



# CLEAN POWER PLAN – AIR AND WASTE MANAGEMENT CONFERENCE

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# On August 3, 2015 EPA Issued

- NSPS 111 (b) standards for new, modified and reconstructed electric utility units
- NSPS 111 (d) for existing electric generating units (approximately 4.3 million comments)
- A proposed Federal Plan for 111 (d) implementation
- A proposed Clean Energy Incentive Program

## Section 111(d)

- Seldom used Section of the CAA New Source Performance Standards for Existing Sources
- They are “Guidelines” for the States to develop plans for EPA approval
- If States do not prepare a plan a Federal Plan will be developed
- Seeking 32% reduction in CO2 emissions from 2005 levels from the electric utility industry group

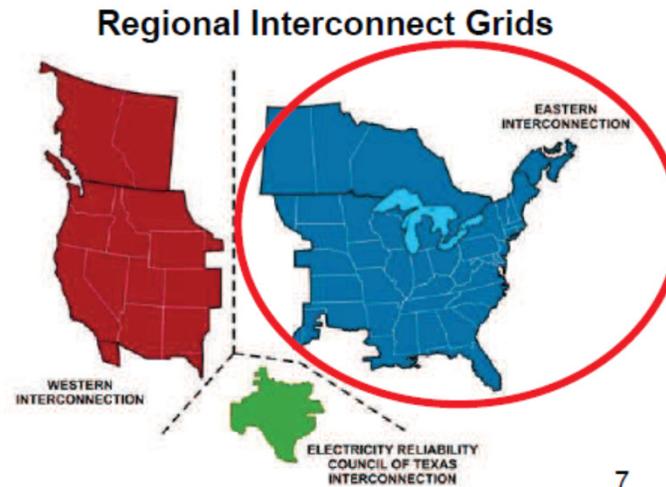
# Final vs Proposal

- Compliance time frame moved from 2020 to 2022
- Changes to the Building Blocks that must be part of State Plans
- State “Target” Goals have changed
- Deadline for state plans in Sept. 2016 with option for 2-year extension
- “Trading ready” approaches
- Clean Energy Incentive Program provides incentives for early action

# Goal Computation

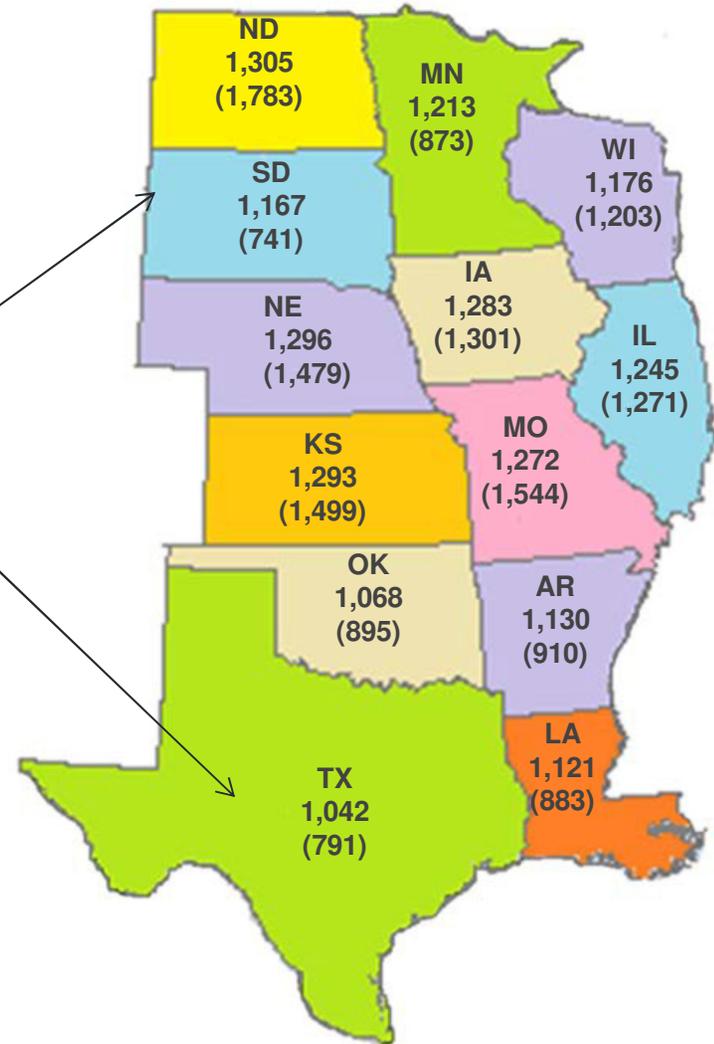
- EPA divided the country into three regional interconnects and applied the best system of emission reduction (BSER) to each
- The goal rates are as follows and those can be translated to mass-based. States choose between Rate or Mass.

EGU Type	2030 Rate (lbs CO <sub>2</sub> /MWh)
Fossil Steam	1,305
NGCC	771



# Mid-U.S. 2030 CPP Rate Goals Final v. Proposed

- Mid-U.S. Range (ND and TX)
- Final Rule Range: (1,042 – 1,305)
- Note: All goals are listed in units of lbs CO<sub>2</sub>/MWh



# Building Blocks

- Heat rate improvements – Change from 6% to 4.3%
- Re-dispatch to gas-fired units from proposed 70% to final 75% of net summer capacity
- Increase RE in place of coal - No nuclear
- Demand side energy efficiency removed
- But the States can include other measures in SIPs if they want



LESS



MORE



# Proposed Federal Plan & CEIP

- **Federal Plan** - Two Trading Programs – (1) a rate-based program or (2) a mass-based program
- May be used as a model rule for States to use but States are not required to use
- **CEIP** – Voluntary program that would award States CEIP allowances/ERCs for eligible projects and EPA matches
- Only Solar and Wind/EE in low-income communities
- For additional generation in 2020-2021

## Race to the Courthouse

- 27 States lead by WV and TX file suit to Challenge the CPP (over 150 parties total)
- This includes Kansas, Missouri and Nebraska
- 18 States file in support of CPP lead by NC and CA
- Generally falls along party lines
- Suits filed even before the rule was published
- All lawsuits consolidated at the D.C. Circuit





# Key Legal Challenges

Utilities are already regulated under §112.

- EPA cannot regulate sources under § 111(d) if they are subject to regulation under § 112 (Hazardous Air Pollutant Program)
- Electric utilities are subject to regulation under §112 for emissions of mercury (the “MATS” rule)
- EPA argues that two versions were enacted and as such a version that DOES NOT appear in 111(d) should create ambiguity and Chevron deference
- EPA argues that the CAA allows regulation under §111(d) of a different air pollutant as opposed to the broader “source category”



## EPA's Building Blocks are not BSER

- CAA only allows imposition of “Best System of Emission Reduction” (BSER) at a source
- The proposal is inconsistent with the CAA because it includes more than technological and operational measures to reduce emissions at an affected facility
- EPA's “outside the fence” and beyond the source category measures are unprecedented and are not permissible
- The recent Supreme Court case in *UARG* indicates that without clear statutory authorization EPA's transformative expansion of how it proposes to regulate sources under § 111(d) will not be upheld.



# Federalism Issues

- Unlike 111 (b), EPA is required by the terms of 111 (d) to allow States to develop BSER and only if they do not, can EPA regulate
- EPA cannot side step this mandate by calling the State percentage reduction goals “guidelines”
- EPA clearly states in the proposal that these are mandates that the States cannot change
- If finalized, EPA will usurp the ability of States to consider “remaining useful life” and other source-specific factors contemplated by 111 (d)

# Other Legal Challenges

- Drastic changes from proposed to final rule requires notice and comment
- 111(d) is more stringent than 111(b)
- Can be subject to 111(b) and (d) – CAA does not allow
- Can be subject to 111(d) and NSR
- Stepping into FERC Jurisdiction
- The Standards are not attainable and are therefore arbitrary and capricious and contrary to law

# Supreme Court Issues a Stay

- Elements that petitioner must establish:
  - Irreparable and imminent harm
  - Likely to succeed on the merits
  - The public interest favors granting a stay
- The D.C. Circuit declines to issue a stay
- In an unprecedented move the Supreme Court in a 5-4 decision issued a stay of the rule
- No analysis of the elements



# What Does the Stay Mean

- EPA cannot enforce the CPP or approve State plans until the case is heard and decided on the merits
- It does not mean that the petitioners will succeed on the merits
- It does not mean that the deadlines will be changed if upheld
- EPA will still work with States that plan to proceed
- EPA will still finalize the Federal Plan and CEIP



## And Another Development

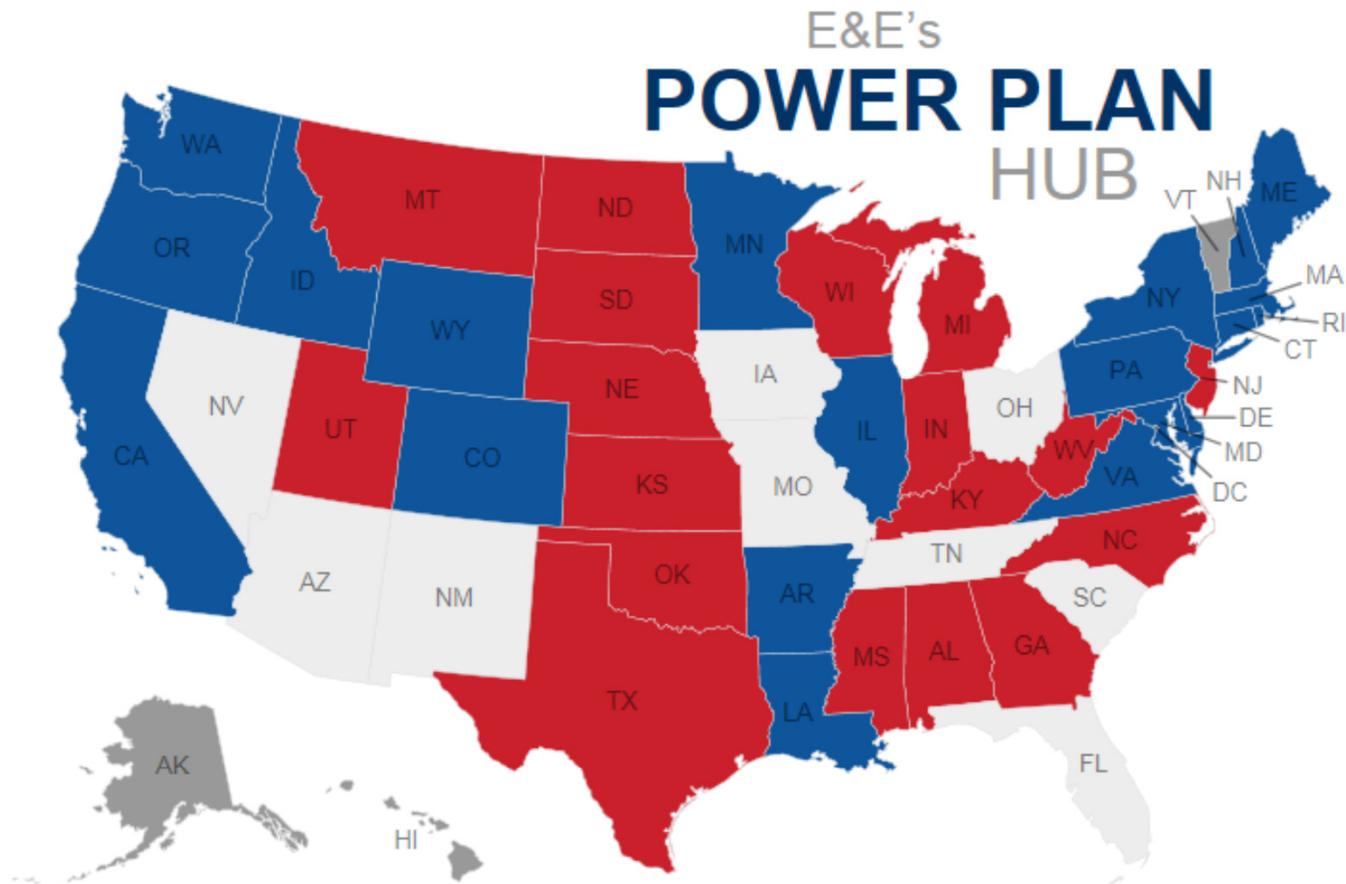
- Just four days after the Supreme Court Issues the Stay Justice Scalia Dies – He voted for the Stay
- Possibility that the Court could split 4-4 on the merits
- If so, all action could be at the D.C. Circuit
- Opening Briefs filed last Friday and Oral argument scheduled in early June (June 2<sup>nd</sup>)
- Panel of three judges – two Democrat Appointees and one Republican
- One of the judges is rumored to be a potential Supreme Court nominee



# What is a State to Do?

- States have two choices:
- Continue as if the stay did not occur
- Put planning on hold
- 18 States have suspended planning work (including Kansas and Nebraska)
- 9 are assessing (including Missouri and Iowa)
- Two bills have been introduced in MO that would restrict MDNR
- 20 States are continuing the planning process

# State Responses



## Supreme Court Stay Response



# Court Schedule

- D.C. Circuit CPP Schedule is on a fast track
- Opening Briefs filed last Friday
- Oral argument scheduled for June 2<sup>nd</sup>
- Decision late summer/early fall
- Supreme Court decision in 2017



# What if the Rule is Vacated?

- If the Court agrees with the Section 112 argument the rule would be vacated
- BUT – The Massachusetts case requires EPA to regulate GHGs
- What other CAA programs could be used?
- NAAQS, Section 112, Section 115 – Others?
- Modify the CAA?

## Any Questions?



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