-power-plan-now-26-states-urge-supreme-court/>.

196. *Id.* A group of sixty utility companies and energy industry trade groups also filed a separate application for a stay of the Plan. Lyle Denniston, *States Move to Block “Clean Power Plan”*, SCOTUSBLOG (Jan. 26, 2016, 9:28 PM), <http://www.scotusblog.com/2016/01/states-move-to-block-clean-power-plan/>. The Obama Administration and the EPA had the option of answering the stay application by February 4, before either the Chief Justice or the full Court acts. *Id.*

197. State Petitioners’ Motion for Stay and for Expedited Consideration of Petition for Review at 1, *West Virginia v. Envtl. Prot. Agency*, (D.C. Cir. Jan. 26, 2016) (No. 15-1363), <http://www.ago.wv.gov/publicresources/epa/Documents/StatePetrsMotionForStay.pdf>; Patel, *supra* note 195.

198. Lyle Denniston, *Carbon Pollution Controls Put on Hold*, SCOTUSBLOG (Feb. 9, 2016, 6:45 PM), <http://www.scotusblog.com/2016/02/carbon-pollution-controls-put-on-hold/>.

199. *Id.*

200. Robinson Meyer, *Will a Reconfigured Supreme Court Help Obama’s Clean-Power Plan Survive?*, ATLANTIC (Feb. 14, 2016), <http://www.theatlantic.com/politics/archive/2016/02/antonin-scalia-clean-power-plan-obama-climate-change/462807/>.

arguments before a three-judge panel would be postponed until September 27th and would be heard by the full court.<sup>201</sup>

### A. Clean Air Act § 111: Statutory Breakdown

The EPA roots its authority for the CPP in § 111(d) of the CAA.<sup>202</sup> Consequently, opponents of the Plan argue that there are serious flaws in this authority.<sup>203</sup> Understanding this section is thus invariably important to the discussion of CPP litigation. Section 111 establishes nationwide emission standards for the categories of stationary sources that cause air pollution, which threatens public health and welfare.<sup>204</sup> Power plants fired by fossil fuels have been in listed source categories under the section since 1971.<sup>205</sup>

Section 111 also addresses the regulation of both “existing” and “new” sources.<sup>206</sup> Regarding new and modified sources, § 111(b) guides the EPA to establish nationwide “standards of performance.”<sup>207</sup> Section 111(d) requires the EPA to establish standards of performance for existing sources that would otherwise be subject to § 111(b) standards if they were a new source.<sup>208</sup> Emission standards for pollutants regulated under § 108 or § 112—which respectively regulate criteria air pollutants from existing sources and hazardous air pollution—are not established under § 111(d).<sup>209</sup>

For both existing and new sources, the standards of performance must demonstrate the achievable emission reductions through the application of the BSER found by the EPA to be “adequately demonstrated” (after considering energy requirements, costs, and non-air quality environmental and health impacts).<sup>210</sup> Section 111(d) outlines the approach utilized by the

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201. Andrew Shaw, *US Circuit Court of Appeals for the DC Circuit Delays Oral Arguments in Clean Power Plan Litigation*, LEXOLOGY (July 13, 2016), <http://www.lexology.com/library/detail.aspx?g=f4493ef0-20eb-429e-b3fb-0732d137efee>. “The court’s decision appears to be *sua sponte* (on the court’s own initiative), as there is no record of any party to the case asking the court to hear the case en banc in the first instance.” Jonathan H. Adler, *Clean Power Plan to Get Unanticipated En Banc Review*, WASH. POST (May 16, 2016), <https://www.washingtonpost.com/news/voлокх-conspiracy/wp/2016/05/16/clean-power-plan-to-get-unanticipated-en-banc-review/>.

202. See Gerrard, *supra* note 28.

203. *Id.*

204. 42 U.S.C. § 7411(b)(1)(A) (2016); Tomás Carbonell, *EPA’s Proposed Clean Power Plan: Protecting Climate and Public Health by Reducing Carbon Pollution from the U.S. Power Sector*, 33 YALE L. & POL’Y REV. 403, 407 (2015) (quoting 42 U.S.C. § 7411(b)(1) (2012)).

205. Carbonell, *supra* note 204.

206. *Id.*

207. *Id.*; 42 U.S.C. § 7411(b)(1).

208. Carbonell, *supra* note 204.

209. *Id.*; 42 U.S.C. § 7411(d)(1)(A)(i). However, there are two conflicting versions of the section that will have to be resolved by the Court. See Andrew Childers, *Clean Power Plan Opponents Gear Up for New Lawsuits*, BLOOMBERG BNA (Oct. 19, 2015), <http://www.bna.com/clean-power-plan-n57982059588/>.

210. 42 U.S.C. § 7411(a)(1); Carbonell, *supra* note 204, at 408.

CPP for regulation of existing sources, in which the EPA provides emission guidelines for states that include a determination of the BSER.<sup>211</sup>

Although § 111(d) will likely be the source of contention, the provision is seldom used and has never been litigated.<sup>212</sup> That said, case law on the section is nonexistent, and the provision has only been used by the EPA a handful of times in its over forty years on the books.<sup>213</sup> This adds to the ambiguity that already exists within the language of the statute itself and makes predicting the outcome of the challenges even more difficult.<sup>214</sup>

### *B. Legal Theories Behind the Challenges to the Clean Power Plan*

Opponents of the CPP have advanced several legal theories, including (1) whether the EPA actually has the legal authority to enforce the rule, (2) whether the EPA's determination of the BSER can regulate beyond the fenceline, and (3) whether the rule is constitutional.<sup>215</sup>

#### *1. The Legislative "Glitch": Is the Environmental Protection Agency Overstepping Its Authority Under Clean Air Act § 111(d)?*

Petitioners previewed this argument in their initial challenge to the Plan—whether establishing standards for hazardous air pollutants from power plants under § 112 of the CAA abrogates the EPA's power to issue carbon dioxide standards under § 111(d).<sup>216</sup> At the time the CAA was last amended, in 1990, the House of Representatives and the Senate adopted two conflicting amendments for § 111(d).<sup>217</sup> The Senate language in the provision only bars the EPA from regulating *pollutants* under § 111(d) that already have emission limits imposed on them under § 112.<sup>218</sup> Notably, the Senate's account of the 1990 amendments maintained the exclusion of pollutants.<sup>219</sup> CPP opponents consider the House amendment, on the other hand, more restrictive.<sup>220</sup> The House version bars the EPA from imposing

211. See Carbonell, *supra* note 204, at 408; *supra* Section II.C.

212. Keith Goldberg, *Carbon Rule Sends EPA into Uncharted Legal Territory*, LAW360 (June 13, 2014, 3:00 PM), [http://www.law360.com/articles/547456/carbon-rule-sends-epa-into-uncharted-legal-territory?article\\_related\\_content=1](http://www.law360.com/articles/547456/carbon-rule-sends-epa-into-uncharted-legal-territory?article_related_content=1).

213. *Id.* The most recent use of § 111(d) prior to the CPP is found in the EPA's Clean Air Mercury Rule, which was issued in 2005. *Id.* The Rule was intended to crack down on mercury emissions from power plants. *Id.* Though the D.C. Circuit set the Rule aside in 2008, it did not get into the arguments involving the EPA's authority under § 111(d). *New Jersey v. Env'tl. Prot. Agency*, 517 F.3d 574, 583 (D.C. Cir. 2008).

214. See Goldberg, *supra* note 212.

215. See Childers, *supra* note 209.

216. See Childers, *supra* note 209.

217. *Id.*

218. *Id.*

219. Patrick Parenteau, *The Clean Power Plan Will Survive: Part I*, LAW360 (Sept. 28, 2015, 11:37 AM), <http://www.law360.com/articles/704046/the-clean-power-plan-will-survive-part-1>.

220. See Childers, *supra* note 209.

regulations on *industrial source categories* under § 111(d) for which the EPA has previously issued emissions standards under § 112 (as it has with power plants).<sup>221</sup>

Under a reading of the House's version, the argument follows that the EPA cannot regulate existing fossil fuel plants because they are already regulated under the National Emission Standards for Hazardous Air Pollutants program created under § 112.<sup>222</sup> Both the House and Senate amendments were signed into law, and both amendments appear in the Statutes at Large, although only the House amendment appears in the United States Code.<sup>223</sup> Understandably, CPP opponents argue that the House amendment is more applicable and should take precedence.<sup>224</sup> The director of the Natural Resources Defense Council's Climate and Clean Air Program, however, believes the Court will likely support the EPA's interpretation of its § 111(d) authority.<sup>225</sup>

Since the initial challenges to the proposed form of the CPP, which the director calls "a scrimmage before the big game," the EPA has had the opportunity to enhance the legal foundations of the Plan.<sup>226</sup> At first, the EPA argued that the resolution of statutory ambiguity created by the conflicting amendments should be afforded agency deference.<sup>227</sup> The EPA has now expanded its argument by suggesting that opponents' interpretation of the House amendment is not the only conceivable interpretation and that the language could actually be read to support its carbon dioxide standards.<sup>228</sup>

Opponents, however, still find flaws in the EPA's interpretations and believe they should not be entitled to deference from the court.<sup>229</sup> The EPA refers to an ambiguity that is not the typical ambiguity it relies on to assert that it is entitled to deference.<sup>230</sup> Typically, the EPA is entitled to deference when there is ambiguity in language that requires *technical decisions* from the EPA.<sup>231</sup> In contrast, the ambiguity in this case is one of *legislative construction*, and "[i]t's not within the expertise of EPA to determine which portion of these two competing provisions ought to be given greater weight."<sup>232</sup>

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221. *Id.*

222. *See* Gerrard, *supra* note 28, at 2.

223. *See* Childers, *supra* note 209.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*; *see* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.")

228. *See* Childers, *supra* note 209. This additional interpretation was included in the EPA's final rule. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

The argument for the House version of § 111(d) relies on the proposition that Congress intended to deprive the EPA of the authority, previously granted under the section, to regulate harmful pollutants not covered by other provisions.<sup>233</sup> The legislative history of the 1990 amendments, however, does not suggest that Congress intended such an action.<sup>234</sup> Whether deference should be given to the EPA's interpretation is ultimately a question for the Court.<sup>235</sup>

*2. The Fenceline Dilemma: Can the Environmental Protection Agency's Determination of the Best Systems of Emission Reductions Regulate Beyond the Fenceline?*

Opponents consider the CPP an unprecedented action by the EPA that requires “power plants to achieve emissions reductions from beyond the fenceline of their own facilities by shifting generation to cleaner natural gas or renewable energy, which could mean to competing utilities.”<sup>236</sup> In the past, rules under § 111 focused solely on the emissions reductions achievable within regulated facilities themselves.<sup>237</sup> The problem with the CPP is that natural gas and renewable power generation are included in the emissions rate calculation, which creates more stringent performance standards for existing power plants than imposed on new units.<sup>238</sup>

Section 111(d) allows the EPA to establish emission guidelines based on a “standard of performance.”<sup>239</sup> The statute defines standard of performance as a standard demonstrating the “degree of emission limitation achievable” through the EPA-determined “best system of emission reduction” that has been “adequately demonstrated.”<sup>240</sup> What exactly is meant by “system” is a matter of contention.<sup>241</sup> System could either apply solely to reductions achievable within the power plant itself, or it could allow the EPA to regulate outside the fenceline of the power plant.<sup>242</sup> Nonetheless, reductions achievable within the fenceline (through actions such as upgrading boilers) are not substantial.<sup>243</sup> The EPA would be unable to get anywhere close to the emissions reductions they are seeking if they were limited to within the fenceline regulations.<sup>244</sup>

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233. See Parenteau, *supra* note 219.

234. *Id.*

235. *Id.*; see also *infra* Section IV.C.1 (discussing the reconciliation of conflicting statutes).

236. See Childers, *supra* note 209.

237. *Id.*

238. *Id.*

239. See Gerrard, *supra* note 28, at 2.

240. *Id.* (quoting 42 U.S.C. §§ 7411(a)(1), (d)(1)(A) (2012)).

241. See *id.* at 2.

242. *Id.*

243. *Id.*

244. *Id.*



Based on the argument that the statutory language—especially the language relating to the BSER—negates the EPA’s ability to go beyond the fenceline, CPP opponents suggest that the rules allow the EPA to become an energy regulator that makes expansive decisions about matters such as fuel choice.<sup>245</sup> In their Joint Reply in Support of Motions for Stay and for Expedited Consideration, the petitioners argued that “it is undisputed that the Plan is intended to, and will, force a massive reordering of each State’s mix of generation facilities.”<sup>246</sup> Opponents maintain that the EPA is requiring states to achieve emissions reductions based on the regulated source buying or investing in their competitors’ businesses, which the EPA deems to be cleaner.<sup>247</sup>

### 3. *Are the Carbon Pollution Emission Guidelines Constitutional?*

Furthermore, CPP opponents challenge the Plan on federalism grounds, arguing that it allows the EPA to coerce states into implementing a national energy policy.<sup>248</sup> Laurence Tribe—President Obama’s one-time mentor—argues the Plan violates the Fifth Amendment because limiting companies’ use of coal plants without due compensation constitutes a regulatory taking by the government.<sup>249</sup> The heart of the constitutional arguments is that the CPP improperly treads on states’ rights in violation of the Tenth Amendment by ultimately influencing critical energy policy choices.<sup>250</sup>

Tribe testified before the House Committee on Energy and Commerce, accusing the EPA of simultaneously usurping the prerogatives of Congress, the states, and the federal courts.<sup>251</sup> He added, “Burning the Constitution . . . should not become part of our national energy policy.”<sup>252</sup> Nonetheless, these constitutional arguments are less likely to be persuasive to judges than statutory challenges rooted in the CAA itself.<sup>253</sup>

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245. *Id.*

246. Joint Reply of West Virginia, et al., Oklahoma, et al., North Dakota, and Mississippi deq in Support of Motions for Stay and for Expedited Consideration at 1, *West Virginia v. Env’tl. Prot. Agency*, No. 15-1363 (D.C. Cir. Dec. 23, 2015), <http://www.ago.wv.gov/publicresources/epa/Documents/States%20Stay%20Reply%20and%20exhibit%20-%20file%20stamped.pdf>.

247. *Id.* at 4.

248. See *Fate of Climate Change Rule*, *supra* note 185.

249. See *States Prepare Legal Challenges to EPA’s Clean Power Plan*, *supra* note 129.

250. WILLIAM W. BUZBEE ET AL., *THE CLEAN POWER PLAN: ISSUES TO WATCH* 1, 3 (2015), [http://progressivereform.org/articles/CPP\\_1506.pdf](http://progressivereform.org/articles/CPP_1506.pdf).

251. See *States Prepare Legal Challenges to EPA’s Clean Power Plan*, *supra* note 129.

252. *Id.*

253. See Childers, *supra* note 209.

*C. Cloudy with a Chance of Deference?: The Legal Precedent Determining the Fate of the Clean Power Plan*

The CPP's ability to withstand judicial review will have a widespread impact on United States and global actions to address climate change.<sup>254</sup> The resolution of the challenges to the CPP will likely turn on the deference the Supreme Court gives to the EPA's determinations of the ambiguous clauses found in § 111(d). As the arguments are brought into the legal arena, looking to recent Supreme Court decisions dealing with related principles provides insight on how the CPP challenges could potentially be decided.<sup>255</sup>

The well-established *Chevron* doctrine—which governs judicial review of administrative agencies' statutory interpretations—will play a major role in determining the outcome of the CPP.<sup>256</sup> The “*Chevron* Two-Step” requires courts to first determine whether Congress has directly spoken to the specific issue, and if so, the reviewing court “must give effect to the unambiguously expressed intent of Congress.”<sup>257</sup> If a statute is ambiguous, however, then the court must defer to the EPA's interpretation—so long as the interpretation is reasonable.<sup>258</sup>

Courts have relied on *Chevron* to uphold many of the EPA's regulatory actions over the past few decades.<sup>259</sup> However, opponents view the extremely unique stay issued by the Supreme Court as evidence of judicial skepticism towards the Plan.<sup>260</sup> In spite of the CPP's certainly untraditional legal track—filled with many unexpected twists and turns—the courts have several issues to resolve in this monstrous litigation surrounding the Plan.

*1. Reconciling the Conflicting Statutes*

In addressing the issue of the conflicting statutory language found in the House and Senate versions of § 111(d), the Court will have to determine whether the EPA's interpretation of the exclusionary language in the provision to be pollutant specific rather than source specific is reasonable and should be given deference.<sup>261</sup> The plurality decision in *Scialabba v. Cuellar*

254. Bob Sussman, *What the Michigan v. EPA SCOTUS Ruling Means for the President's Clean Power Plan*, BROOKINGS (July 17, 2015), <http://www.brookings.edu/blogs/planetpolicy/posts/2015/07/17-michigan-epa-clean-power-sussman>.

255. Nasi et al., *supra* note 180.

256. Ann E. Carlson & Megan M. Herzog, *Text in Context: The Fate of Emergent Climate Regulation After UARG and EME Homer*, 39 HARV. ENVTL. L. REV. 23, 23–24 (2015); see *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

257. See *Chevron*, 467 U.S. at 842–43; Carlson & Herzog, *supra* note 256, at 24.

258. See *Chevron*, 467 U.S. at 843.

259. Erin Murphy, Note, *The Clean Air Act: The End of a Chevron Era?*, 5 KY. J. EQUINE AGRIC. & NAT. RESOURCES L. 331, 331 (2012–2013).

260. See Ellen M. Gilmer, *Clean Power Plan: Both Sides Claim Upper Hand After 'Complete Surprise' from Court*, E&E NEWS (May 17, 2016), <http://www.eenews.net/stories/1060037362>.

261. See Parenteau, *supra* note 219.

*de Osorio* demonstrates the tension that occurs when the Court decides how to apply the *Chevron* doctrine.<sup>262</sup> In *Scialabba*, the Supreme Court held that the Board of Immigration Appeals was entitled to *Chevron* deference in its interpretation of conflicting provisions in the Child Status Protection Act.<sup>263</sup> The provision at issue in that case contained two clauses that did not easily cohere with each other—a situation that Justice Kagan, writing for the plurality, reasoned, “*Chevron* was built for.”<sup>264</sup> In the concurring opinion, Chief Justice Roberts (writing for himself and Justice Scalia) disagreed that the two clauses were contradictory and rejected the notion that *Chevron* was a “license for an agency to repair a statute that does not make sense.”<sup>265</sup> Chief Justice Roberts also stated, “Direct conflict is not ambiguity, and the resolution of such a conflict is not statutory construction but legislative choice.”<sup>266</sup>

No matter which camp carries a majority, if and when the CPP challenges reach the high court, it appears that the EPA should retain the authority under § 111(d) to regulate carbon emissions from power plants.<sup>267</sup> Should Justice Kagan’s reasoning control, the Court would defer to the EPA’s interpretation of § 111(d) in applying *Chevron* and would affirm the EPA’s authority to regulate carbon emissions under the CPP.<sup>268</sup> Likewise, if the two amendments are concluded to be in “direct conflict,” then, in Chief Justice Roberts’s view, deference to the EPA’s interpretation is unwarranted.<sup>269</sup> In that case, the proper course of action would be to throw both amendments out as invalid.<sup>270</sup> The Court would then look to the pre-1990 form of § 111(d), which clearly authorized the EPA’s regulation of pollutants that were not previously regulated.<sup>271</sup>

## 2. *The Clean Power Plan’s Viability in Terms of EME Homer and UARG*

In the same term, the Supreme Court decided two significant cases for the EPA: *Environmental Protection Agency v. EME Homer City Generation, L.P. (EME Homer)*, in which it achieved a complete victory, and *Utility Air Regulatory Group v. Environmental Protection Agency (UARG)*, in which it

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262. See *id.*; *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2193–96 (2014).

263. See *Scialabba*, 134 S. Ct. at 2213; Parenteau, *supra* note 219.

264. See *Scialabba*, 134 S. Ct. at 2213.

265. *Id.* at 2214.

266. *Id.*

267. See Jack Lienke, *Could a Copy-Editing Error Undermine Obama’s Climate Rule?*, GRIST (Aug. 22, 2014), <http://grist.org/climate-energy/could-a-copy-editing-error-undermine-obamas-climate-rule/>; Parenteau, *supra* note 219.

268. See Lienke, *supra* note 267.

269. *Id.*

270. *Id.*

271. *Id.*; see also Parenteau, *supra* note 219 (“After all, if the statute really is at war with itself the judiciary has no more business picking a winner than the EPA.”).

achieved a partial victory.<sup>272</sup> In both *EME Homer* and *UARG*, the Court relied on the second step of *Chevron* in somewhat conflicting ways.<sup>273</sup> These cases illustrate two different scenarios in which the Court decided the EPA's interpretation of statutory language, and the legality of the CPP could be determined.<sup>274</sup>

Scenario one follows *EME Homer*—in which the EPA is “sensibly” interpreting § 111(d) by designing and issuing the CPP that takes into consideration cost-effectiveness, historical state efforts to regulate carbon emissions, and the complexity of the problem.<sup>275</sup> In *EME Homer*, the Court found the relevant statutory language of the CAA's “Good Neighbor Provision,” which focused on cross-border pollution between states, to be ambiguous.<sup>276</sup> The Court upheld the EPA's interpretation of the provision, allowing a multi-state emission trading program.<sup>277</sup> Additionally, the Court emphasized that the EPA exercised sensible judgment when attacking a “thorny” pollution problem in its interpretation of the Good Neighbor Provision.<sup>278</sup>

Justice Scalia's dissent provides a starkly different opinion from the deferential majority.<sup>279</sup> His concern that the rule reflects “remarkably expansive” authority could not be soothed by either the sensibleness of the EPA's interpretation or the complexities of implementing the Good Neighbor Provision.<sup>280</sup> Nonetheless, should the scenario of *EME Homer* prevail, the Court could conclude that the CPP is a “permissible, workable, and equitable interpretation” of § 111(d).<sup>281</sup>

In the second scenario, the Court could—as it did in *UARG*—strike down the CPP by finding the EPA's “enormous and transformative” interpretation of § 111(d) unreasonable under the second step of *Chevron*.<sup>282</sup> In *UARG*, the Supreme Court invalidated the EPA's interpretation of two CAA “permitting programs” applying to GHG emissions—though it nonetheless upheld the majority of the EPA's

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272. See *Util. Air Regulatory Grp. v. Evtl. Prot. Agency (UARG)*, 134 S. Ct. 2427, 2430–32 (2014); *Env'tl. Prot. Agency v. EME Homer City Generation, L.P. (EME Homer)*, 134 S. Ct. 1584, 1587–90 (2014); Carlson & Herzog, *supra* note 256, at 23.

273. See *UARG*, 134 S. Ct. at 2445–49; *EME Homer*, 134 S. Ct. at 1607; Carlson & Herzog, *supra* note 256, at 24.

274. See Carlson & Herzog, *supra* note 256, at 26.

275. See *id.*; *EME Homer*, 134 S. Ct. at 1607.

276. See *EME Homer*, 134 S. Ct. at 1607; Carlson & Herzog, *supra* note 256, at 24.

277. See *EME Homer*, 134 S. Ct. at 1607; Carlson & Herzog, *supra* note 256, at 25.

278. See *EME Homer*, 134 S. Ct. at 1604, 1607; Carlson & Herzog, *supra* note 256, at 25–26 (“The Court emphasized the complexities of interstate air pollution control, particularly where states have different historical track records of attention to the pollution.”).

279. See *EME Homer*, 134 S. Ct. at 1617 (Scalia, J., dissenting); see also Carlson & Herzog, *supra* note 256, at 26.

280. See *EME Homer*, 134 S. Ct. at 1617; see also Carlson & Herzog, *supra* note 256, at 26–27.

281. See *EME Homer*, 134 S. Ct. at 1610 (majority opinion).

282. See *UARG*, 134 S. Ct. 2427, 2444 (2014); Carlson & Herzog, *supra* note 256, at 25.

permitting plan.<sup>283</sup> The EPA interpreted the application of the CAA's Prevention of Significant Deterioration and Title V permitting programs to stationary sources of GHGs—requiring permits to sources potentially emitting GHGs in the amount of 100 to 250 tons per year.<sup>284</sup> At those emission levels, the EPA's regulatory domain would have increased by potentially thousands of sources.<sup>285</sup> In invalidating the EPA's action, the Court referred to the absurd consequences resulting from applying the permitting programs to GHGs solely on those emission levels.<sup>286</sup>

The Court also expressed hesitation about the EPA expanding its permitting authority into the unprecedented regulatory area of small, nonindustrial sources.<sup>287</sup> Writing for the majority, Justice Scalia invoked powerful reasoning:

EPA's interpretation is also 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," 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 "economical and political significance."<sup>288</sup>

In reviewing the CPP, the Court could employ reasoning resembling that of the *UARG* majority and *EME Homer* dissent, finding that the EPA is extending its authority into a new regulatory area and that courts "expect Congress to speak clearly" in such situations.<sup>289</sup> The new regulatory area would result from the outside-the-fenceline measures included in the CPP that have effects beyond the regulated sector and interact with policy areas traditionally thought to belong to the states.<sup>290</sup> Furthermore, considering that the regulation of GHGs under the CAA is relatively recent as well as the fact that in *Massachusetts v. EPA* four members of the Court argued that GHGs

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283. See *UARG*, 134 S. Ct. at 2449; Carlson & Herzog, *supra* note 256, at 23. Thus, *UARG* was technically a substantive win for the EPA. See Carlson & Herzog, *supra* note 256, at 23.

284. See *UARG*, 134 S. Ct. at 2436.

285. *Id.* ("[N]umerous small sources not previously regulated under the Act would be swept into the PSD program and Title V, including 'smaller industrial sources,' 'large office and residential buildings, hotels, large retail establishments, and similar facilities.'") (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)); see Carlson & Herzog, *supra* note 256, at 27.

286. See *UARG*, 134 S. Ct. at 2442–43 (referencing the EPA's acknowledgment that applying the permitting programs to smaller sources would be unparalleled, administratively taxing, economically troublesome, and perhaps beyond congressional intent); Carlson & Herzog, *supra* note 256, at 27.

287. See *UARG*, 134 S. Ct. at 2443.

288. *Id.* at 2444 (internal citation omitted). The Supreme Court has also noted its wariness against statutory constructions that "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

289. See Carlson & Herzog, *supra* note 256, at 31.

290. See *id.* at 32.

are not even included in the CAA term “air pollutant,” it is possible for a majority of the Court to view the ambitious CPP as an unsupportable power grab by the EPA.<sup>291</sup>

### 3. *Consideration of Costs: What Michigan v. Environmental Protection Agency Means for the Clean Power Plan*

Last summer’s Supreme Court decision in *Michigan v. Environmental Protection Agency* has many people questioning the decision’s repercussions for the legality of the CPP.<sup>292</sup> The Court held, by a 5–4 margin, that the EPA improperly refused to consider costs in its determination that regulation of power plant emissions of hazardous air pollutants was “appropriate and necessary” under § 112 of the CAA.<sup>293</sup> Section 112—the provision at issue in *Michigan*—establishes a technology-based approach for reducing hazardous air pollutant emissions, while § 111(d) establishes standards of performance for existing sources of pollutants not previously regulated under § 112.<sup>294</sup> The two provisions differ in regards to cost as well.<sup>295</sup> Section 111(d), on one hand, identifies cost as an applicable factor in establishing standards of performance, and the EPA analyzed and explicitly evaluated the costs of compliance in crafting the CPP.<sup>296</sup> On the other hand, § 112(n)(1)(A) does not address costs, and the EPA made a deliberate choice to disregard costs in its initial decision to regulate power plants.<sup>297</sup> Though the statutory provisions at issue in the CPP and *Michigan* differ, the value of *Michigan* lies in the “unusually aggressive approach of the majority in scrutinizing and then rejecting EPA’s legal and policy choices under a complex regulatory scheme.”<sup>298</sup>

The CAA provides for regulation of hazardous emissions from power plants by the EPA only if it finds that it is appropriate and necessary to do so.<sup>299</sup> Congress left the task of defining appropriate and necessary to the EPA.<sup>300</sup> The EPA’s interpretation, however, defined the terms to mean that it need only consider (at the outset) whether regulation of power plant emissions was necessary to protect the health and safety of the public.<sup>301</sup>

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291. *Id.*

292. *See* Sussman, *supra* note 254.

293. *See id.*; *Michigan v. Env’tl. Prot. Agency*, 135 S. Ct. 2699, 2704 (2015).

294. *See* Sussman, *supra* note 254.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. Lyle Denniston, *Opinion Analysis: Power Plants Stymie Smokestack Controls*, SCOTUSBLOG (June 29, 2015, 5:37 PM), <http://www.scotusblog.com/2015/06/opinion-analysis-power-plants-stymie-smokestack-controls/>.

300. *See* Sussman, *supra* note 254.

301. *See* Denniston, *supra* note 299. In *Michigan*, the EPA estimated that its regulations would cost power plants \$9.6 billion per year while the resulting benefits from reductions in hazardous air pollutant

Under such an interpretation, power plant emission standards are determined based on available technology, not on a cost-benefit analysis—similar to other industry sectors under § 112.<sup>302</sup>

*Chevron* directs courts to defer to agency interpretations of ambiguous statutory provisions when the agency has reasonably exercised its regulatory expertise.<sup>303</sup> Thus, the EPA’s interpretation of power plant regulation under CAA § 112 would appear to be given deference under this doctrine.<sup>304</sup> The majority in *Michigan*, however, concluded that the “EPA strayed far beyond . . . [the] bounds” of reasonable interpretation when reading the statute to mean that costs can be ignored when deciding to regulate power plants.<sup>305</sup> The Court found the term appropriate to include costs, and it was therefore unreasonable to ignore costs.<sup>306</sup>

Assuming review of the CPP reaches the Supreme Court, § 111(d) contains unspecific wording, similar to § 112, that is susceptible to conflicting interpretations.<sup>307</sup> Phrases such as “best system of emission reduction” and “standards of performance” do not clearly command the EPA to regulate in a specific way and could thus be subject to the Court’s interpretation.<sup>308</sup>

*Michigan* potentially played an important role in the future of the CPP in the Supreme Court’s grant of a stay, halting the implementation of the Plan.<sup>309</sup> It has been suggested that the Court was concerned about a repeat of *Michigan*, in which the Court reversed the D.C. Circuit’s ruling, invalidating the EPA’s finalized Mercury and Air Toxics Standards to the point of having little practical effect.<sup>310</sup> In their application seeking a stay, the States contend that the Court’s decision in *Michigan* “starkly illustrates the need for a stay in this case.”<sup>311</sup> The States further asserted that the EPA assured its supporters that the “majority of power plants are already in compliance or well on their way to compliance” as a result of the rule not being stayed during the years of litigation.<sup>312</sup> Thus, the States claimed that the EPA

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emissions would amount to \$4 to \$6 million a year. *Michigan v. Env’tl. Prot. Agency*, 135 S. Ct. 2699, 2706–07 (2015).

302. See Sussman, *supra* note 254.

303. *Id.*

304. *Id.*

305. See *Michigan*, 135 S. Ct. at 2707; see also Sussman, *supra* note 254.

306. See *Michigan*, 135 S. Ct. at 2707–09; see also Sussman, *supra* note 254. But see *Michigan*, 135 S. Ct. at 2715 (Kagan, J., dissenting) (categorizing the majority opinion as a “micromanagement of EPA’s rulemaking, based on little more than the word ‘appropriate’”).

307. See Sussman, *supra* note 254.

308. *Id.*; see also Carlson & Herzog, *supra* note 256, at 30.

309. See Jonathan H. Adler, *Supreme Court Puts the Brakes on the EPA’s Clean Power Plan*, WASH. POST (Feb. 9, 2016), [https://www.washingtonpost.com/news/voikh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/?utm\\_term=.3f8b51a8308c](https://www.washingtonpost.com/news/voikh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/?utm_term=.3f8b51a8308c).

310. *Id.*

311. *Id.*

312. *Id.*

regulations cost power plants nearly \$10 billion per year in compliance costs before the Supreme Court was even able to review the rule.<sup>313</sup>

#### 4. *King v. Burwell Could Undermine the Environmental Protection Agency's Nationalization of Energy Policy*

While not an environmental decision, the Supreme Court's most recent Affordable Care Act (ACA) case, *King v. Burwell*, could also play an important role in determining the fate of the CPP.<sup>314</sup> Handed down the week before the *Michigan* decision, the Court declined to give the Internal Revenue Service deference under *Chevron*—although the Court ultimately upheld the agency's interpretation of the statute.<sup>315</sup> After ruling that a key clause in the ACA was ambiguous, the Court decided to resolve the ambiguity itself instead of determining whether the agency's interpretation was reasonable and deferring.<sup>316</sup> Chief Justice Roberts explained that *Chevron* was “premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”<sup>317</sup> But “[i]n extraordinary cases, . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”<sup>318</sup>

The Court considered this to be one of those extraordinary cases and did not defer to the IRS because the issue, involving national healthcare policy, was a “question of deep ‘economic and political significance’” and the IRS “has no expertise in crafting health insurance policy of this sort.”<sup>319</sup> Accordingly, the Court did not apply *Chevron*.<sup>320</sup>

Analogous to the treatment of *Chevron* in *King*, opponents of the CPP argue that Congress would not entrust the decision to implement a regulation that radically reduces the use of coal to generate electricity, consequently altering a national policy dating back to the Kennedy Administration, to the EPA.<sup>321</sup> The EPA itself has disclaimed agency expertise over grid reliability or energy markets,<sup>322</sup> and it would seem to be a reach for the EPA to

313. *Id.*

314. *See King v. Burwell*, 135 S. Ct. 2480 (2015); Nasi et al., *supra* note 180, at 15.

315. *See* Nasi et al., *supra* note 180, at 15; David Doniger, *Steady as She Goes: Lessons for the Clean Power Plan from the Supreme Court's Mercury and Healthcare Decisions*, NAT. RESOURCES DEF. COUNCIL: EXPERT BLOG (July 6, 2015), [http://switchboard.nrdc.org/blogs/ddoniger/steady\\_as\\_she\\_goes\\_lessons\\_for.html](http://switchboard.nrdc.org/blogs/ddoniger/steady_as_she_goes_lessons_for.html).

316. *See King*, 135 S. Ct. at 2488–89.

317. *Id.* at 2488 (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

318. *Id.* at 2488–89 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159).

319. *Id.* at 2489 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160).

320. *Id.*

321. *See* Nasi et al., *supra* note 180, at 15.

322. *See Del. Dep't of Nat. Res. & Env'tl. Control v. Env'tl. Prot. Agency*, 785 F.3d 1, 18 (D.C. Cir. 2015).



convincingly assert expertise in power generation and transmission in regards to the CPP.<sup>323</sup>

*King* also creates a challenge for the EPA if congressional intent is considered open to judicial interpretation.<sup>324</sup> In the Congressional Findings and Declaration of Purpose, the CAA states, “[A]ir pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments.”<sup>325</sup> The EPA, however, appears to seek nationalization of the entire country’s electric grid through its regulations in the CPP.<sup>326</sup> Alternatively, the EPA argues that Congress intended it to have the legal tools necessary to regulate all kinds of dangerous air pollution and adopted § 111(d) to avoid any gap in the EPA’s authority to address such pollutants from the nation’s industrial sources.<sup>327</sup>

#### V. OPTIONS FOR TEXAS AND OTHER STATES CHALLENGING THE PLAN, WEATHER PERMITTING

States challenging the legality of the CPP are divided over whether to suspend or continue compliance planning following the Supreme Court’s decision to grant a stay of the rule.<sup>328</sup> Pending the eventual decision on the merits, states must decide what can be done while the fate of the Plan is to be determined.<sup>329</sup>

##### A. *Wait Out the Storm*

Texas has not given any indication that it will develop a state plan.<sup>330</sup> In fact, Texas Attorney General Ken Paxton celebrated the Supreme Court’s staying of the CPP.<sup>331</sup> He stated, “The whole point of the stay was to stop us from having to provide any implementation plan,” and also added, “[W]e’re not moving forward with anything until this case is resolved.”<sup>332</sup> However, as litigation remains pending, the TCEQ declined to comment on the

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323. See Nasi et al., *supra* note 180, at 15.

324. Leigh Thompson, *How King v. Burwell Could Undermine the EPA’s Clean Power Plan*, FEDERALIST (July 8, 2015), <http://thefederalist.com/2015/07/08/how-king-v-burwell-could-undermine-the-epas-clean-power-plan/>.

325. 42 U.S.C. § 7401(a)(3) (2016).

326. See Thompson, *supra* note 324.

327. *Id.*

328. *E&E’s Power Plan Hub, Supreme Court Stay Response*, E&E NEWS, [http://www.eenews.net/interactive/clean\\_power\\_plan#planning\\_status](http://www.eenews.net/interactive/clean_power_plan#planning_status) (last visited Nov. 19, 2016).

329. Thomas Pyle, *Resist the EPA’s Carbon Rule — in Court and out*, NAT’L REV. (Nov. 9, 2015, 4:00 AM), <http://www.nationalreview.com/article/426760/resist-epas-carbon-rule-court-and-out-thomas-pyle>.

330. *E&E’s Power Plan Hub: Texas*, E&E NEWS, [http://www.eenews.net/interactive/clean\\_power\\_plan/states/texas](http://www.eenews.net/interactive/clean_power_plan/states/texas) (last visited Nov. 19, 2016).

331. *Id.*

332. *Id.*

Supreme Court's action.<sup>333</sup> While the TCEQ Chairman said, in January 2016, that Texas is not actively developing a plan, state regulators should possibly reconsider.<sup>334</sup> State regulating agencies, such as the TCEQ, ERCOT, and the Public Utility Commission of Texas (PUC), are in the best position to review the rule and evaluate the practical implications for the state.<sup>335</sup> Should the states' legal challenges be unsuccessful, Texas state regulators would be in a substantially better position than the EPA to develop a SIP.<sup>336</sup>

*B. Any Port in the Storm: The Legislative Response to the Clean Power Plan*

*1. Too Little, Too Late for the Texas Legislature*

Texas could also adopt legislation to address how it plans to comply with the CPP by developing a state plan.<sup>337</sup> Any bills directing state regulators in Texas (i.e., the TCEQ) to adopt a state plan died in the 84th Legislative Session, which ended June 1, 2015.<sup>338</sup> Lawmakers are not scheduled to convene again until January 2017, after the initial September 2016 deadline.<sup>339</sup> Fortunately, the Supreme Court's stay let Texas off the hook for developing a state plan—at least until all the legal challenges have been resolved.<sup>340</sup>

Nevertheless, legislatures in twenty-seven states introduced fifty-six bills or resolutions regarding the CPP in the 2015 session.<sup>341</sup> These state legislatures attempted to establish their role ahead of the release of the final CPP.<sup>342</sup> Legislative actions reflected a wide variety of approaches to address potential issues resulting from the Plan.<sup>343</sup> Some legislation that has been introduced required state plans to be approved by the legislature before their submission to the EPA, while other legislation only required state plans to be

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333. *Id.*

334. See *Fate of Climate Change Rule*, *supra* note 185. TCEQ Commissioner Toby Baker also criticized the Plan as being a “dramatic broadening of the power of th[e] Clean Air Act.” Mella McEwen, *TCEQ Commissioner: Washington Regulating by Politics, Not Policy*, MRT (Nov. 19, 2015, 12:54 PM), [http://www.mrt.com/business/oil/top\\_stories/article\\_351fb072-8f21-11e5-85fa-b7788560d2f3.html](http://www.mrt.com/business/oil/top_stories/article_351fb072-8f21-11e5-85fa-b7788560d2f3.html).

Baker does believe, however, that it is possible to protect the environment and still maintain economic growth. *Id.* He compares such a task to a stool with three legs—law, science, and data, and common sense—which he notes is missing from recent federal regulations. *Id.*

335. *E&E's Power Plan Hub: Texas*, *supra* note 330.

336. See generally Malewitz, *supra* note 194.

337. See generally Durkay, *supra* note 67.

338. Jim Malewitz, *Acting on the EPA's "Clean Power Plan"*, TEX. TRIB., <http://txlege.texasribune.org/topics/energy/acting-on-the-epas-clean-power-plan/> (last updated May 27, 2015).

339. See Malewitz, *supra* note 194.

340. See *supra* Part IV.

341. See Durkay, *supra* note 67.

342. See *id.*

343. *Id.*

submitted to the legislature (not requiring legislative approval).<sup>344</sup> Some states also considered legislation that would charge an entity—such as a legislature, committee, task force, or environmental regulatory agency—to study the impact of the Plan on reliability, affordable energy, and consumers in addition to the feasibility of compliance.<sup>345</sup> Other legislative actions included prohibiting state plan development until legal challenges are resolved, capping rate increases, and establishing market-based compliance options.<sup>346</sup>

## 2. Governor Abbott's Texas Plan

Texas Governor Greg Abbott proposed an additional solution for states attempting to curb federal power: amend the United States Constitution to restore the balance of power between the states and the federal government.<sup>347</sup> Governor Abbott's "Texas Plan" proposed amending the Constitution through a convention of states, and offered nine constitutional amendments, including an amendment that prohibits administrative agencies as well as the unelected bureaucrats that run them from creating federal law.<sup>348</sup> Thus, the Texas Plan would essentially allow states to reject the CPP on the basis of it being law created by an administrative agency.<sup>349</sup>

Article V of the Constitution requires thirty-four states to hold the convention and the support of thirty-eight states for any amendment to become law; alternatively, the Constitution could also be amended with a two-thirds majority in both chambers of Congress.<sup>350</sup> Though the Constitution has never been amended as a result of a convention of states, the idea has garnered support in conservative circles.<sup>351</sup> Amending the Constitution, as proposed in the Texas Plan, could be a last ditch effort for states to block the CPP.<sup>352</sup>

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344. *Id.*

345. *Id.* Five states have enacted legislation creating such a requirement. *Id.*

346. *See id.* (providing more information on actions by states as of December 17, 2015). Market-based compliance options include cap-and-trade and carbon credit systems. *Id.*

347. Press Release, Office of the Governor Greg Abbott, Governor Abbott Unveils Texas Plan, Offers Constitutional Amendments to Restore the Rule of Law (Jan. 8, 2016), <http://gov.texas.gov/news/press-release/21829>.

348. *Id.*

349. Jason Plautz, *Texas Governor Calls for Constitutional Convention to Curb Federal Power*, ATLANTIC (Jan. 8, 2016), <https://www.theatlantic.com/politics/archive/2016/01/texas-governor-calls-for-constitutional-convention-to-curb-federal-power/459210/>.

350. *Id.*

351. *Id.* In an editorial, former presidential contender Marco Rubio wrote that if elected, he would have "promote[d] a convention of states to amend the Constitution and restore limited government." *Id.*

352. *See generally id.* But see The Editorial Bd., *Marco Rubio's Very Bad Idea: Our View*, USA TODAY (Jan. 6, 2016, 5:23 PM), <http://www.usatoday.com/story/opinion/2016/01/06/marco-rubio-constitutional-convention-balanced-budget-editorials-debates/78328702/> ("Rubio's [constitutional] convention is an invitation to constitutional mayhem . . .").

### 3. *Too Much Politics, Not Enough Policy: Congressional Attempts to Rein in the Environmental Protection Agency*

Attempts to either delay the implementation of the Plan or allow states to not submit an initial implementation plan (without negative consequences) are currently proceeding in both the United States House of Representatives and Senate.<sup>353</sup> Successfully passing climate change legislation is extremely difficult given the political divisiveness on this issue.<sup>354</sup> Utilizing the Congressional Review Act, Senate Joint Resolution 24 was Congress's go at blocking the EPA's Carbon Pollution Emission Guidelines for existing sources and nullifying the CPP.<sup>355</sup> President Obama vetoed the resolution on December 18, 2015, calling the Plan a "tremendously important step in the fight against global climate change."<sup>356</sup> Nonetheless, both the Ratepayer Protection Act and the Affordable Reliable Energy Now Act (ARENA) are currently in the Senate and House, respectively, and, if passed, would be a substantial victory for states challenging the Plan.<sup>357</sup>

The Ratepayer Protection Act, passed in the House, aims to protect businesses and families from increased electricity rates and reduced electricity reliability that could potentially result from the CPP.<sup>358</sup> The bill would also allow for completion of judicial review of the Plan before requiring states to comply.<sup>359</sup> Lastly, the bill would shield states from being required to adopt or submit a state plan and from being forced to implement a Federal Implementation Plan if its governor finds a significant adverse

353. See Durkay, *supra* note 67.

354. See generally Jill U. Adams, *Air Pollution and Climate Change*, 25(41) CQ RESEARCHER, Nov. 13, 2015, <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre2015111306>. Opponents argue that instead of doing the work to get legislation such as the CPP passed through Congress, President Obama and the EPA discovered all the authority needed in a "short, 45-year-old provision of the Clean Air Act" to establish the Plan. *Id.*

355. Aaron Larson, *Obama Vetoes Resolution to Stop Clean Power Plan*, POWER (Dec. 21, 2015), <http://www.powermag.com/obama-vetoes-resolution-to-stop-clean-power-plan/>. The Congressional Review Act allows Congress to invalidate new regulations within sixty days of publication in the *Federal Register*. *Id.*

356. Timothy Cama, *Obama Vetoes GOP Push to Kill Climate Rules*, HILL (Dec. 19, 2015, 8:35 AM), <http://thehill.com/policy/energy-environment/263805-obama-vetoes-gop-attempts-to-kill-climate-rules>. The passage of the resolution by both chambers of Congress was mostly symbolic, as the votes occurred before and during the United Nation's Paris Climate Change Conference, sending a message of congressional disapproval of the CPP. *Id.*

357. See Durkay, *supra* note 67. Although, under the current Administration, the bills would have to overcome a presidential veto. *Id.* Additionally, federal spending bills (H.R. 2822 and S. 1645) from the House and Senate Appropriations Committees earlier this year would have significantly reduced the EPA's budget—which would have blocked the EPA from implementing environmental regulations, such as the CPP—but were ultimately rejected. David Schultz et al., *EPA Avoids Cuts, Most Riders in Omnibus Bill*, BLOOMBERG BNA (Dec. 17, 2015), <http://www.bna.com/epa-avoids-cuts-n57982065235/>.

358. *Whitfield's Ratepayer Protection Act Passes the House of Representatives*, 101.3 FM WMSK (June 25, 2015), <https://wmskamfm.com/whitfields-ratepayer-protection-act-passes-the-house-of-representatives>.

359. H.R. 2042, 114th Cong. (2015–2016).

effect on the state's ratepayers or reliability.<sup>360</sup> This legislative action would be a safeguard to protect both ratepayers and electric reliability across the country against the legal uncertainty that surrounds the CPP.<sup>361</sup>

The Senate's ARENA was passed out of the Environment and Public Works Committee.<sup>362</sup> Under the bill, in order for the EPA to regulate carbon dioxide emissions from existing power plants, it must establish state-specific model plans demonstrating how each state can achieve the required GHG emission reductions.<sup>363</sup> Similar to the Ratepayer Protection Act, states are also not required to adopt or implement state plans or to comply with a federal plan if the Plan is determined to adversely affect electricity reliability, electricity ratepayers, or jobs, competitiveness and economic growth.<sup>364</sup>

House Resolution 2834 also provides a more creative way of undermining the EPA's authority to regulate GHGs with the CPP. The bill reorganizes the CAA into its own part of the U.S. Code.<sup>365</sup> Interestingly, the codification picks the House version of § 111(d), prohibiting the EPA from regulating additional pollutants from power plants because it already regulates mercury from power plants under § 112.<sup>366</sup> The bill would thus write out the EPA's authority behind the Plan.<sup>367</sup> As a whole, the bill provides a roundabout way of reconciling the conflicting statutes as well as subverting the EPA's rule.<sup>368</sup>

Addressing the threat of climate change is clearly an important and deeply political issue. The appropriate response, however, deserves a solid legislative foundation through laws that elected officials created.<sup>369</sup> Congress should adopt bills such as these to reclaim legislative power from bureaucratic agencies—such as the EPA—acting as lawmakers.<sup>370</sup>

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360. *Id.*

361. *Whitfield's Ratepayer Protection Act Passes the House of Representatives*, *supra* note 357.

362. *See* Durkay, *supra* note 67.

363. S. 1324, 114th Cong. (2015–2016).

364. *Id.*

365. *See* H.R. 2834, 114th Cong. (2015–2016).

366. *Id.*

367. *Id.*

368. *Id.*; *see also* Scott DuBoff, *A Ghost from the Past: How a Congressional Miscue 25 Years Ago Could Impact Defense of EPA's Clean Power Plan*, NW. LAND L. F. (Nov. 13, 2015), <http://www.northwestlandlawforum.com/2015/11/a-ghost-from-the-past-how-a-congressional-miscue-25-years-ago-could-impact-defense-of-epas-clean-power-plan/> (justifying the recodification “because ‘EPA has used the obsolete language in the Statutes at Large to create an argument that it actually had authority to promulgate section 111(d) regulations for CO<sub>2</sub> emissions from power plants”). *But see id.* (“[E]nvironmental organizations describe H.R. 2834 as ‘a thinly veiled attempt to block the Obama Administration’s signature climate change initiative, the Clean Power Plan.’”).

369. *See generally* Adams, *supra* note 354.

370. *Id.*

*C. Weather the Storm: Allow Market Forces to Work*

Ultimately, the CPP is not the solution. Politics and legal issues aside, the best approach to achieve carbon emission reductions and the CPP's goals in Texas would be for the EPA to simply let the market work.<sup>371</sup> Without governmental influences, American electricity generation has become less carbon intensive over time—carbon dioxide emissions in April 2015 were the lowest of any month since April 1988.<sup>372</sup> Reductions like these result from market forces.<sup>373</sup> Because the United States is the leading producer of natural gas in the world, power plants already have an incentive to use the abundant and affordable cleaner burning natural gas without the EPA's interference.<sup>374</sup>

To comply with the CPP, Texas would be forced to prematurely shutdown power plants and dramatically introduce renewable sources onto the electricity grid.<sup>375</sup> Significant investments have made those power plants profitable, reliable, and essential sources of electricity generation.<sup>376</sup> Imposing reliance on renewables too quickly clashes with the traditional and successful market principles that Texas relies upon.<sup>377</sup> The unreliability of renewable resources could lead to those sources being turned down or off to ensure grid reliability, causing distortion in the market that could interfere with the ability of renewables to be integrated into the grid in the future.<sup>378</sup>

Even the Environmental Defense Fund admitted, "Texas will be 88% of the way toward compliance with the Plan, merely through existing market trends."<sup>379</sup> If existing market trends are allowed to continue, older fossil fuel units can be retired as investments and outstanding debts can be paid off.<sup>380</sup> More importantly, ratepayers will not be burdened by severe rate increases often caused by premature retirement and stranded investments.<sup>381</sup>

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371. Mike Nasi, *Statement on Balanced Energy for Texas*, WILSON COUNTY NEWS (Oct. 19, 2015), <http://www.wilsoncountynews.com/article.php?id=68727&n=commentaries-statement-balanced-energy-texas>.

372. Allen McFarland, *Monthly Power Sector Carbon Dioxide Emissions Reach 27-Year Low in April*, U.S. ENERGY INFO. ADMIN. (Aug. 5, 2015), <http://www.eia.gov/todayinenergy/detail.cfm?id=22372>.

373. AM. PETROLEUM INST., *THE RIGHT ROAD TO CLEAN POWER* (2015).

374. *Id.*; Linda Doman, *U.S. Remained World's Largest Producer of Petroleum and Natural Gas Hydrocarbons in 2014*, U.S. ENERGY INFO. ADMIN. (Apr. 7, 2015), <http://www.eia.gov/todayinenergy/detail.cfm?id=20692>.

375. *See* Nasi, *supra* note 371.

376. *Id.*

377. *Id.*

378. *Id.*

379. *Texas Well on Way to Meeting Clean Power Plan*, ENVTL. DEF. FUND, <https://www.edf.org/texas-clean-power> (last visited Nov. 19, 2016).

380. *See* Nasi, *supra* note 371.

381. *Id.*

## VI. TAKE A RAIN CHECK ON THE CLEAN POWER PLAN: CONCLUSION

In creating the CPP, the Obama Administration and the EPA are repeating policy mistakes of the past.<sup>382</sup> Similar to the FUA, the Plan is an overly complicated regulatory action intended to address issues that the market is better suited to solve.<sup>383</sup> While attempting to mitigate the United States' impact on climate change is a positive step forward, the historic and unprecedented limitations on carbon emissions will do more harm than good.

The costs, both to society and to the legal system, associated with the Plan do not justify the benefits.<sup>384</sup> States and their citizens will bear the costs of the Plan, all for no appreciable benefit.<sup>385</sup> Climate change is a global problem, and incremental actions in the United States, such as the CPP, will have no meaningful impact on the progression of climate change.<sup>386</sup> Furthermore, climate change action should occur through legal means rather than through the clouded authority of the EPA.<sup>387</sup> Frustration with congressional inaction does not justify the EPA's proposal to restructure the country's electricity markets.<sup>388</sup>

As the legal battle eventually unfolds within the coming months or years, several forces are at play that could shape the future of the Plan, including the 2016 presidential election and the current vacancy on the Supreme Court.<sup>389</sup> Justice Antonin Scalia died just four days after the Supreme Court issued a stay on the CPP.<sup>390</sup> All five conservative Justices supported the stay, while the four liberal Justices opposed it.<sup>391</sup> Because the stay is not a ruling on the merits of the case, it is not yet certain how the Justices will rule whenever the Plan litigation is before the Court.<sup>392</sup> Justice Anthony Kennedy, who is often considered the swing vote, supported the stay.<sup>393</sup> Interestingly, Justice Kennedy sided with the liberal Justices in the 2007 *Massachusetts* decision, holding that the EPA has authority to regulate GHGs.<sup>394</sup>

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382. See *supra* Part I.

383. See *supra* Part I.

384. See *supra* Parts III–IV.

385. See *supra* Part III.

386. See *supra* Part III.

387. See *supra* Part IV.

388. See *supra* Part V.

389. See Ben Adler, *Here's How a Republican President Could Undermine the Clean Power Plan*, GRIST (Aug. 5, 2015), <http://grist.org/climate-energy/heres-how-a-republican-president-could-undermine-the-clean-power-plan/>; see also Shaw, *supra* note 201.

390. See Shaw, *supra* note 201.

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.*

The 2016 presidential election adds to the uncertainty created by Scalia's vacancy.<sup>395</sup> The D.C. Circuit's postponement of oral arguments makes it very improbable for the Court to issue a decision on the Plan until after the November presidential and congressional elections.<sup>396</sup> The ideological differences between Democratic nominee Hillary Clinton and Republican nominee Donald Trump will likely determine the fate of the Plan.<sup>397</sup> Furthermore, the next president may be charged with the responsibility of filling the current vacancy on the Supreme Court and that judge—either conservative or liberal—could be the decisive vote on whether to uphold the Plan.<sup>398</sup> If the Supreme Court hears the CPP case before a ninth justice is appointed and is split 4–4, then the D.C. Circuit's ruling would stand.<sup>399</sup> However, that is not likely as the Supreme Court would not hear oral arguments until next February or March at the earliest or even October, depending on how long the D.C. Circuit's decision takes.<sup>400</sup>

Nevertheless, the en banc hearing in September adds an extra layer of judicial review that may expedite consideration of the Plan by the Supreme Court.<sup>401</sup> Initially, with the three-judge panel, the losing party was theoretically expected to request a full en banc hearing by the D.C. Circuit.<sup>402</sup> The en banc hearing in September ideally allows the Supreme Court to consider the legality of the CPP sooner, possibly in 2017.<sup>403</sup>

No matter the outcome of the legal challenges, the CPP will certainly prove to be a noteworthy chapter in our nation's history.

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395. See Meyer, *supra* note 200.

396. See Shaw, *supra* note 201.

397. *Id.*

398. *Id.*

399. See Meyer, *supra* note 200.

400. *Id.*

401. See Shaw, *supra* note 201.

402. *Id.*

403. *Id.*