



Judicial Review of EPA's Clean Power Plan

The Key Legal Issues

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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

- 10th Amendment
 - Argument: CPP impermissibly tramples on States' rights.
- 5th 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

- Petitions for review may be filed for 60 days following publication (until Dec. 22, 2015)
- Stay motions
 - Four filed on October 23
 - Motions cut-off was November 5
 - Briefing concludes December 23
 - May be decided by early in the New Year
- Petitions for administrative reconsideration
- 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?