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The Many Possible Futures for the Regulation of Greenhouse Gas Emissions
By Christina I. Reichert

A discussion of the relationship between the outcome of the Clean Power Plan litigation and future regulations of greenhouse gas emissions.

Some parties are saying that the unusual decision by the U.S. Supreme Court to delay an important greenhouse gas regulation does not bode well for the future of the rule. But how does the future of this particular regulation, the Clean Power Plan, affect the future of climate policy in general? This article focuses on how three possible outcomes of the Clean Power Plan litigation might affect future climate policy.

The Clean Power Plan’s Uncertain Future

As part of the United States’ plan to address climate change, the U.S. Environmental Protection Agency (“EPA”) released the Clean Power Plan, which establishes the first federal limits on greenhouse gas emissions for the existing fleet of fossil fuel–fired power plants. For a number of reasons, the Clean Power Plan will affect how state regulators decide to meet the challenges facing the electricity sector. However, this rule is currently being litigated, thus creating uncertainty about whether the rule will survive the lawsuit in whole or in part. And some groups have implied that the Supreme Court’s decision to grant a stay of the rule casts a shadow on the survival of the Clean Power Plan.

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1 Order in Pending Case, West Virginia v. EPA, 577 U.S. (Feb. 9, 2016) (No. 15A773).

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Nevertheless, climate change policy will likely move forward regardless of whether the Clean Power Plan survives in whole or in part. As Michael B. Gerrard recently noted, “[T]he Clean Power Plan is the biggest game in town in terms of achieving [reductions in greenhouse gas emissions], [but] it is by no means the only game in town.” The United States has other options for regulating greenhouse gas emissions from the power sector, as well as other sectors of the economy. This article discusses how three possible outcomes of the Clean Power Plan litigation affect future climate policy.

**Future (1): Incremental Climate Policy**

First, the Supreme Court may uphold the Clean Power Plan as a whole or with minor modifications. This future does not necessarily curtail the uncertainty surrounding future climate policy because even if the rule survives, the EPA may take further action under the Clean Air Act to regulate greenhouse gas emissions from other parts of the energy sector or from other sectors of the economy. Further, Congress could always pass comprehensive legislation to address climate change.

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6 The Supreme Court has explained repeatedly that the EPA has the authority to regulate greenhouse gases under the Clean Air Act. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Court determined that greenhouse gases fit well within the Act’s “capacious definition of ‘air pollutant,’” and said that the EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles if the agency found that the emissions caused or contributed to harmful air pollution. *Id.* at 532–33. Then, in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011), the Court reaffirmed this holding: “The [Clean Air] Act itself . . . provides a means to seek limits on emissions of carbon dioxide from domestic power plants . . . . We see no room for a parallel track.” *Id.* at 2537 (“Once EPA lists a category, the agency must establish standards of performance for emission of pollutants from new or modified sources within that category. And, most relevant here, [Section 111(d)] then requires regulation of existing sources within the same category.”) (internal citations omitted). However, in a footnote, the Court cabin's its discussion of the EPA’s authority to regulate existing sources of greenhouse gas emissions under Section 111(d). *Id.* at 2538 (“There is an exception: EPA may not employ [Section 111(d)] if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, [Sections 108-110], or the ‘hazardous air pollutants’ program, [Section 112].”).


9 The Supreme Court will most likely provide the final decision in the Clean Power Plan litigation, as indicated by its decision to stay the rule. However, depending on the outcome of the 2016 presidential election, the incoming president could alter the outcome of the rule as well, both in terms of direct action affecting the rule and in deciding Justice Scalia’s replacement. Further, a challenge to the emissions standards for new and modified sources under Section 111(b) could affect the Clean Power Plan’s future: rules promulgated under Section 111(d) depend on a valid regulation of the same category under Section 111(b).


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Future (2): Regulating “Inside the Fence Line”

Second, the Supreme Court may throw out parts of the Clean Power Plan, while upholding some restrictions of greenhouse gas emissions from existing power plants. Specifically, the Court could agree with the challengers’ argument that the EPA may not use Section 111(d) to regulate “outside the fence line.” 11 This argument focuses on the language from the Clean Air Act defining the “best system of emission reduction.” 12 The best system of emission reduction in the Clean Power Plan includes three building blocks: (1) improved efficiency of existing coal plants (i.e., heat rate improvements); (2) increasing generation at existing natural gas plants; and (3) shifting generation to renewable energy sources. The challengers argue that the EPA does not have the authority to use the second and third building blocks because these two building blocks do not deal with actions occurring at the power plant itself. If the Court agrees with the challengers, then it would only allow the EPA to calculate achievable reductions of greenhouse gas emissions using “inside the fence line” methods (e.g., co-firing or carbon capture and storage).

In this possible future, the EPA may look for other building blocks that would comply with the Court’s “inside the fence line” reasoning. The agency may also look to other sections of the Clean Air Act for the authority to regulate greenhouse gas emissions from existing power plants and beyond. And, of course, Congress could still step in to put a price on greenhouse gas emissions.

Future (3): Back to the (Clean Air Act) Drawing Board

Third, the Supreme Court could completely invalidate the rule. This decision would most likely result from the claim that the EPA may not regulate greenhouse gas emissions from existing power plants because the agency already regulates hazardous air pollutant emissions from the same sources. This argument arises largely because of the two versions of Section 111(d) in the U.S. Statutes at Large: one from the U.S. House of Representatives and one from the U.S. Senate. 13 The House version includes language that a court could interpret as restricting the EPA’s ability to regulate an emission source that the agency already regulates under Section 112 (the hazardous air pollution program). Thus, the challengers argue that because the EPA currently regulates mercury emissions from existing power plants under Section 112, 14 the agency cannot also use Section 111(d) to regulate greenhouse gas emissions from the same

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11 An “inside the fence line” regulation would include an action that an owner or operator could take at the power plant itself (e.g., technology installed on the smokestack).
12 Clean Air Act Amendment of 1990 § 111(a)(1), 42 U.S.C. § 7411(a)(1) (2012) (“[T]he degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.”) (emphasis added).

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power plants. If the Court agrees with this argument, then it would wholly invalidate the Clean Power Plan.

In response to this decision, the EPA may go back to the drawing board and look for authority in another section of the Clean Air Act. Further, similar to the possible futures outlined above, Congress could adopt comprehensive climate legislation and put a price on carbon.

**Conclusion**

The futures of the Clean Power Plan and climate change policy in general are unsettled. However, although related, the relationship between the rule and the widespread policy is complicated. In all three futures outlined above, regardless of what happens to the Clean Power Plan, the EPA could introduce further restrictions for greenhouse gas emissions, and Congress could create comprehensive climate policy setting a price for carbon.

Thus, while the outcome of the Clean Power Plan litigation may affect the form of one regulation of greenhouse gas emissions, it does not dictate the future of climate change policy as a whole.

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**EPA’s Fiscal Year 2015 Annual Enforcement Results: Focus on Complex, High Impact Cases Yields Results**  
*By Lisa Lowry*

An overview of the EPA’s 2015 annual enforcement results.

EPA’s 2015 annual enforcement results are out:

- EPA initiated 2,380 civil enforcement cases in 2015, up from 2,278 in 2014, but more than 30% below 2010 numbers. EPA attributes this decline to “the continued pursu[it of] larger more complex, risk-based enforcement cases.”

- EPA initiated 213 criminal investigations in 2015—the lowest number in 6 years, as compared with 346 investigations initiated in 2010, 371 in 2011, 320 in 2012, 297 in 2013, and 280 in 2014. EPA attributes this decline to its focus on “complex cases that involve a serious threat to human health and the environment or that undermine program integrity.”

- EPA conducted 15,400 federal inspections and evaluations in 2015, 200 fewer than in 2014, and 25 percent below 2010 numbers. EPA attributes this decline to budget
constraints, though “EPA continues to pursue additional means of gathering information about facility compliance, to supplement [] on the ground inspections.”

EPA has opted to focus on the “largest, most complex” cases, given budget constraints in recent years. Two enforcement actions are responsible for a major portion of the agency’s 2015 results. The first of these cases was a major Clean Air Act settlement with Hyundai and Kia to resolve allegations arising out of automotive emissions certifications. This case resulted in a $100 million penalty, amounting to nearly one half of the total federal civil and administrative penalties collected in 2015. The second case concluded with a plea agreement with three subsidiaries of Duke Energy Corporation in connection with the 2014 North Carolina coal ash spill. The agreement resulted in a $68 million criminal fine; an agreement to undertake $34 million in environmental projects and land conservation; and a commitment to meet legal obligations to remediate coal ash compounds that will cost approximately $3.4 billion.

EPA has increasingly been forced to do more with less. Over the past 5 years, EPA has endured approximately $2.2 billion in cuts, a 21 percent reduction in its budget since fiscal year 2010. Looking forward into 2016, financial pressure remains. While EPA dodged proposed budget cuts that would have slashed its budget by $700 million in 2016, EPA’s funding for the 2016 fiscal year will remain unchanged from 2015, maintaining EPA’s staffing at the lowest level since 1989.

EPA aims to sustain its current enforcement strategy in 2016. The agency has pledged that its “top enforcement priority will be pursuing higher impact cases, including large, complex cases that require significant investment and a long-term commitment.” In recognition of the “sheer

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2 EPA, FY 2014-2018 EPA Strategic Plan 38 (2014) (“EPA’s top enforcement priority will be pursuing large, complex cases that require significant investment and a long-term commitment. Our commitment to the largest most complex cases that have the biggest impact necessarily means that we will be doing fewer cases overall . . . . This strategy will also help maintain the enforcement program’s effectiveness given limited resources.”), available at http://www.epa.gov/planandbudget/strategicplan.  

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number of regulated facilities, the contributions of large numbers of smaller sources to environmental problems, and limited resources," the agency proposes to supplement its traditional single facility inspection and enforcement approach by continuing to implement "new and innovative methods to reduce pollution and increase compliance nationwide over the long term," primarily through its Next Generation Compliance program. In a December 16, 2015 press release, Cynthia Giles, Assistant Administrator for EPA’s Office of Enforcement and Compliance Assurance, attributed some of EPA’s recent successes to this “Next-Gen” program: “These cases are putting cutting edge tools to work, and using innovative approaches to reduce pollution. Through another strong year in enforcement, we are implementing America’s environmental laws and delivering on EPA’s mission.”

The agency, however, has already been confronted with a number of challenges leading into early 2016: EPA is under increased public scrutiny as a result of the Gold King Mine release near Silverton, Colorado, and the Flint, Michigan water crisis. The U.S. Supreme Court also stayed the agency’s rulemaking on the Clean Power Plan, a central component of the agency’s 2016 agenda. The unexpected death of Justice Scalia throws another (although possibly favorable) wrench into the mix and some anticipate that this vacancy could generate more ambiguity over the Clean Power Plan case, as well as other climate, clean energy, and environmental cases on the Court’s docket.

If the last several years are any indication, observers can expect 2016 to offer another twelve months of high-profile EPA enforcement and regulatory efforts—some of which might find their way to the high court.

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A Water Crisis in Flint, Michigan
By Ashley Boaz

An outline of the water contamination in Flint, Michigan.

The Timeline

Flint, Michigan, the seventh largest city in Michigan and the former automobile-manufacturing powerhouse, has 100,000 poor and mostly black residents. Due to the decline in the auto industry over the past three decades, many industrial plants and people have left the city. Consequently, in 2011, the governor appointed four financial managers to control the budget during this financial state of emergency.

In April 2014, one of these managers decided to save money by switching Flint’s water supply from the Detroit water system to the Flint River. The manager believed that they would save the city five million dollars. In the meantime, the state would build a new state-run supply line to Lake Huron, estimated to be completed in two years.

However, troubles began bubbling to the surface in the summer of 2014 when the state began issuing boil water advisories. At this time, fecal coliform bacteria appeared in the water, and officials added extra chlorine to the water to solve the problem. The chlorine caused the water to become highly corrosive, and the officials did not add any anti-corrosive solutions into the water. The corrosive water caused lead to leach from the pipes within the city.

Governor Rick Snyder finally acknowledged the city’s problems in September of 2015. At this time, the lead poisoning became clear when environmental analysts found lead in the water and doctors found lead in the blood of some children. In October, the city reverted back to using water from Detroit’s water system, but the damage to the lead pipes within the city was already

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3 Id.
5 Kozacek, supra note 4.
6 Ganim & Tran, supra note 2.
7 Kozacek, supra note 4.
9 Id.
10 Ganim & Tran, supra note 2.
11 Kozacek, supra note 4.
12 Ganim & Tran, supra note 2.

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The water from the lake continued to leach lead from the pipes despite the fact that officials added phosphates to the water to rebuild a protective coating inside the pipes.

**The Ramifications**

Since August 2015, as a result of the water crisis, the state has handed out 210,000 filters and 29,000 cases of bottled water. In November, several Flint citizens filed a class action suit that alleges that the Michigan Department of Environmental Quality (MDEQ) is to blame.

In December 2015, Governor Snyder apologized for his actions, as he is currently facing protests, lawsuits, and calls for his resignation. He promised to seek twenty-eight million dollars in state funds to provide more bottled water, health care for affected children in the city, and improvements to the city’s troubled water infrastructure. On the same day, he accepted the resignation of Dan Wyatt, the director of the MDEQ. The MDEQ acknowledged that it should have used an anti-corrosive in the water taken from the Flint River after the chlorine was added.

On Thursday, January 14, 2016, Governor Snyder declared a state of emergency, requested federal action, and summoned the National Guard. Two days later, President Barack Obama declared a state of emergency, which allowed the Federal Emergency Management Agency to provide water, filters, cartridges, and other items for ninety days. However, the President could not declare a major disaster since the situation was man-made.

On January 15, the U.S. Environmental Protection Agency (EPA) and the U.S. Attorney in Michigan began investigating possible violations of federal law.

The EPA said on January 19 that the agency worked repeatedly to communicate the steps the state needed to treat properly the water, but the state did not take the actions quickly enough. This same day, President Obama met with Flint Mayor Karen Weaver to discuss the issues.

On Thursday, January 21, 2016, Susan Hedman, the head of the Midwest region of the EPA resigned from her position. She is the second official to resign since the crisis unfolded.

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13 Id.
14 Kozacek, supra note 4.
15 Ganim & Tran, supra note 2.
16 Id.
17 Id.
18 Kozacek, supra note 4.
19 Id.
20 Atkinson et al., supra note 4.
21 Id.
23 Southall, supra note 1.
24 Atkinson et al., supra note 4; Ganim & Tran, supra note 2.
26 Id.
27 © 2016 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
A Global Problem

The situation in Flint, Michigan, is not unique. There are many other instances of unsafe drinking-water supplies in the United States and around the world.\(^29\) In the United States, the problem stems from aging infrastructure and municipalities’ inability to pay for repairs.\(^29\) The EPA estimates that restoring and expanding water systems over the next twenty-five years could cost one billion dollars.\(^30\)

Environmental Racism?

Although the drinking water crisis in Flint, Michigan, has its roots in financial mismanagement and a disregard of safety regulations, several civil rights activists believe it is an example of environmental racism.\(^31\) This term refers to the disproportionate exposure of blacks to polluted air, water, and soil.\(^32\) Experts consider environmental racism to be the result of poverty and segregation, which has caused many blacks to live in industrialized and dilapidated environments.\(^33\) Flint is nearly 57% black and 42% white.\(^34\)

A Final Solution

The answer to Flint’s water crisis will be very costly, to the tune of billions of dollars.\(^35\) It will include cleaning up the water, intensive infrastructure upgrades to rebuild the city’s entire water system, along with legal fees and settlements and in-depth investigations to prevent it from happening again.\(^36\) There are also the health care issues that the state needs to address with possibly brain-damaged children and sickened adults who have consumed the dangerously high levels of lead.\(^37\) Currently, it is too early to tell how much damage the lead has already done.\(^38\)

As a start, President Obama stated that by the end of January 2016, eighty million dollars will go to Michigan so that it can improve its water system.\(^39\) This money is part of a financial package

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\(^{28}\) Kozacek, *supra* note 4.

\(^{29}\) Id.

\(^{30}\) Id.


\(^{32}\) Id.

\(^{33}\) Id.


\(^{36}\) Id.

\(^{37}\) Id.

\(^{38}\) Id.


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Congress passed in December that will help several other local governments make improvements.40

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Ashley Boaz is a third-year student at the University of Richmond School of Law, with an expected graduation date of May 2016.

40 Id.
PARK PHOTOGRAPH SUBMISSIONS

By Cortney Tyson
Lake Johnson Park in North Carolina

By Vickie Adams
Top of the Beehive Trail in Acadia National Park in Maine
By Lisa Lowry
*Bryce Canyon National Park in Utah*

By Alexandra Campbell-Ferrari
*Dumbarton Oaks Park in Washington, D.C.*
RECENT LEGAL DEVELOPMENTS

1. The Supreme Court granted a stay of the Environmental Protection Agency’s Clean Power Plan. Earlier this year, the U.S. Court of Appeals for the District of Columbia Circuit denied a similar request to delay the implementation of the rule.


3. The Supreme Court of the United States held that the Federal Energy Regulatory Commission had the authority to regulate demand response and upheld the agency’s Order No. 745.

NEWS AND ANNOUNCEMENTS

Solicitation for Articles for Co-Sponsored Spring Newsletter

We are excited to announce that our next Newsletter will be a joint-publication with the ABA SEER Special Committee on Young Lawyers. If you are interested in writing an article on an environmental, energy, or resources issue, please submit an article by March 5, 2016, to acampbellferrari@gmail.com. Or if you are feeling more artistic, please submit a cartoon or a photo (taken by you) of your favorite animal. We will publish our Spring Newsletter in late April 2016.

Teleconference: Scientific Experts in Environmental Litigation

The ABA SEER Environmental Litigation and Toxic Torts Committee and Environmental Transactions and Brownfields Committee will host a teleconference about scientific experts in environmental litigation. Before incurring the expense of retaining a scientific expert to collect and analyze data, it is paramount that you have a firm understanding of the scientific methods such experts will rely upon to opine, among other things, how and when a discharge occurred and the extent of the impact. Join esteemed faculty as they identify and explain the various scientific methods available to help you further your cause, factors to consider in deciding whether to retain a scientific expert, and whether such experts have survived Daubert challenges. Speakers will also respond to questions from the audience. Register here.

Social Media Team Update

The Social Media Team is pleased to announce the new Social Media Policy! The purpose of this policy is to provide direction on appropriate and effective ways to use social media on behalf of the ABA YLD when delivering content, facilitating engagement, and communicating with both members and non-members. The policy includes such information as sample posts,

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proper use of our social media channels, and of course directions for using the online spreadsheet we set up to capture posts from across the division. The new policy can be found at:

http://www.americanbar.org/content/dam/aba/administrative/young_lawyers/leadership_portal/social_media_policy.authcheckdam.pdf

Disaster Legal Services Team

The Disaster Legal Services (“DLS”) team is currently implementing DLS in Mississippi, Texas, South Carolina, and California. Earlier this year, we implemented DLS in Texas, Wyoming, Saipan, and Kentucky. We expect this to be a busy year on the DLS front, as the National Aeronautics and Space Administration predicts that this year’s El Nino is going to be the worst ever.

The DLS team encourages all young lawyers to be prepared in the event of an emergency or disaster, and to coordinate with your local or state bar association to help disaster survivors.

More information about the DLS program can be found on our website.

National Conferences Team Update

In addition to the regular activities of the ABA YLD National Conferences Team during the ABA Midyear meeting, the Team is putting together a social media photo scavenger hunt. New attendees will have the opportunity to be a part of a scavenger hunt that allows them to meet seven YLD leaders, receive their business cards, and also take a selfie and post it to their social media accounts with the hashtag #YLDmidyear16. The first person to have a selfie with each YLD leader and receive their signature on a business card will receive a generous gift from the ABA YLD National Conferences Team.

Here is information about the upcoming YLD Spring Conference:

YLD Spring Conference
May 5–7, 2016
St. Louis, MO

Member Services Project Update

The Member Services Project is proud to launch the Young Lawyer Toolkit at the ABA Midyear Meeting. The Toolkit is a curated collection of ebooks, tutorials, and online resources intended to be a one-stop-shop for lawyers in their first years of practice. The Toolkit contains resources covering trial practice, the business of law, going solo/opening a firm, financial wellness, diversity and inclusion, and first-year lawyers. At launch, the Toolkit will include materials for lawyers with one to three years of experience, with materials for more experienced lawyers to come.

To access the Toolkit, please visit http://www.ambar.org/younglawyertoolkit. The Young Lawyer Toolkit is free for ABA Members.

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