



# Judicial Review of EPA's Clean Power Plan

## The Key Legal Issues

ETIC/EQC 111(d) SUBCOMMITTEE  
ON FEDERAL CLEAN POWER PLAN  
2015-2016

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Exhibit 4

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## The “Core” Legal Issues

- Section 112 Exclusion
  - Cooperative Federalism
  - Best System of Emission Reduction
  - Standards More Stringent Than NSPS
  - Constitutional Issues
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- Programmatic and “Secondary” Issues

## Section 112 Exclusion

- Argument: Under House version of Section 111(d), no regulation of sources in category regulated under Section 112 (HAPs)
- Strengths:
  - Would bar *any* version of CPP as long as power plants are regulated under Section 112
  - Could bar other Section 111(d) regulations
- Weaknesses:
  - Could fail if MATS is vacated by D.C. Circuit
  - Proper scope of BSER likely wouldn't be resolved

## Cooperative Federalism

- Argument: Section 111(d) authorizes *States* (not EPA) to establish and apply standards of performance. EPA's binding statewide goals violate the statute.
- Strengths:
  - *Chevron* Step 1 argument (statute clear)
  - Would result in substantial revision of CPP, with lower overall targets
- Weaknesses:
  - CPP could survive, though in a diminished form

# Best System of Emission Reduction

- Arguments:
  - BSER is intended to be a standard of performance, not a standard of *nonperformance*
  - BSER may not look beyond the fenceline; cannot include source owner or operator
- Strengths:
  - Traditionally, BSER has looked at what can be accomplished at the individual unit through technological or operational measures
  - Most of EPA's BSER would fail under this argument
  - *UARG* decision: Supreme Court looks skeptically on agencies finding authority to regulate broad swaths of the economy in vague statutory language
- EPA's Likely Response:
  - "Best system of emission reduction" is undefined; *Chevron* deference

## Standards More Stringent Than NSPS

- Argument: Logically, new sources should be able to achieve the greatest reductions. In CPP, EPA sets standards for existing plants that are far more stringent than those for new plants.
- Strengths:
  - Common sense argument
  - Appealing
- Weaknesses:
  - Might be cured by tightening the NSPS, as well as by relaxing the existing source standard

## Constitutional Issues

- 10<sup>th</sup> Amendment
  - Argument: CPP impermissibly tramples on States' rights.
- 5<sup>th</sup> Amendment
  - Argument: CPP impermissibly confiscates property without due process or just compensation

## Programmatic and Secondary Issues

- Calculation of the Rates: Did EPA err?
- Calculation of Individual State Goals
- Unit-specific issues
  - Achievability
  - Lack of availability of specific building block measures

# Litigation Outlook

- Stay motions
  - Nine were filed
  - Briefing concluded December 23
  - Will likely be decided by end of January
- Petitions for administrative reconsideration filed
- Merits briefing – Spring 2016?
- Argument – as early as May 2016, likely no later than September/October 2016
- Decision – as early as July 2016, likely no later than January/February 2017
- Supreme Court – Review by end of 2017?