# U.S. BRANCHES BATTLE OVER EPA'S CLEAN POWER PLAN

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The Obama Administration, Congress, and the Judiciary are all engaged in the battle over EPA's Clean Power Plan. The question remains, which branch has the ultimate power to either force this new Plan through or stop it. The Executive Branch, through EPA, published the Plan in October. Congress passed a resolution nullifying the Plan. President Obama has veto power over the Congressional resolution. If it were just up to those two entities, a Presidential veto would trump the resolution and the Plan would be implemented. However, thanks to our third branch of government, the Judiciary will have the ultimate final say.

The D.C. Circuit is considering two consolidated cases challenging EPA's rulemaking authority and discretion in the Clean Power Plan: State of Arizona, et al., v. EPA, et al., case number 15-1392, and Murray Energy Corp. v. EPA, case number 15-1385), including a motion to stay the implementation of the Plan. The Department of Justice filed a brief in opposition of such a stay. If a stay is granted, then the pre-Clean Power Plan ozone standard of 75 ppb will remain effective nationwide and states may be relieved of 2016 compliance requirements, at least temporarily.

The Clean Power Plan, published in the Federal Register in October, is a major part of the President's climate change program. The Plan sets a nationwide goal for power plants to cut their carbon dioxide output by 32 percent by 2030, compared to 2005. In addition, the Plan lowers the ozone standard from 75 ppb to 70 ppb. States would be required to submit a final compliance plan (or file for an extension) by late 2016, and power plants would be required to show emission cuts starting as early as 2020. Opponents to the Clean Power Plan argue that it will be impossible for existing coal-fired power plants to meet the 70 ppb standard and therefore plants will be shut down before the end of their usable life.

On December 1, the U.S. House of Representatives passed 242-180, a resolution to repeal EPA's Power Plan, which would regulate existing power plants. The resolution was previously passed by the Senate (S.J. Res. 23, passed in 52-46 vote). Although President Obama has vowed to veto the resolution, the House resolution sends a message to EPA that Congress does not agree with the "extreme" and "unworkable" terms set forth in the Plan by EPA. Congress has stated emphatically that EPA ignored Congress' clear intent and clear language in the Clean Air Act that regulations and standards must be "attainable."

According to the petitioners in the consolidated case before the D.C. Circuit, Congress intended under the Clean Air Act that the ozone standards be attainable, and 70 parts per billion is not an attainable standard. The petitioners also allege that EPA failed to conduct the appropriate independent scientific analysis and review before publishing the new standards. In addition, according to the petitioners, Clean Air Act Section 111(d), under which the EPA has claimed its authority for the proposed rule, prohibits EPA from mandating state-by-state standards for existing sources that are already subject to a national standard. Because EPA may issue nationwide hazardous air pollutant standards at existing power plants under Section 112 of the Clean Air Act, EPA's authority to regulate greenhouse gases is limited to creating standards that are not from a source category already regulated under Section 112. EPA has argued that Section 111(d) is ambiguous and open to the agency's interpretation.

EPA claims that the new standards will prevent thousands of asthma attacks, heart attacks, missed school days and workdays, and premature deaths, among other health benefits.

While that may be true, the D.C. Circuit may nonetheless find that the standards are unattainable, or that EPA did not follow proper rulemaking procedures under the Administrative Procedures Act, or that EPA acted outside of its authority under the law. Typically, a court would give significant deference, under the Supreme Court "Chevron doctrine," to EPA's rulemaking. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Incorporated, 467 U.S. 837, 842-43 (1984),* the Supreme Court articulated a two-step standard by which challenges to agency actions should be reviewed:

Step one:

*"When a court reviews an agency's construction of the statute it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."*

*Step two:*

*"If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. 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."*

Petitioners in the consolidated case challenging the Clean Power Plan argue that the Clean Air Act language is clear and unambiguous and not subject to interpretation and, therefore, that EPA is clearly overreaching. If the D.C. Circuit agrees, then the court will not need to go to step two of Chevron. The D.C. Circuit could find that the Plan is not consistent with Congress' intent and clear language in the Clean Air Act, and could strike down the rule and send it back to EPA to revise. If the D.C. Circuit goes to Chevron step two, then the court will look to the reasonableness of EPA's 70 ppb standard, and will evaluate whether that standard is supported by the rulemaking record. If the court finds it is not reasonable, then there was an abuse of discretion and the court will strike down the rule.

In the interim, it is likely that the D.C. Circuit will issue a stay, over the Department of Justice's objection. There is recent precedent for a stay of an EPA nationwide rule because of a court challenge to its validity. Earlier this year, the Sixth Circuit stayed implementation of EPA's Waters of the United States rule under the Clean Water Act. See Bick Law Group blog: Untangling 'Waters Of The US' Web In 6th Circ. - Law360. The Sixth Circuit telegraphed that it is likely to strike down the rule when it stated, "We conclude that petitioners have demonstrated a substantial possibility of success on the merits of their claims."

Although EPA is given deference in its rulemaking, the WOTUS case shows that it is nonetheless possible to challenge an EPA rule for overreaching if the rule is not aligned with the intent of Congress in the governing statute. Time will tell if EPA is brushed back off the plate in the WOTUS rulemaking or in the Clean Power Plan. Like the Sixth Circuit in the WOTUS, the D.C. Circuit may stay implementation of the Clean Power Plan and then, on the merits, may strike down the Plan. The pre-Clean Power Plan regulations would be effective nationwide until further rulemaking by EPA, or unless and until the Supreme Court accepts a petition for writ of certiorari to review the D.C. Circuit's decision.

The fact that Congress has weighed in here by putting a resolution on the President's desk may have some political impact on the D.C. Circuit's decision in the consolidated case.

Congress and the Senate passed a second companion resolution nullifying EPA's new source rule that sets specific carbon limits for new natural gas- and coal-fired power plants (the rule would limit new plants to 1,400 pounds of carbon dioxide per megawatt-hour of electricity for coal-fired power plants, and 1,000 pounds for gas-fired power plants). The lawmakers that proposed the resolution to

overturn this rule assert that it is essentially a de facto ban on new coal-fired plants.

If the D.C. Circuit upholds the Clean Power Plan and the new source rule, and if the resolutions to nullify them are vetoed by the President, there is a possibility that many existing power plants will phase out and no new plants will be built to replace them. While this may be the ultimate plan of the Obama Administration in order to reduce carbon emission, the plan will not be without consequences. Without a long term and near term power replacement plan in place, the resulting loss of base-load power generation could drive up energy prices and impact the reliability of the power grid.