



## **Survival of Clean Power Plan under a Trump administration looms as a question**

**By Jeannine Anderson**

**News Editor**

President-elect Donald J. Trump has promised to do away with the Environmental Protection Agency's Clean Power Plan, eliminate the Waters of the United States final rule, and make other changes in the nation's energy sector, including withdrawing from the international climate change accord that was reached in Paris, France, in December 2015.

"We will eliminate the highly invasive 'Waters of the U.S.' rule, and scrap the \$5 trillion dollar Obama-Clinton Climate Action Plan and the Clean Power Plan," says a statement on the Trump transition team's website.

On Nov. 22, the president-elect seemed to slightly moderate his stance on climate change. In an interview with editors at the New York Times, Trump said "that he would 'keep an open mind' about whether to pull the United States out" of the Paris agreement, the Times reported. "I'm looking at it very closely. I have an open mind to it," the president-elect said.

### **Court ruling on Clean Power Plan is pending**

The EPA's final Clean Power Plan rule, which was published in the *Federal Register* in October 2015, is currently on hold because of pending court litigation.

More than two dozen states are taking part in the litigation against the Clean Power Plan. In February 2016, the Supreme Court voted 5-4 to grant motions filed by 27 states and various industry groups — including the American Public Power Association — asking to put the Clean Power Plan on hold while the courts review it.

In September, a full "en banc" panel of the U.S. Court of Appeals for the District of Columbia Circuit heard seven hours of oral arguments in the case, *State of West Virginia, et al., v. Environmental Protection Agency*.

If the D.C. Circuit court upholds the Clean Power Plan, then the challengers could, and almost certainly will, ask the Supreme Court to take up the case. If the court strikes the EPA plan down, then states and others who support the Clean Power Plan could, likewise, appeal to the Supreme Court.

As of Jan. 6, the court had not issued a ruling in the case.

### **When will the appeals court rule?**

If the D.C. Circuit court issues its ruling before Inauguration Day, Jan. 20, 2017, and upholds the EPA rule (a possibility that many legal experts consider likely) then the next move would be up to the incoming Trump administration.

The new administration could ask the court to remand the rule back to the EPA. The agency could then re-examine the rule through a new round of rulemaking. While the rulemaking process is time-consuming, the EPA already has a massive amount of information about this topic, so it could issue a new rule relatively quickly — perhaps within a year.

Another approach the incoming administration could use, if the EPA rule is upheld by the courts, would be to decide not to enforce the rule. The new administration also could cut the EPA's budget, making it harder for the agency to enforce all environmental regulations.

### **Section 111(b) litigation**

The EPA's regulations on CO<sub>2</sub> emissions from new, modified and reconstructed coal- and natural gas-fired power plants were promulgated under Section 111(b) of the Clean Air Act. The agency's regulations on CO<sub>2</sub> emissions from existing power plants, on the other hand, were promulgated under a different part of the Clean Air Act: Section 111(d).

The Section 111(b) rule for new power plants also has been challenged in court, and that litigation provides another potential way of defeating the Clean Power Plan for existing power plants. As the *Washington Post* reported last year, the EPA "is required to promulgate standards for new sources before it may impose standards on existing sources under 111(d)."

If a court decision strikes down the Section 111(b) rule, this could cause the rest of the Clean Power Plan to fall.

### **Interpretations could change**

When President-elect Trump takes office, his new administration could decide to revise the EPA rule on existing plants by reversing the current statutory interpretation of the EPA's authority to regulate power plant emissions under Section 111(d) of the Clean Air Act. For example, the new administration could conclude that Section 111(d) prevents the EPA from promulgating emission guidelines for source categories that are already regulated under Section 112 of the Act — one of the arguments put forth by those who are challenging the Clean Power Plan.

Under the new administration, the EPA also could revisit the "best system of emissions reduction, or BSER, methodology that the agency used to establish performance standards based on generation shifting from fossil fuels to renewable resources.

### **NRDC vows to fight**

Final rules such as the Clean Power Plan are not easy to turn around, said David Goldston, the Natural Resources Defense Council's director of government affairs, in a Nov. 22 interview with the American Public Power Association. These rules took years to be proposed, to go through public comments, be revised, and be issued in final form, and need to be modified the same way, he said.

The NRDC "will use the tools the law provides" to defend the Clean Power Plan and other environmental regulations, he said.

“We feel that these environmental safeguards have broad public support,” Goldston said. “A president can’t just snap his fingers and undo them.”

### **Orders, rules, and final rules**

President Obama has issued many executive orders over the last few years. In theory, at least, President-elect Trump could undo Obama’s orders with fresh executive orders of his own.

And in the case of rules that have been proposed but not yet made final, the new administration could simply opt to stop working on them and let them die.

But a final rule, such as the Clean Power Plan, which has gone through an extensive public notice and comment process, is more difficult to roll back.

To undo such a rule, “you have to go through the same process” that was used to create it, said the NRDC’s Goldston. This means proposing a new rule, providing evidence to justify the rule, taking public comments, then revising the draft rule in response to the comments, and so on, until a final rule emerges.

“That’s not an easy process,” Goldston said.

### **Congress could weigh in**

Another possible way to undo the Clean Power Plan would be to have Congress pass legislation, perhaps proposing a new rule to take its place, wrote Thomas A. Lorenzen and Sherrie A. Armstrong in an article published in the November-December 2016 issue of the American Bar Association’s newsletter, Trends. But this would be time-consuming, they said in the article, “Change in administrations, change in course? What the next president could do to vacate or reform Obama’s Clean Power Plan.”

Whatever happens, environmental groups and states supporting the Clean Power Plan are bound to fight any attempt that would weaken the EPA or its rules. And efforts to undo regulations are likely to face significant hurdles both in Congress and in the courts.

### **Attorneys general square off over Clean Power Plan**

Meanwhile, a group of attorneys general from more than a dozen states in late December asked Trump to stand behind the CPP.

In a Dec. 28 letter, a coalition of 14 states, four cities and one county asked the president-elect to “continue the federal government’s defense” of the Clean Power Plan. The letter, led by New York Attorney General Eric Schneiderman, called the EPA rule “a well-considered and critical rule that reasonably limits emissions from fossil-fueled power plants, our nation’s largest source of carbon pollution.”

The letter came two weeks after a different group of attorneys general wrote to Trump’s transition team urging him to scrap the EPA rule. In a Dec. 14 letter led by West Virginia Attorney General Patrick Morrisey and the chief legal officers for more than 20 states, they called on the president-elect

to issue an executive order “on day one” of the new administration to dismantle the Clean Power Plan.

The executive order, they specified, should rescind President Obama’s presidential memorandum directing the EPA to issue the rule, and should instruct the agency to take no further action to enforce it.

### **Oklahoma AG is Trump's choice to head EPA**

In related news, Trump’s transition team confirmed on Dec. 8 that Trump plans to nominate Oklahoma Attorney General Scott Pruitt to lead the EPA.

Pruitt, a Republican, has been at the forefront of lawsuits challenging both the Clean Power Plan and the agency’s “Waters of the United States” rule.

The EPA administrator is one of several government positions that has the status of cabinet rank.

### **Details on Trump cabinet picks**

Trump has nominated the following individuals for his cabinet (as of Jan. 6, 2017):

**Secretary of Energy:** Rick Perry, the former governor of Texas. Perry, who was elected as the governor of Texas in 2002, 2006, and 2010, is the longest-serving governor in Texas state history. During his time as governor, he was a champion for fossil fuels in the oil-rich state and also oversaw a major expansion of wind capacity in Texas.

**Secretary of the Interior:** Rep. Ryan Zinke, R-Mont. Zinke has served on the House Committee on Armed Services and the Committee on Natural Resources.

**Secretary of State:** Rex Tillerson, former chairman and CEO of energy giant Exxon Mobil.

**Secretary of the Treasury:** Steve Mnuchin, founder, co-CEO and chairman of Dune Capital Management, an investment firm specializing in public equity markets, real estate and the entertainment industry.

**Secretary of Defense:** James Mattis, a retired U.S. Marine Corps general. Mattis became Commander of U.S. Central Command in 2010 and directed operations across the Middle East before retiring in 2013.

**Attorney General:** Sen. Jeff Sessions, R-Ala. Sessions was elected Alabama Attorney General in 1995, serving as the state’s chief legal officer until 1997, when he entered the U.S. Senate.

**Secretary of Commerce:** Wilbur Ross. In 2000, Ross started the investment firm WL Ross & Co.

**Secretary of Labor:** Andy Puzder, CEO of CKE Restaurants.

**Secretary of Health and Human Services:** U.S. Rep. Tom Price, R-Ga. Price was first elected to represent Georgia’s 6th district in November 2004. He serves on the House Committee on Ways and Means and in the 114th Congress, Price was named Chair of the House Committee on the Budget.

**Secretary of Housing and Urban Development:** Dr. Ben Carson. Carson became the director of pediatric neurosurgery at Johns Hopkins Hospital at age 33 and earned fame for his groundbreaking

work separating conjoined twins. He was a candidate for the 2016 Republican presidential nomination.

**Secretary of Transportation:** Elaine Chao. Chao served as the U. S. Secretary of Labor from 2001–2009. Prior to the Department of Labor, Chao was president and CEO of United Way of America.

**Secretary of Education:** Betsy DeVos. DeVos is chairman of the American Federation for Children.

**Secretary of Homeland Security:** General John Kelly. As Commander of U.S. Southern Command, Kelly oversaw U.S. military operations in Central and South America and the Caribbean.

As of mid-January, Trump had yet to formally name his choices for Secretary of Agriculture or Secretary of Veterans Affairs.