

# Clean Power Plan Update

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## ORAL ARGUMENT HIGHLIGHTS



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# Outline

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  - Clean Power Plan Background
  - Clean Air Act (CAA) Sec 112 Exclusion
  - US Court of Appeals for the D.C. Circuit, including history of Clean Power Plan appeals
  - Four Key Cases
- Snapshot of Oral Argument By Issue
  - Non-Sec 112 Issues
  - Section 112
  - Constitutional Issues
  - Record-Based Issues
- Q & A

# Clean Power Plan Background

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- Final Rule adopted Oct. 2015
- Establishes uniform emission limits for existing natural gas and steam electric generating units (“EGUs”) (mostly coal-fired units)
- Best system of emission reductions (“**BSER**”) = 3 “**building blocks**”:
  - 1) Boost heat rate at coal-fired EGUs;
  - 2) Substitute gas- for coal-fired generation; and
  - 3) Substitute new renewable power for fossil fuel-fired EGUs
  - Nos. 2 & 3 above involve “**generation-shifting**”
- Emission reductions phased in annually through 2030.

# Clean Power Plan Background

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- “Standard of performance” is the degree of emission limitation achievable through the application of the [BSER] . . . **adequately demonstrated**”
- Under  $\delta$  111(d)(1), EPA must adopt regulations that “establish[ ] standards for any **existing source** of any air pollutant....”
- $\delta$  111(d)(1) also requires regulations for **State plans** setting standards of performance; EPA plan if no approved State plan

# CAA § 112 Exclusion

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- CAA § 112: EPA must (i) specify major source categories of major sources of listed hazardous air pollutants (HAPs) and (ii) set standards for each source category
  - coal plants are already regulated under § 112.
- § 111(d): requires regulation of dangerous pollutants that are not regulated as criteria pollutants (Sec. 108) or “emitted from a source category which is regulated under” § 112 (HAPs) => Sec 112 Exclusion
- Current § 111(d) based on 1990 House Amendment; Senate Amendment *not* codified.

# CAA § 112 Exclusion

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- Pre-1990 version of § 111(d):  
The Administrator shall prescribe regulations ... under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or **which is not included on a list published under section 7408(a) or 7412(b)(1)(A) of this title ....**
- As codified (based only on **House Amendment**), subsection (i) reads, “which is not included on a list published under section 7408(a) or ~~7412(b)(1)(A)~~ emitted from a source category which is regulated under section 7412 ....”
- **Senate Amendment**: “which is not included on a list published under section 7408(a) or 7412(b) ~~(1)(A)~~”

# CAA § 112 Exclusion

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# US Court of Appeals for the D.C. Circuit

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- Subject to review *only* in D.C. Circuit.
- Heavy regulatory review caseload
- *En banc* argument: before active judges minus Garland, C.J. (recused)





# Course of D.C. Circuit Appeals

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- Appeals filed by 27 states and others; consolidated, numerous interventions on both sides.
- D.C. Cir. denied stay motions, but [Supreme Court](#) granted stay (5-4).
- In May, court sets for appeals for *en banc* hearing on Sept. 27, 2016. Last time: US. v. Microsoft (2001).



# Course of D.C. Circuit Appeals

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- Format for oral argument, with times allocated to each issue:
  - I. **Statutory issues** other than  $\delta$  112
  - II.  $\delta$  112
  - III. **Constitutional Issues**
  - IV. **Notice Issues**
  - V. **Record-Based Issues**
- 1 representative from designated aligned parties, and normal sequence: (petrs) opening—response—rebuttal.

# Key Case Law

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- UARG v. EPA ("UARG"): Major Questions/Clear Statement Rule.
- AEP v. Conn. ("AEP"): No federal common-law right to seek GHG emission reductions; & fn. 7 (EPA may not use 7411(d) if "existing stationary sources of the pollutant in question are regulated under the [NAAQS]" or the HAPS program (Sec 7412)).
- Massachusetts v. EPA ("Mass."): CAA requires regulation of mobile-source GHG emissions upon *endangerment* finding (which EPA made in response (2009)).
- Chevron v. NRDC ("Chevron"): Cts defer to administering agency's reasonable construction of an ambiguous statute.



# Non- $\delta$ 112 Issues

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- Petrs: Rule is **transformative** but lacks clear congressional authorization
- Resps: CAA confers necessary authority, as [AEP](#) confirms.
- Ct: Is rule truly **transformative**?
  - *For petrs.*— Just industry trend? History of regulation and [Mass.](#) and related cases?
  - *For resps.*— Authority to set limits unachievable by individual EGUs? Who takes care of those left behind? Didn't Administrator say Rule is **transformative**?

# Non- $\delta$ 112 Issues

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Petrs:  $\delta$  111(d) doesn't allow "beyond the fence line" regulation).

Resps: **Generation-shifting** = BSER

Ct: Scope of  $\delta$  111(d)?

- *For petrs.* – Like technology-forcing? **Generation-shifting** track normal grid operation? Doesn't regulation often require "subsidy" to other industries? Congress didn't want public to subsidize dirty sources?
- *For resps.* – Could limit be set at "0"? Can any individual source comply with emission standards? Doesn't **generation-shifting** entail subsidizing competitors? Other examples?

# § 112

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- Petrs: § 111(d) as codified is unambiguous and bars regulation of existing EGUs (since regulated first under § 112); only **1990 House Am.** should be given effect.
- Resps: **House Am.** is ambiguous, and EPA's "middle ground" interpretation is reasonable and entitled to deference.
- Ct: How should § 111(d) be construed? Which version?
  - *For petrs.*: Why ok if § 111(d) regulation adopted first? Doesn't exclusion bar double regulation of *same* pollutant? Is § 111(d) in fact *inclusive* rather than *exclusive*? Why allow GHG regulation of *new* EGUs but not existing units? How reconcile AEP?
  - *For resps.*: How consistent with "emitted from a source category"? Senate amendment? Other § 111(d) regulation of sources already subject to § 112 reg.?

# Constitutional Issues

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- Petrs: Rule unlawfully “commandeers” States.
- Resps: Rule regulates individual sources, not States.
- Ct: More required of States than under other regulations?
  - *For petrs.*: Extraordinary actions required? Is ADA be unconstitutional? Integrated, interstate grid?
  - *For resps.*: Requires restructuring of energy supply? Need clear Congressional authorization? States have to ensure reliability?

# Record-Based Issues

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- Petrs: None of **Building Blocks 1-3** was adequately demonstrated, no consideration of reliability, infrastructure or State-specific variables.
- Resps: Emission rates are achievable, incl. through trading, and rule includes long compliance deadline and is conservative and flexible.
- Ct: Challenges ripe? How else could they be raised?
  - *For petrs.*: Aren't predictive judgments ok the first time something is regulated? Can sources purchase ERCs from units in another State? Interstate cooperation? Generation shifting as "business as usual"?
  - *For resps.*: Will EPA work with States? What EPA actions are judicially reviewable? Can mass-based trade with rate-based States?



# Q & A

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