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Legal Sidebar

EPA Proposes to Repeal the Clean Power Plan

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On October 10, 2017, the Environmental Protection Agency (EPA) issued a proposal to repeal the Obama Administration's 2015 rule, "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (EGUs)" (commonly referred to as the Clean Power Plan (CPP) rule). (See this CRS report for additional background on the CPP). The CPP has not gone into effect because the Supreme Court in 2016 stayed the implementation of the rule until the lawsuit challenging its legality is resolved. Upon its review of the CPP and its 2015 legal justification, EPA has now determined that the CPP exceeds its statutory authority based on a change in the agency's legal interpretation of Section 111 of the Clean Air Act (CAA). The proposal formally starts a potentially lengthy process to repeal the CPP and raises questions about whether EPA will replace the CPP with another rule targeting CO_2 emissions from existing power plants and how the repeal will affect existing legal challenges to the CPP. This Sidebar will explore these and other questions and the next steps in repealing the CPP.

What is the legal basis for EPA's proposed repeal of the CPP?

EPA is proposing to repeal the CPP after reviewing the rule and its 2015 legal justification, in accordance with the Trump Administration's Executive Order 13783, "Promoting Energy Independence and Economic Growth." Upon review of the CPP, EPA determined that its 2015 legal interpretation of the "best system of emission reduction" (BSER) for CO_2 from existing power plants exceeds its statutory authority under CAA Section 111(d).

As background, Section 111 directs EPA to list categories of stationary sources that cause or contribute significantly to "air pollution which may reasonably be anticipated to endanger public health or welfare." Once EPA lists a source category such as fossil fuel-fired EGUs (power plants), Section 111(b) requires EPA to establish "standards of performance" for new and modified sources (known as NSPSs) within a listed source category. Under Section 111(a), a "standard of performance" is defined as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction [BSER]." Once NSPSs are issued under Section 111(b) for *new or modified* sources in that category, EPA is then required to establish "emission

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guidelines" for states to set a "standard of performance" for *existing* sources under Section 111(d).

In 2015, EPA finalized both NSPSs for *new* or *modified* power plants under Section 111(b) and emission guidelines for *existing* power plants (the CPP) under Section 111(d). For the CPP, EPA based the BSER for existing power plants on three "building blocks": (1) improving efficiency at affected power plants, (2) shifting generation from higher-emitting coal units to lower-emitting natural gas combined cycle units, and (3) shifting generation from fossil fuel units to renewable energy generation. The agency then used the BSER to set a CO_2 emission "standard of performance" for existing power plants.

EPA's proposed repeal is based on a different legal interpretation of the BSER from its 2015 interpretation. As explained in the proposal, a broader interpretation of the BSER necessarily yields a "greater universe" of measures that EPA could consider in setting emission standards, and, conversely, a narrower reading limits the measures the agency can consider for the affected sources. EPA proposes to limit the interpretation of the BSER to emission reduction measures that can be "*applied to or at* the individual source, . . . rather than measures that the source's owner or operator *can implement on behalf of* the source at another location." In other words, EPA proposes that it has authority to regulate only emission control technologies at individual power plants and not broader measures that can be implemented outside of the physical location of the individual power plant. EPA explains in the proposed repeal that physical and operational efficiency improvements could be applied directly to an affected source, while "beyond-the-source" measures (commonly referred to as "outside the fenceline" measures) such as generation shifting and renewable energy capacity increases could be applied only by owners and operators at a different location. Because the BSER in the 2015 final rule was based, in part, on "beyond-the-source" measures, EPA concludes that the CPP exceeded its authority under the CAA and proposes that it be repealed.

In both the 2015 CPP rule and the proposed repeal, EPA cites to CAA legislative history, prior agency practice, jurisprudence, and policy concerns to justify its interpretation of the BSER. However, the proposed repeal focuses on different aspects and perspectives of those materials to support a source-oriented and narrower interpretation of the BSER. For example, EPA argues that the BSER should be interpreted similar to other technology-based CAA standards such as the "maximum achievable control technology standards" for hazardous air pollutants that apply physical and operational measures directly at the source. While acknowledging that a source's owner or operator implements the measures, EPA explains that its 2017 interpretation focuses on what can be applied directly to the source "from the perspective of the source and not its owner or operator."

This proposed interpretation of the BSER directly contrasts with the interpretation set forth in 2015 that focused on the measures that the owner or operator could implement. EPA's 2015 interpretation concluded that "system" in the BSER "is capacious enough to include actions taken by the owner/operator of a stationary source designed to reduce emissions from that affected source, including actions that may occur off-site and actions that a third party takes pursuant to a commercial relationship with the owner/operator." EPA reasoned in the CPP that the electricity "system" should be viewed as a group of interdependent and integrated individual power plants when determining the BSER.

What are the next steps in the repeal?

In order to repeal a rule, an agency must generally follow the same notice and comment rulemaking procedures that were required to issue the rule in the first place. Here, because the CPP went through notice and comment rulemaking, EPA is following the same process to repeal the rule. EPA will accept comments on the proposal received by January 16, 2018. EPA will hold a hearing on the proposal in Charleston, West Virginia on November 28 and 29, 2017. Many stakeholders likely will submit comments on the proposed repeal. In 2015, the proposed CPP received more than 4.3 million public comments, the most ever for an EPA rule. Under the CAA Section 307(d), the agency may issue a final rule repealing the CPP once it has considered any comments received on the proposal.

Can the repeal be challenged in court?

Under CAA Section 307(b), if EPA finalizes the repeal of the CPP, a petition for review of the final repeal can be filed with the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) within 60 days from the date the repeal is published in the *Federal Register*. The court may reverse an agency action that the court finds to be:

- arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- contrary to a constitutional right, power, privilege, or immunity;
- in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or
- an arbitrary and capricious failure to observe legal procedures.

Petitioners of the repeal may also ask the court to stay (i.e., pause) the repeal, similar to the petitioners' request to stay the implementation and enforcement of the CPP.

What will happen to the CPP litigation in the D.C. Circuit?

The D.C. Circuit granted EPA's request to hold in abeyance (i.e., pause temporarily) the CPP litigation until October 10, 2017, to allow EPA to reconsider the CPP. Because the repeal of the CPP has not been finalized, it is difficult to predict the next steps for the litigation. The court could remand or continue to pause the litigation—actions that the court considered when it first issued the abeyance. EPA recently filed a litigation report on the status of its reconsideration of the CPP, explaining that the court should continue to hold the case in abeyance until the repeal is finalized. EPA could also seek to dismiss the case as moot once the repeal is final.

States and other groups supporting the CPP in the litigation urge the court to issue a decision that could guide any potential replacement of the CPP or potential legal challenges to the repeal. Many of the legal issues raised in the CPP litigation, including the scope of EPA's authority and the interpretation of the BSER, likely will be central to any future legal challenges to the repeal or replacement rule of the CPP. For example, in the litigation, petitioners claimed that CPP is unlawful because Congress must issue a "clear statement" of authority for an agency action that could have potentially serious economic and political implications. EPA is seeking comment on this issue in the proposed repeal. However, the court may not want (and could potentially be constrained by the prohibition against a court ruling on a case that is moot) to expend judicial resources and time to issue a decision for a regulation that likely will be altered or repealed soon.

Will EPA issue a replacement for the CPP to regulate CO_2 emissions from power plants?

On the same day that EPA issued the proposed repeal, EPA submitted for White House review an advance notice of proposed rulemaking (ANPRM) that considers a replacement for the CPP. An ANPRM allows an agency to gather information for potential rulemaking but does not bind an agency to future action. The proposed repeal indicated that EPA will consider through an ANPRM whether it is appropriate to issue another rule interpreting CAA Section 111(d) to replace the CPP and if so, in what form and scope.

Stakeholders and two members of the D.C. Circuit have indicated that EPA may have a legal obligation to replace the CPP. In the order extending the abeyance of the CPP litigation, Judges Tatel and Millett issued a concurring opinion, noting that EPA has an "obligation" to regulate greenhouse gases (GHGs) from power plants because the agency's 2009 determination that GHGs in the atmosphere endangers public health and welfare "triggered an affirmative statutory obligation" to make such a regulation. To date, EPA has not announced plans to reconsider the 2009 "endangerment finding."

In addition, stakeholders may turn to the courts to determine whether EPA must issue a replacement for the CPP. In 2011, EPA entered into an agreement to settle a lawsuit brought by states and environmental groups in which EPA agreed to set standards for GHG emissions from new and existing fossil fuel-fired

power plants under CAA Section 111. If EPA does not issue a replacement for the CPP, the states and groups party to the settlement could seek judicial relief to enforce the terms of the agreement, which likely would involve a new lawsuit that would review whether EPA breached the agreement by not complying with its terms.

Without the CPP or a replacement, the power industry likely will still undergo change as the result of market forces and the need to update or replace older generation facilities, issues that are discussed in this report.

What will happen to the GHG emission standards for new and modified power plants?

Pursuant to Executive Order 13783, EPA is currently reviewing the New Source Performance Standards (NSPSs) for GHG emissions from new and modified power plants issued under CAA Section 111(b). The NSPSs for power plants is currently in effect and applies to newly constructed or modified fossil fuel-fired power plants. The D.C. Circuit issued an order to pause the litigation challenging the NSPSs to allow EPA to reconsider the standards. Because EPA must issue Section 111(b) NSPSs before it may issue emission guidelines under Section 111(d) for existing sources, a repeal of the NSPSs could threaten EPA's basis for the CPP or any replacement. Because EPA has not completed its review, it is unclear what actions, if any, EPA will take with respect to the NSPSs for new and modified power plants.

What Actions Might Congress Take?

Congress has taken an active interest in the fate of the CPP since it was proposed in 2014 and subsequently challenged in court. For instance, Members of Congress have filed amici curiae briefs on both sides of the CPP litigation. A brief opposing the CPP argues, among other things, that EPA "usurped the role of Congress" through the CPP's "expansive regulatory requirements." A brief in support of the CPP argues, among other things, that Congress conferred "broad authority" on EPA, and that the CPP is "consistent with the text, structure, and history" of the CAA. Some Members of Congress may consider submitting comments on the proposed repeal or propose legislation that clarifies the scope of EPA's authority under CAA Section 111 and the definition of the BSER.