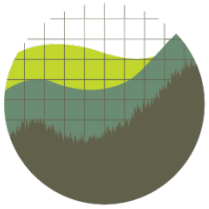

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CLEAN POWER PLAN LEGAL BACKGROUND AND RESOURCES

At a public hearing this week in Charleston, West Virginia, EPA Administrator Scott Pruitt and other agency officials will likely call into question the legality of the Clean Power Plan. But the Clean Power Plan's design conforms to all statutory limits and is consistent with decades of Clean Air Act practices under presidents of both parties.

Richard Revesz, Lawrence King Professor of Law and Dean Emeritus of NYU School of Law, and Director of the Institute for Policy Integrity, has released the following statement on the rule's legality:

"Opponents of climate change policy are turning up the volume on their Clean Power Plan criticism, but this doesn't make their arguments any more persuasive. The Clean Power Plan is fully consistent with the Clean Air Act's 'best system of emission reduction' requirement. And the rule's flexible, cost-saving approach fits with decades of bipartisan precedent."

LEGAL BACKGROUND

The EPA respected all statutory boundaries in crafting the Clean Power Plan.

Section 111 of the Clean Air Act places several important limits on the EPA's discretion to craft emission guidelines for power plants and other facilities, such as forbidding the agency from imposing excessive costs, requiring it to consider how its guidelines might affect the nation's energy supply, and requiring it to base guidelines on reduction techniques that have been "adequately demonstrated." The Clean Power Plan explicitly acknowledges and respects each of these statutory boundaries.

A close analysis of the statute reveals eight major requirements that the EPA must meet in crafting a regulation under Section 111(d). In the design of the Clean Power Plan, the agency conformed to each of these requirements:

- EPA identified a "best system of emission reduction" and calculated the "degree of emission reduction achievable" using that system.
- EPA took into account the magnitude of expected emission reductions.
- EPA took into account costs.

- EPA took into account nonair quality health and environmental impacts.
- EPA took into account energy requirements.
- EPA found that its "best system" was adequately demonstrated.
- EPA ensured that its guidelines are translatable into standards of performance that can be applied to "any existing source."
- EPA gave states sufficient flexibility to account for their sources' remaining useful lives.

A full analysis of how the Clean Power Plan addressed statutory boundaries in the Clean Power Plan can be found in *Bounded Regulation: How the Clean Power Plan Conforms to Statutory Limits on EPA's Authority*, published in September 2016 by Richard Revesz, Denise Grab, and Jack Lienke.

The Clean Power Plan is consistent with decades of Clean Air Act practices, under both Republican and Democratic administrations.

There are a wide variety of regulations from the Clean Air Act's 45-year history that provide substantial precedent for the flexible design of the Clean Power Plan, belying opponents' claims about the "unprecedented" nature of the rule. The Clean Power Plan repeal proposal text claims that "all of the EPA's other CAA section 111 regulations are based on a BSER consisting of technological or operational measures that can be applied to or at a single source. The CPP departed from this practice." But there are several EPA precedents for the rule's inclusion of "beyond-the-fenceline" pollution-reduction measures. Of particular note, the 2011 Cross-State Air Pollution Rule, which allows for "beyond-the-fenceline" trading under its Good Neighbor Provision, was upheld by the Supreme Court in 2014. There are also multiple precedents for the Clean Power Plan's shifting of generation from one energy source to another. Some past EPA rules have shifted demand to low-sulfur coal, while others have shifted demand to natural gas.

A detailed examination of these precedents for the Clean Power Plan can be found in a 2016 *Environmental Law Reporter* article, written by Richard Revesz, Denise Grab, and Jack Lienke.

ADDITIONAL RESOURCES:

- Our recent report, *The Falling Cost of Clean Power Plan Compliance*, discusses various independent analyses showing that electric sector trends have made it vastly cheaper to achieve the rule's targets.
- Our issue brief on regulatory "co-benefits" (p. 3 discusses the valuation of reductions in particulate matter pollution beyond National Ambient Air Quality Standard limits – a matter where the proposed Clean Power Plan repeal would reverse long-standing practice).
- A 2017 letter in the *Journal of Environmental Economics and Policy* on the importance of using a global social cost of carbon, written by Revesz, Nobel Prize-winning economist Kenneth Arrow, and a number of other academics.
- A 2017 letter in *Science* on why the Interagency Working Group's estimate of the Social Cost of Carbon remains the best available estimate, written by Revesz, economist Michael Greenstone, and others.

- Denise Grab's 2017 article explaining why the Interagency Working Group's Social Cost of Carbon is consistent with economic best practices and why the Trump administration's use of a higher discount rate does not reflect economic reality.

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The Institute for Policy Integrity at New York University School of Law is a non-partisan think tank dedicated to improving the quality of government decisionmaking. The institute produces original scholarly research in the fields of economics, law, and regulatory policy; and advocates for reform before courts, legislatures, and executive agencies.