

Clean Power Plan 2016 Outlook: Litigation

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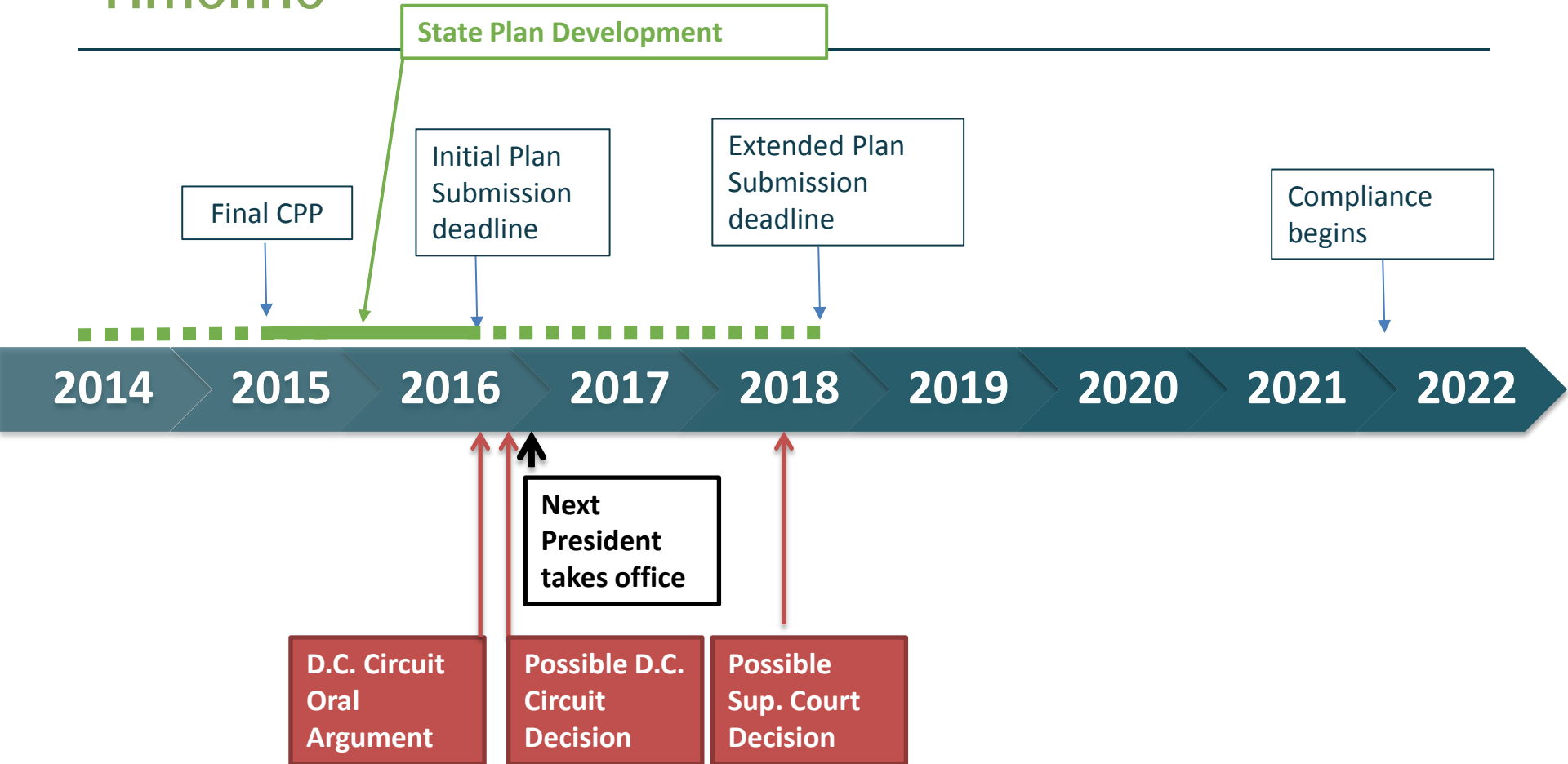
Overview

- All cases consolidated in D.C. Circuit
- *West Virginia v. EPA* (Clean Power Plan)
- *North Dakota v. EPA* (Carbon Pollution Standard)
- Numerous parties
 - 27 states opposing
 - 19 states supporting

January 21 Order

- Denied motions for stay
- Outlined expedited schedule
 - Proposed briefing schedule due today
 - Final briefs due April 22
 - Oral argument June 2-3
- Implications
 - Rejection of proposal for “split” briefing?
 - Decision likely by September 2016?
 - Supreme Court decision in mid-2018?

Timeline



Panel

Judge Karen LeCraft Henderson

- Nominated (1990) by Pres. George H.W. Bush

Judge Judith W. Rogers

- Nominated (1994) by Pres. Bill Clinton

Judge Sri Srinivasan

- Nominated (2013) by Pres. Barack Obama

Issues in the Litigation

- Constitutional issues
- Section 112 Exclusion
- “Best System of Emission Reduction” determination
- Interaction with Carbon Pollution Standards Rule

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Section 112 Exclusion

- Before 1990
 - Section 111 authorizes regulation of any *pollutant* not regulated under Section 108 or Section 112
- Unreconciled 1990 Amendments to Clean Air Act
 - Senate amendment: preserves status quo
 - House amendment: one reading precludes regulation of *source categories* regulated under Section 112
- 2012: EPA promulgated Section 112 regulation for power plants.
- EPA interpretation
 - Read together, Senate and House amendments do *not* exclude regulation

Section 112 Exclusion Issues

- Two enrolled amendments
 - Unreconciled amendments result in ambiguity – does EPA benefit from deferential standard of review; or
 - Primacy of House amendment
- Meaning of House amendment
 - Ambiguous; or
 - Clearly exclusionary
- Reasonableness of exclusionary interpretation
 - Congress could not have intended to leave gap; or
 - Reasonable in light of 1990 expansion of coverage of Section 112

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Best System of Emission Reduction Determination

- Section 111 authorizes EPA to set standard of performance based on “best system of emission reduction” (BSER) that has been adequately demonstrated.
- CPP BSER is based on emission reductions from:
 - Heat rate improvements at coal-fired power plants
 - Substituting gas-fired generation for coal-fired generation
 - Substituting renewable generation for fossil fuel-fired generation
- CPP authorizes compliance through purchasing of emission reduction credits

Petitioner BSER Arguments

- BSER for standard of performance must be based on *emission performance* not reduced generation (i.e., non-performance)
- BSER has to be achievable through measures *at a* regulated source; yet CPP relies on combinations of actions at multiple plants and also non-regulated plants (renewables).
- Unreasonable for BSER for existing plants to be more stringent than standard for new plants

EPA BSER Arguments

- “System” is an expansive term; CPP interpretation is reasonable given interconnected nature of grid
- The 3 BSER measures are widely deployed for pollution control in the sector
- Limiting BSER to inside-the-fence measures would not be the “best” system
- BSER is achievable by a regulated plant through direct investments or credit purchases
- New source standard is a different type of standard

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Interaction with Carbon Pollution Standards Rule

- Section 111(d) authority to establish standards
 - “for any pollutant to which a standard of performance under [Section 111] would apply if such existing source were a new source.”
 - “New source” defined to include new and modified sources
- Implication:
 - *Authority to regulate under Section 111(d) conditioned on valid Section 111(b) regulation*
- Issue in Carbon Pollution Standards Rule
 - BSER for *new* sources is based on partial carbon capture and sequestration
 - Is CCS “adequately demonstrated”?
 - Is valid BSER for *modified* sources sufficient?

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