FRED UPTON, MICHIGAN
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

MEMORANDUM

October 21, 2015

To: Subcommittee on Energy and Power Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Hearing on "EPA's CO_2 Regulations for New and Existing Power Plants: Legal Perspectives"

On Thursday, October 22, 2015, at 2:00 p.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Energy and Power will hold a hearing on "EPA's CO_2 Regulations for New and Existing Power Plants: Legal Perspectives." The hearing will focus on the legal issues surrounding the suite of Environmental Protection Agency (EPA) rules to regulate carbon pollution from power plants.

I. BACKGROUND

On August 3, 2015, EPA announced the final rule to regulate carbon pollution from existing power plants - known as the "Clean Power Plan."[1] The rule establishes emission guidelines for states to follow in developing plans to control carbon pollution from existing coal-fired and natural gas-fired power plants under section 111(d) of the Clean Air Act (CAA).[2] That same day, EPA also announced final standards limiting carbon pollution from new, modified,

[1] U.S. Environmental Protection Agency, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units* (Aug. 3, 2015) (Final Rule) (online at www2.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule.pdf) (hereinafter *Clean Power Plan*).

[2] U.S. Environmental Protection Agency, *Clean Power Plan.*

and reconstructed power plants;[3] and a proposed federal plan and model trading rules[4] that "demonstrate a readily available path forward for Clean Power Plan implementation, and present flexible, affordable implementation options for states."[5]

As a reminder, the subcommittee held a hearing on March 17, 2015, on the legal and cost impacts of the proposed Clean Power Plan;[6] and more recently held a hearing on October 7, 2015, regarding the suite of final carbon pollution rules generally.[7] Please see the Democratic memos from those hearings for additional background information.

II. RECENT LEGAL CHALLENGES

[3] U.S. Environmental Protection Agency, *Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units* (Aug. 3, 2015) (Final Rule) (online at www3.epa.gov/airquality/cpp/cps-final-rule.pdf) (hereinafter *GHG Standards for New, Modified, and Reconstructed Power Plants*).

[4] U.S. Environmental Protection Agency, *Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014*; *Model Trading Rules*; *Amendments to Framework Regulations* (Aug. 3, 2015) (Proposed Rule) (online at www3.epa.gov/airquality/cpp/cpp-proposed-federal-plan.pdf) (hereinafter *Proposed Federal Plan and Model Rules*).

[5] *Id.*

[6] Memo from Democratic Staff to Democratic Members and Staff of the House Committee on Energy and Commerce, Subcommittee on Energy and Power, *Hearing on "EPA's Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues"* 114th Cong. (Mar. 17, 2015) (online at democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Memo-EP-Clean-Power-Plan-2014-3-17.pdf).

[7] Memo from Democratic Staff to Democratic Members and Staff of the House Committee on Energy and Commerce, Subcommittee on Energy and Power, *Hearing on "EPA's CO_2 Regulations for New and Existing Power Plants"* 114th Cong. (Oct. 7, 2015) (online at democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/Dem-Memo-EP-CO2-Regulations-2015-10-7.pdf).

On August 5, 2015, a group of 16 states, led by West Virginia, requested that EPA issue an administrative stay of the final Clean Power Plan.[8] Requests for an administrative stay have also been submitted by the National Mining Association,[9] Texas,[10] and New Jersey.[11]

On August 13, 2015, a group of 15 states, again led by West Virginia, filed a petition asking the U.S. Court of Appeals for the D.C. Circuit to issue an emergency stay of the rule to postpone the Clean Power Plan's deadlines.[12] On the same day Peabody Coal renewed its lawsuit challenging the rule, which had previously been dismissed by the D.C. Circuit because it was not ripe for judicial review.[13] EPA promptly responded to these lawsuits, arguing that the "petitioners once again prematurely attack EPA's Clean Power Plan," and urging the court to dismiss them since "[p]ublication in the Federal Register, while shortly forthcoming, has not yet occurred."[14] Environmental advocates weighed in on the side of EPA, noting that the "[p]etitioners fail to identify any emergency that would justify bypassing the statutory procedure for obtaining judicial review."[15] Ultimately, the court denied the requests of the states and

[8] Letter from Patrick Morrisey, Attorney General, West Virginia, to U.S. Environmental Protection Agency Administrator McCarthy (Aug. 5,2015) (online at www.ago.wv.gov/Documents/WV%20-%20Administrative%20Request%20for%20Stay%20CPP.PDF). The other 15 states are: Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Utah, Wisconsin, and Wyoming.

[9] Letter from the National Mining Association to U.S. Environmental Protection Agency Administrator McCarthy (Aug. 3, 2015) (online at www.nma.org/pdf/tmp/080315-NMA-request-for-EPA-to-Stay-CPP.pdf).

[10] Letter from Jon Niermann, Chief of the Enivronmental Protection Divison, Texas Attorney General, to U.S. Environmental Protection Agency Administrator McCarthy (Aug. 20, 2015) (online at www.texasattorneygeneral.gov/files/epress/images/2015/Request_for_Administrative_Stay_of_Carbon_Rule.pdf).

[11] Letter from Bob Martin, Commissioner, New Jersey Department of Environmental Protection, to U.S. Environmental Protection Agency Administrator McCarthy (Sept. 2, 2015) (online at www.nj.gov/dep/111d/docs/njdep-111-d-cover-letter-to-epa-admin-stay-reconsideration-request.pdf).

[12] *In Re West Virginia, et al*., No. 15-1277 (D.C. Cir., filed Aug. 2015). The other 14 states are Alabama, Arkansas, Florida, Indiana, Kansas, Kentucky, Louisiana, Michigan, Nebraska, Ohio, Oklahoma, South Dakota, Wisconsin and Wyoming.

[13] In re Murray Energy Corp., Nos. 14-1112 & 14-1151 (D.C. Cir., filed Aug. 13, 2015; opened as new case (15-1284) and consolidated with 15-1277 Aug. 24, 2015); In re Murray Energy Corp., No. 14-1112 (D.C. Cir. June 9, 2015).

[14] *In re West Virginia*, No. 15-1277 (D.C. Cir., EPA response Aug. 2015).

[15] *In re West Virginia*, No. 15-1277 (D.C. Cir., envtl. intervenors response Aug. 2015).

Peabody Coal on September 9, 2015, ruling that the petitioners must wait for EPA to publish the regulations in the Federal Register before they can file a lawsuit against it and request a stay.[16]

The final Clean Power Plan, along with the final Standards for New Power Plants and the proposed federal plan, are expected to be published in the Federal Register by the end of October.[17]

III. LEGAL ARGUMENTS REGARDING EPA AUTHORITY TO ADOPT THE CLEAN POWER PLAN

The purpose of this memo is to update members and staff on the recent legal arguments being raised regarding the rule. To that end, the following section outlines the likely arguments being made by opponents of the Clean Power Plan, and the various responses and rebuttals to those claims.[18] Since the final Clean Power Plan has not yet been published in the Federal Register, a number of these scenarios, while directly related to the proposed rule, are nonetheless relevant for the hearing.[19]

A. Two Provisions of Law

The Clean Air Act Amendments of 1990, as passed by the Congress and signed into law by the President, contain two conflicting provisions related to section 111(d). One version was included in the House version of the bill and a second version was included in a Senate conforming amendment. These provisions were not reconciled and so both appear in the Public Law version of the statute signed by the President.

Opponents of the rule and numerous majority witnesses have argued that EPA does not have authority to issue the Clean Power Plan – or any carbon regulations - under section 111(d) of the Clean Air Act because the Agency is already regulating those same sources under section 112 of the Act – namely, the Mercury and Air Toxics rule, finalized by EPA in 2012.[20] This

---

[16] In re West Virginia, No. 15-1277 (D.C. Cir., petition for extraordinary write denied Sept. 9, 2015).

[17] House Committee on Energy and Commerce, Subcommittee on Energy and Power, Testimony of the Honorable Janet McCabe, Acting Assistant Administrator for Air and Radiation, U.S. Environmental Protection Agency, *Hearing on "EPA's CO_2 Regulations for New and Existing Power Plants"* 114th Cong. (Oct. 7, 2015).

[18] *See, e.g.* National Resources Defense Council (NRDC), *Issue Brief: What to Expect in Clean Power Plan Litigation* (Oct. 2015) (online at www.nrdc.org/air/clean-power-plan/files/clean-power-plan-litigation-IB.pdf); Center for Progressive Reform, *The Clean Power Plan: Issues to Watch* (Aug. 2015) (online at progressivereform.org/articles/CPP_1506.pdf).

[19] For additional information on the legal issues in the Clean Power Plan, please see the EPA's 152-page legal memorandum, the final Clean Power Plan's preamble, and the Response to Comments which will be available once the rule is published in the Federal Register.

[20] *See, e.g.*, Letter from Patrick Morrisey, Attorney General, West Virginia, to U.S. Environmental Protection Agency Administrator McCarthy at 4 (Aug. 5,2015) (online at

argument stems from an assertion that the Senate-originated language was enacted into law in error, and should be ignored. At the March 17, 2015 hearing, Professor Laurence Tribe argued "the plain text of Section 111(d) flatly and unambiguously prohibits EPA's proposal."[21]

Environmental advocates and legal scholars have strongly rejected this argument.[22] At the March 17, 2015, hearing Professor Richard Revesz stated:

> Opponents of the Clean Power Plan argue that because the House version of the provision was transcribed into the U.S. Code, that version should govern. However, it is well established that when the Statutes at Large and the U.S. Code conflict, the text in the Statutes at Large controls … Because both the Senate amendment and the House amendment appear in the Statutes at Large, an interpretation of Section 111(d) must try to give effect to both.[23]

Further, in the preamble to the final Clean Power Plan:

> EPA has concluded that the two differing amendments are not properly read as conflicting. Instead, the House amendment and the Senate Amendment should each be read to mean the same in the context presented by this rule: that the Section 112 Exclusion does not bar the regulation under CAA section 111(d) of non-hazardous air pollutants (HAP) from a source category, regardless of whether that source category is subject to standards for HAP under CAA section 112.[24]

In other words, "EPA has the authority to promulgate CAA section 111(d) regulations for CO_2 from power plants notwithstanding that power plants are regulated for HAP under CAA section

---

www.ago.wv.gov/Documents/WV%20-%20Administrative%20Request%20for%20Stay%20CPP.PDF).

[21] House Committee on Energy and Commerce, Subcommittee on Energy and Power, Prepared Testimony of Laurence Tribe, *Hearing on "EPA's Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues,"* at 39, 114th Cong. (Mar. 17, 2015) (online at democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony-Tribe-EP-Clean-Power-Plan-2015-03-17_0.pdf) (hereinafter *Tribe Prepared Testimony*).

[22] NRDC, *Grasping at Straws: Why a Legislative Glitch Will Not Exempt Power Plants from Carbon Standards* (Nov. 1, 2013) (online at switchboard.nrdc.org/blogs/blongstreth/grasping_at_straws_why_a_legis.html).

[23] House Committee on Energy and Commerce, Subcommittee on Energy and Power, Prepared Testimony of Richard Revesz, *Hearing on "EPA's Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues,"* at 9, 114th Cong. (Mar. 17, 2015) (online at democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony-Revesz-EP-Clean-Power-Plan-2015-03-17.pdf) (hereinafter *Revesz Prepared Testimony*).

[24] U.S. Environmental Protection Agency, *Clean Power Plan* at 247.

112."[25] For a more detailed discussion of EPA's authority under section 111(d), please see the preamble of the final Clean Power Plan.[26]

B. "Beyond-the-Fence" Measures

Opponents have also criticized EPA's use of "beyond the fence" measures to help states meet their CO_2 emissions goals, without putting the burden of reducing emissions entirely on power plants.[27] They argue that the building blocks approach – and specifically building blocks 2 and 3 – is unlawful because a system of emission reduction must begin and end at the source, and therefore cannot include things that go beyond the fence line of the plant. At the March 17, 2015, hearing Allison Wood said that the rule is:

> unlawful because it attempts to redefine the statutory term "system of emission reduction" by relying on a dramatic redefinition of the word "system" to broaden the program beyond the source by claiming that it may base a standard of performance on any "set of things" that leads to reduced emissions from the source category overall. This is misguided. A "system of emission reduction" must begin and end at the source itself.[28]

This argument has been rebutted by a number of sources.[29] EPA disagrees with this argument, and responded to stakeholders in the preamble to the final Clean Power Plan:

> Under CAA section 111(d)(1) and (a)(1), the EPA's emission guidelines must establish achievable emission limits based on the "best system of emission reduction ... adequately demonstrated." … the phrase "system of emission reduction," by its terms and when read in context, contains no such limits. To the contrary, its plain meaning is deliberately broad and 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, so long as those actions enable the affected source to achieve its emission limitation. Such actions include the measures in building blocks 2 and 3, which, when implemented by an affected source, enable the

---

[25] *Id.* at 270.

[26] *Id.* at 243-281.

[27] *See* Tribe Prepared Testimony.

[28] House Committee on Energy and Commerce, Subcommittee on Energy and Power, Prepared Testimony of Allison Wood, Partner, Hunton & Williams LLP, *Hearing on "EPA's Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues,"* at 1, 114th Cong. (Mar. 17, 2015) (online at democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony-Wood-EP-Clean-Power-Plan-2015-03-17.pdf) (hereinafter *Wood Prepared Testimony*).

[29] *See, e.g.*, Revesz Prepared Testimony; Glicksman and Buzbee, *EPA's Systemwide Approach: The Policy and Legal Debate on Regulating Beyond the Fenceline* at 19 (Aug. 2015) (online at progressivereform.org/articles/CPP_1506.pdf).

source to achieve their emission limits because of the unique characteristics of the utility power sector.[30]

C. Tenth Amendment

At the March hearing Professor Tribe said that the Clean Power Plan requires states to meet CO_2 targets as set by EPA, and "this submissive role for the States confounds the political accountability that the Tenth Amendment is meant to protect."[31]

EPA, in its legal memo accompanying the final Clean Power Plan, disagrees:

> "Far from violating principles of federalism, this rule and CAA section 111(d) fully respects such principles. In particular, they provide states with the initial opportunity to submit a satisfactory state plan, with no consequences to states in their sovereign capacity should they decline to participate. Rather, if a state declines to take advantage of that opportunity, affected EGUs in that state will instead be subject to a federal plan that satisfies statutory requirements. No state is legally required to submit a 111(d) plan, and the lone consequence for failing to submit a satisfactory 111(d) plan—imposition of a federal plan for affected EGUs in the state—does not violate the Tenth Amendment."[32]

When asked about the potential conflict between the Clean Power Plan and the Tenth Amendment, Professor Revesz said:

> "So the reason there isn't a Tenth Amendment problem is because EPA does not actually require the states to do these state implementation plans, it merely gives them the option to do them. And 111(d) is exactly the same situation. Through … the proposed rule in the Clean Power Plan, EPA has set a reduction requirement that applies to each state. Each state can now decide what to do. Each state is not forced in any way to do what EPA has suggested they do in the regulation. They can do whatever they want as long as they meet the reduction requirement. And if they choose not to do anything, and some states have said they won't, EPA can then impose a federal implementation plan. And the fact that some states have already said that they will not do it shows that there is no compulsion." [33]

---

[30] U.S. Environmental Protection Agency, *Clean Power Plan* at 509-510.

[31] Tribe Prepared Testimony at 5.

[32] U.S. Environmental Protection Agency, *Legal Memorandum Accompanying Clean Power Plan for Certain Issues*, at 47 (Aug. 2015) (online at www3.epa.gov/airquality/cpp/cpp-legal-memo.pdf#_ga=1.114632067.508759791.1444059127).

[33] House Committee on Energy and Commerce, Subcommittee on Energy and Power, Testimony of Richard Revesz, *Hearing on "EPA's Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues,"* at 99, 114th Cong. (Mar. 17, 2015) (online at democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Transcript-EP-EPA-Clean-Power-Plan-2015-3-17.pdf).

Further, environmental groups note that:

> "Regulating air pollution that affects the whole nation … lies at the heart of Congress' regulatory powers, and cooperative federalism arrangements addressing such matters are familiar and constitutionally unproblematic… If State Petitioners object to the Clean Power Plan, they can decline to participate and leave regulation of power plants' carbon pollution to EPA. But they cannot leverage their option to participate into a basis for thwarting Congress' command that EPA regulation dangerous emissions from power plants."[34]

D. Fifth Amendment

At the March hearing, Professor Tribe also asserted that the Clean Power Plan violates the "Takings Clause" of the Fifth Amendment – meant to protect private property rights. He said that with the Clean Power Plan, EPA would impose costs that ought to be borne equitably by everyone on a small group of power plants and companies after those same companies invested billions of dollars to reduce their non-CO_2 pollutants over the past 25 years. Under the Takings Clause, these companies would be entitled to just compensation to rectify such a "bait and switch."[35]

In response, Professor Revesz, said that:

> "A regulation leads to a takings violation only if it deprives an owner of essentially all of the value of his or her property, which is not the case [with the Clean Power Plan]. And even if a particular firm had a plausible takings challenge, the remedy would not be to invalidate a nationwide regulation. Instead, the aggrieved firm would have the right to pursue subsequent action for compensation."[36]

EPA's interpretation in the final rule is consistent with that of Professor Revesz: "EPA disagrees that this rule constitutes a taking within the meaning of the Fifth Amendment. The EPA also disagrees that it is likely this rule will lead to widespread regulatory taking that require compensation."[37]

IV. LEGAL ARGUMENTS REGARDING FINAL STANDARDS FOR NEW POWER PLANTS

A. Lack of Requirement that Standard Must Be Met by All Sources

[34] *In re West Virginia*, No. 15-1277 (D.C. Cir., envtl. intervenors response Aug. 2015).

[35] Tribe Prepared Testimony.

[36] Revesz Prepared Testimony, at 6.

[37] U.S. Environmental Protection Agency, *Legal Memorandum Accompanying Clean Power Plan for Certain Issues*, at 57 (Aug. 2015) (online at www3.epa.gov/airquality/cpp/cpp-legal-memo.pdf#_ga=1.114632067.508759791.1444059127).

In the final rule EPA asserted that, "under CAA section 111, an emissions standard may meet the requirements of a 'standard of performance' even if it cannot be met by every new source in the source category that would have constructed in the absence of that standard."[38]

In comments, stakeholders contested this assertion, arguing that a 111(b) standard must be achievable by all new sources. However EPA's view is supported by: "(i) the legislative history of CAA section 111, read in conjunction with the legislative history of the CAA as a whole; (ii) case law under analogous CAA provisions; and (iii) long-standing precedent in the EPA rulemakings under CAA section 111."[39]

B. Energy Policy Act of 2005 (EPACT05) Provisions

Opponents of this rule claim that it violates provisions in the Energy Policy Act of 2005 (EPACT05) that bar EPA from considering the use of technology at a facility that received federal financial assistance under that Act to determine whether the technology is "adequately demonstrated" for the purposes of Clean Air Act section 111.[40] Some commenters on the proposed rule – including Murray Energy – took the position that the EPACT05 provisions bar all consideration of a facility's existence if the facility received EPACT05 assistance.

These claims are based on an erroneous interpretation of the provisions, which prohibit EPA from making a section 111 determination based solely on the use of technology at a federally funded demonstration project, but do not preclude all use of such information as supporting evidence. It is also a misreading of EPA's rule, which cites extensive other evidence supporting the proposed finding.[41]

In fact, EPA specifically solicited comment on its interpretation of these provisions and in the final rule "interprets these provisions to preclude EPA from relying solely on the experience of facilities that received DOE assistance, but not to preclude the EPA from relying on the experience of such facilities in conjunction with other information."[42]

---

[38] U.S. Environmental Protection Agency, *Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units* at 158-159 (Aug. 3, 2015) (Final Rule) (online at www3.epa.gov/airquality/cpp/cps-final-rule.pdf#_ga=1.247583687.1371902854.1438955946).

[39] *Id.* at 159.

[40] *See, e.g.*, Letter from Chairman Upton and Chairman Whitfield to U.S. Environmental Protection Agency Administrator McCarthy (Nov. 15, 2013) (online at energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/letters/20131115EPA.pdf).

[41] *See, e.g.*, Environmental Defense Fund, *The Strong Legal Foundation for the Carbon Pollution Standards for New Power Plants: A Response to the House Energy and Commerce Committee's Letter on the Energy Policy Act of 2005 and Carbon Capture and Storage Technology* (Dec. 5, 2013) (online at blogs.edf.org/climate411/files/2013/12/Response-to-House-Committee-Letter-on-EPAct.pdf).

[42] U.S. Environmental Protection Agency, *Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating*

V. WITNESSES

The following witnesses are expected to testify:

Allison Wood
Partner
Hunton and Williams LLP

Raymond L. Gifford
Partner
Wilkinson Barker Knauer LLP

Elbert Lin
Solicitor General
West Virginia

Richard Revesz
Lawrence King Professor of Law
Dean Emeritus
New York University Law School

Emily Hammond
Associate Dean for Public Engagement; Professor of Law
The George Washington University School of Law

Units at 163 (Aug. 3, 2015) (Final Rule) (online at www3.epa.gov/airquality/cpp/cps-final-rule.pdf#_ga=1.76155409.508759791.1444059127).