

Regulating Carbon Emissions

Executive Order 57

Work Group

August 3, 2015: EPA adopts the final rule

The EPA Administrator, Gina McCarthy, signed the following notice on 8/3/2015, and EPA is submitting it for publication in the *Federal Register* (FR). While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of compliance. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's FDSys website (<http://gpo.gov/fdsys/search/home.action>) and on Regulations.gov (<http://www.regulations.gov>) in Docket No. EPA-HQ-OAR-2013-0602. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

6560-50

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA-HQ-OAR-2013-0602; FRL-XXXX-XX-OAR]

RIN 2060-AR33

Carbon Pollution Emission Guidelines for Existing Stationary

Sources: Electric Utility Generating Units

October 23, 2015: The rule was published in the Federal Register, triggering the appeal period.

64662 Federal Register / Vol. 80, No. 205 / Friday, October 23, 2015 / Rules and Regulations

**ENVIRONMENTAL PROTECTION
AGENCY**

40 CFR Part 60

[EPA-HQ-OAR-2013-0602; FRL-9930-65-OAR]

RIN 2060-AR33

**Carbon Pollution Emission Guidelines
for Existing Stationary Sources:
Electric Utility Generating Units**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In this action, the Environmental Protection Agency (EPA)

Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at <http://www2.epa.gov/dockets>.

World Wide Web. In addition to being available in the docket, an electronic copy of this final rule will be available on the World Wide Web (WWW). Following signature, a copy of this final rule will be posted at the following address: <http://www.epa.gov/cleanpowerplan/>. A number of documents relevant to this rulemaking, including technical support documents (TSDs), a legal memorandum, and the

EGU Electric Generating Unit
EIA Energy Information Administration
EM&V Evaluation, Measurement and Verification
EO Executive Order
EPA Environmental Protection Agency
FERC Federal Energy Regulatory Commission
ERC Emission Rate Credit
FR Federal Register
GHG Greenhouse Gas
GW Gigawatt
HAP Hazardous Air Pollutant
HRSG Heat Recovery Steam Generator
IGCC Integrated Gasification Combined Cycle
IPCC Intergovernmental Panel on Climate Change
IPM Integrated Planning Model
IRP Integrated Resource Plan

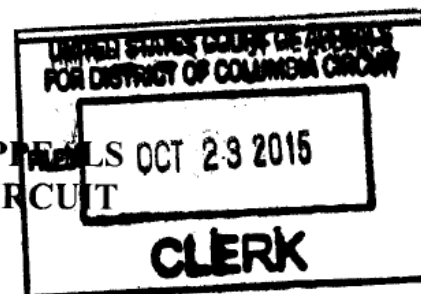
West Virginia et al. filed challenges to it the same day.

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

OCT 23 2015

RECEIVED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT



STATE OF WEST VIRGINIA,
STATE OF TEXAS,
STATE OF ALABAMA,
STATE OF ARIZONA CORPORATION
COMMISSION,
STATE OF ARKANSAS,
STATE OF COLORADO,
STATE OF FLORIDA,
STATE OF GEORGIA,
STATE OF INDIANA,
STATE OF KANSAS,
COMMONWEALTH OF KENTUCKY,
STATE OF LOUISIANA,
STATE OF LOUISIANA DEPARTMENT
OF ENVIRONMENTAL QUALITY

PETITION FOR REVIEW

And moved for a stay.

This Court should issue a stay, and expedite consideration of the Petition For Review,¹ because the States are being immediately and irreparably harmed by EPA's illegal effort to force States to reorder their electrical generation systems.²

This case involves an unprecedented, unlawful attempt by an environmental regulator to reorganize the nation's energy grid. Relying on a rarely used section of the Clean Air Act ("CAA"), 42 U.S.C. § 7411(d), EPA has adopted a final rule, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (the "Power Plan"), that will "transfor[m] . . . the

Coalition intervenes

UNOPPOSED MOTION FOR LEAVE TO INTERVENE AS RESPONDENTS

Pursuant to Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b), the States of New York, California (by and through Governor Edmund G. Brown Jr., the California Air Resources Board, and Attorney General Kamala D. Harris), Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota (by and through the Minnesota Pollution Control Agency), New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, Washington, the Commonwealths of Massachusetts and Virginia, the District of Columbia, the

January 21, 2016

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1363

September Term, 2015

ORDERED that the motions for stay be denied. Petitioners have not satisfied the stringent requirements for a stay pending court review. See Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2015). It is

FURTHER ORDERED that consideration of these appeals be expedited. It is

January 26, 2016

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT:

The States of West Virginia, Texas, Oklahoma, and 26 other States and state agencies (the “States”) respectfully request an immediate stay of the final rule of the United States Environmental Protection Agency (“EPA”) entitled, “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,” 80 Fed. Reg. 64,662 (Oct. 23, 2015). On the day this so-called “Clean Power Plan” (hereinafter “Power Plan” or “Plan”) became subject by statute to judicial review, the States filed petitions for review of the Plan with the D.C. Circuit and, due to the immediate harm from the Plan, also moved simultaneously for a stay pending the court’s review. In light of the present and ongoing harm from

February 4, our coalition filed an opposition

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WEST VIRGINIA, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

and four related cases

**On Applications for a Stay of Final Agency Action Pending Review in the United
States Court of Appeals for the District of Columbia Circuit**

**Opposition of States of New York, California, Connecticut, Delaware, Hawai'i,
Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New
Mexico, Oregon, Rhode Island, Vermont, Virginia, Washington, the District of
Columbia, the Cities of Boulder, Chicago, New York, Philadelphia, and South
Miami, and Broward County, Florida**

Opposition to stay

eighteen states, the District of Columbia, and six municipalities (collectively, “State Respondents”) that have intervened in support of respondent Environmental Protection Agency in pending actions in the U.S. Court of Appeals for the D.C. Circuit challenging EPA’s Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (“Rule”).¹ As this Court recognized in *Massachusetts v. EPA*, 549 U.S. 497, 522 (2007), State Respondents have a compelling interest in reducing carbon-dioxide emissions in order to protect their residents’ health and welfare from the dangers of climate change. State Respondents accordingly join EPA in opposing the multiple applications asking this Court to stay the Rule. These applications make the extraordinary request that this Court intercede in a matter that is still pending in

Tuesday, February 9, 2016

ORDER IN PENDING CASE

15A773 WEST VIRGINIA, ET AL. V EPA, ET AL.

The application for a stay submitted to The Chief Justice and by him referred to the Court is granted. The Environmental Protection Agency's "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (October 23, 2015), is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition, this order shall terminate automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment.

Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.

And four days later...



The merits case

- The Supreme Court's decision to stay the rule did not reach the merits of the rule.
- The parties submitted merits briefs this spring to the D.C. Circuit.
- Our coalition submitted its brief on March 28.
- Oral argument was set for June 2, but then...

May 16 order

15-1410, 15-1413, 15-1416, 15-1422,
15-1432, 15-1442, 15-1451, 15-1459,
15-1464, 15-1470, 15-1472, 15-1474,
15-1475, 15-1477, 15-1483, 15-1488

BEFORE: Garland,* Chief Judge, and Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard,* and Wilkins, Circuit Judges

ORDER

It is **ORDERED**, on the court's own motion, that these cases, currently scheduled for oral argument on June 2, 2016, be rescheduled for oral argument before the en banc court on Tuesday, September 27, 2016 at 9:30 a.m. It is

* Chief Judge Garland and Circuit Judge Pillard did not participate in this matter.

D.C. Circuit Court of Appeals



En banc review

- The May 16 order moved the case from June 2 to September 27 and from a panel to en banc, meaning that the entire D.C. Circuit would hear the case rather than three judges.
- This could speed the resolution of the case, cutting out another level of review at the D.C. Circuit.

Oral argument

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1363

September Term, 2015

ORDERED that the following argument format apply in these cases, which are scheduled for oral argument before the en banc Court in Courtroom 20 at 9:30 a.m. on Tuesday, September 27, 2016:

<u>Argument Segment</u>	<u>Time</u>	<u>Counsel</u>
I. All statutory issues other than Section 112 (includes Generation Shifting & State Authority)	35 min.	Elbert Lin for State Petitioners; Peter D. Keisler for Non-State Petitioners (to be divided as counsel see fit)
	25 min.	Eric Hostetler for Respondents
	10 min.	Michael Myers for State

What interests the Court?

- 1 hour 10 minute on statutory issues (best system of emission reduction, fence-line issues)
- 44 minutes on section 112 (Congressional intent, the “scrivener’s error”)
- 24 minutes on constitutional issues
- 20 minutes on notice issues (final rule too different)
- 1 hour on record-based issues (BSER not adequately demonstrated; cost-benefit analysis; individual state tailoring)

The ruling

- We expect a ruling from the D.C. circuit in late 2016 or early 2017. That means that the Supreme Court will most likely hear the case on its Fall 2017 docket, a little more than a year from now.
- The case would be decided by the Supreme Court by December 2017 at the earliest.
- Approximately 10 months from granting the case to deciding it.

Questions?

