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**EPA's CLEAN POWER PLAN
“WANTED: DEAD OR ALIVE”
Context and Prognosis**

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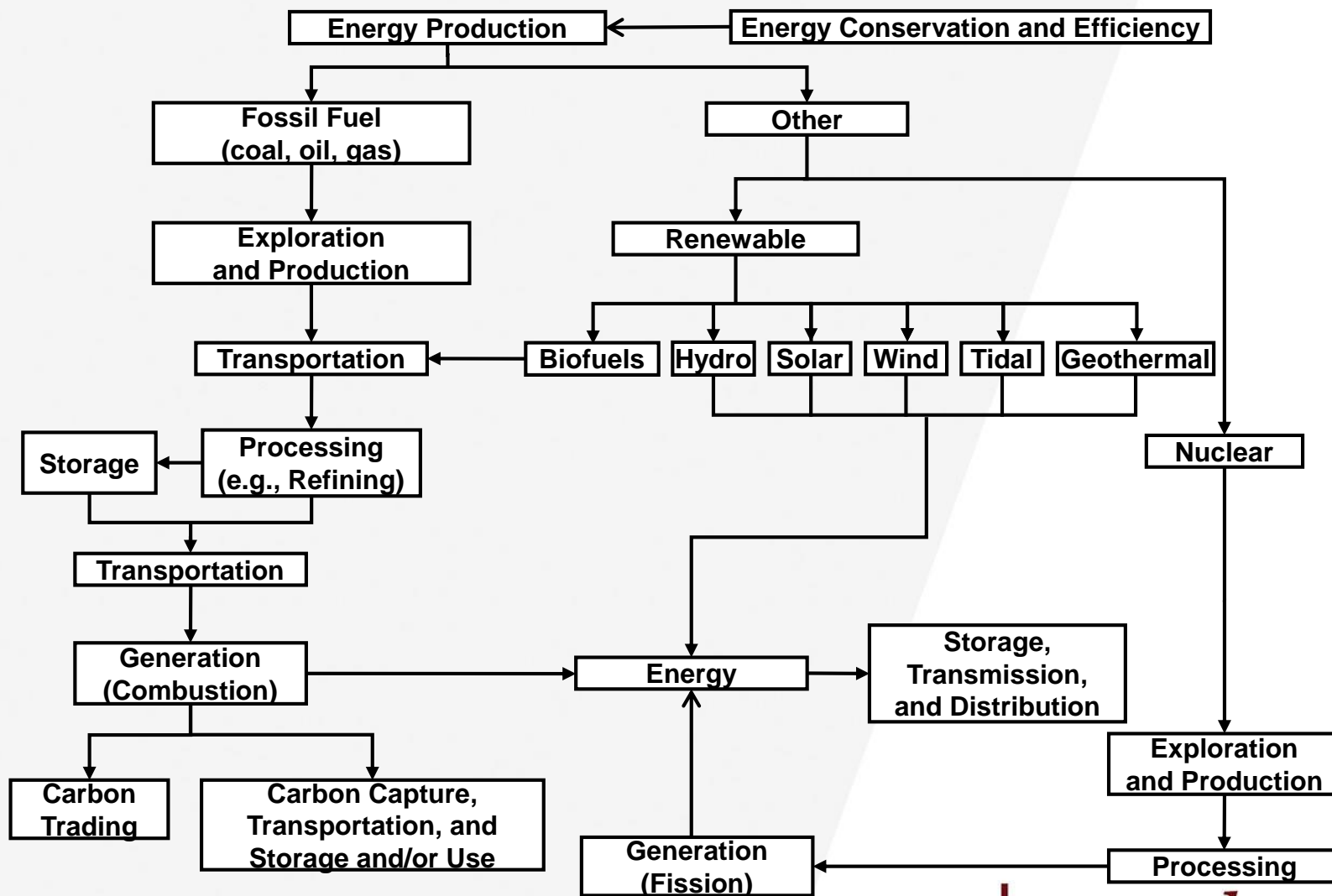
EPA'S CLEAN POWER PLAN

Context and Prognosis

- Context
 - Factual
 - Legislative
 - Regulatory
 - Judicial
- Prognosis
- Conclusion

FACTUAL

The Energy Sector



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Total Domestic Power Consumption in 2015*

- Imported--Petroleum 9%
- Domestically produced-- 91%
 - Natural Gas 32%
 - Petroleum 28%
 - Coal 21%
 - Renewables 11%
 - Nuclear 9%

http://www.eia.gov/energyexplained/?page=us_energy_home

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RELATIVE DOMESTIC POWER CONSUMPTION OF RENEWABLES IN 2015

Biomass	49%
Hydroelectric	25%
Wind	19%
Solar	6%
Geothermal	2%

http://www.eia.gov/energyexplained/?page=us_energy_home

Legislative

The federal Clean Air Act, 42 U.S.C. §§ 7401-7671q

- The Air Pollution Control Act of 1955—provided funds for federal research into air pollution
- Clean Air Act of 1963—established a federal program to address air pollution and authorized research into techniques for monitoring and controlling air pollution
- Air Quality Act of 1967—authorized expanded studies of emission inventories, monitoring, and control and enforcement procedures for pollution resulting from interstate transport

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The federal Clean Air Act, 42 U.S.C. §§ 7401-7671q (cont'd)

- **Clean Air Act of 1970**—authorized the development of comprehensive federal and state regulations to limit emissions from stationary and mobile sources
 - NAAQS
 - SIPs
 - NSPS
 - NESHAPs
- **Clean Air Act Amendments of 1977**
 - PSD
 - Non-attainment
- **Clean Air Act Amendments of 1990**
 - Acid rain
 - Title V operating permits
 - Expanded NESHAPs (189 toxic pollutants or HAPs)

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Overview of the Act

- The Act is generally based on the notion of cooperative federalism, that is, EPA sets minimum criteria for programs that states then will take responsibility for, with EPA retaining an oversight role.
- Some programs apply throughout the country; the applicability of others depend on how specific areas are classified, *e.g.*, as attainment or unclassifiable, on the one hand, or as non-attainment on the other.
- EPA is to set national ambient air quality standards or NAAQS for common pollutants of concern and states are to develop state implementation plans or SIPs to attain and maintain those standards, primarily by regulating sources of air pollutants within their boundaries that affect their air quality as well as the air quality of other states.

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National Ambient Air Quality Standards (NAAQS)

- Types
 - Primary-to protect public health
 - Secondary-to protect public welfare
- Duration
 - Short term ,e.g., hourly
 - Long term-annual
- Criteria Pollutants
 - Sulfur Dioxide (SO₂)
 - Particulate Matter (PM)
 - Nitrogen Oxides (NO_x)
 - Carbon Monoxide (CO)
 - Ozone (O₃)
 - Lead (Pb)

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Overview of The Act (cont'd)

- The Act contains provisions to control emissions from new and existing major stationary sources of air pollutants, including emissions of hazardous air pollutants, as well as emissions from mobile sources.
- The Act's focus was on pollutants with direct and regional impacts; the Act does not contain any provisions explicitly providing for the regulation of CO₂ or other greenhouse gases whose impacts are indirect and global.
- EPA's prevention of significant deterioration (PSD) and nonattainment programs were linked to NAAQS; there are no NAAQS for GHGs.
- Legislative efforts to regulate GHGs, e.g., the American Clean Energy and Security Act, were unsuccessful.

MASSACHUSETTS V. EPA, 549 U.S. 497 (2007)

- A number of states and cities petitioned EPA to regulate motor vehicle GHG emissions.
- EPA refused, saying it lacked authority under the Act and, even if it had authority, it chose not to exercise it.
- Those states and cities challenged EPA's action; a number of other states and trade associations supported it.
- In *Massachusetts v. EPA*, the Supreme Court, in a 5-4 decision, held EPA had the authority under the Act to regulate GHG emissions.

MASSACHUSETTS V. EPA, 549 U.S. 497 (2007)

- “The Clean Air Act’s sweeping definition of “air pollutant” includes “any air pollution agent or combination of such agents, including any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word “any.” Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt “physical [and] chemical . . . substance[s] which [are] emitted into . . . the ambient air. The statute is unambiguous.”
- “Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.”

MASSACHUSETTS V. EPA, 549 U.S. 497 (2007)

“In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore “arbitrary, capricious, . . . or otherwise not in accordance with law.”

“We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA’s actions in the event that it makes such a finding.”

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GHGs

- Examples of GHGs
 - CO₂ (carbon dioxide)
 - CH₄ (methane)
 - N₂O (nitrous oxide)
 - HFCs (hydrofluorocarbons)*
 - PFCs (perfluorocarbons)*
 - SF₆ (sulfur hexafluoride)*
- GHGs are generally referred to as “carbon” and are expressed in terms of CO₂ equivalents, based on their relative global warming potentials over a period of time multiplied by the GHG’s weight.

**Do not occur in nature*

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PROBLEMS WITH REGULATING UNDER THE ACT

- The Act was not drafted with GHGs in mind; its focus was on pollutants with direct and regional impacts.
- The cascading series of regulatory programs that were developed in response to *Massachusetts v. EPA*, therefore, had no statutory grounding that takes into account the unique aspects of GHGs.

GHG Regulation

- GHG Emission Reporting Rule
- EPA's Endangerment and Contribution Findings
- EPA's Motor Vehicle GHG Regulation
- EPA's PSD and Title V GHG Tailoring Rule
(Generally upheld in UARG v. EPA, 134 S. Ct. 2427 (2014))
- NSPS for GHGs from EGUs
- Standards for GHGs from Existing EGUs—
The CPP
- Methane Rule for E & P Activities

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GHG REGULATION

New Source Performance Standards (NSPS) for Fossil Fuel-Fired Power Plants pursuant to section 111(b)—requires coal plants to use carbon capture and sequestration (“CCS”)

- April 13, 2012 EPA proposes NSPS
- > 2.5 M comments
- September 20, 2013 EPA withdraws proposal
- January 8, 2014 EPA publishes proposed NSPS
- August 3, 2015 EPA publishes final NSPS
- October 23, 2015 Effective date of rule

REGULATORY

The CPP for Existing Fossil Fuel-Fired Power Plants pursuant to section 111(d)

- June 14, 2014 EPA proposes CPP and CPP FIP
- > 4.3 M comments
- August 3, 2015 President Obama and EPA announce the CPP
- October 23, 2015 EPA publishes CPP

THE CPP

- Unlike section 111(b), which applies to new sources, section 111(d) applies to existing sources.
- Under section 111(b), EPA must list categories of stationary sources that cause or contribute to air pollution that likely endanger public health or welfare and then regulate emissions from new sources and some modified sources within those source categories by promulgating a standard of performance or NSPS.
- By contrast, under section 111(d), EPA may regulate existing sources, according to EPA, if two prerequisites are met:
 - (1) the target pollutant is not otherwise regulated by the Act as either a criteria pollutant under NAAQS or as a hazardous air pollutant or HAP and
 - (2) the category of sources is determined to require an NSPS for the target pollutant.

THE CPP (CONT'D)

- EPA set the “best system of emissions reduction (“BSER”) that was demonstrated for CO₂ for fossil fuel-fired power plants by examining technologies and measures already being used, taking into account technologies and measures beyond the fence line of affected facilities.
- EPA established statewide goals in two alternative forms that were equivalent to the category-specific CO₂ emission performance rates: (1) a statewide rate-based goal measured in pounds of CO₂ per megawatt hour (lbs/MWh) and (2) a statewide mass-based goal measured in total short tons of CO₂ emissions.

THE CPP (CONT'D)

- EPA determined that BSER comprised three, rather than the four building blocks it had proposed, that individually and together reduce the carbon intensity of electricity generation:
 - (1) increasing the operational efficiency of existing coal-fired power plants;
 - (2) shifting electricity generation from higher emitting fossil fuel-fired steam power plants (generally coal-fired) to lower emitting natural gas-fired power plants; and
 - (3) increasing electricity generation from renewable sources of energy like wind and solar.

THE CPP (CONT'D)

- According to EPA, the CPP calls on higher-emitting sources to make the greater amount of reductions, typically at lower cost.
- The agency noted that power plants can work in concert, using mechanisms like emissions trading, to lower the overall carbon intensity of electricity generation.
- The final rule dropped the fourth building block of demand-side energy efficiency although suggesting that states may nonetheless rely on it.
- The same CO₂ emission performance rates for fossil steam and for natural gas combined cycle were then applied to all affected sources in each state to arrive at individual statewide rate-based and mass-based goals.
- Each state has a different goal based upon its own particular mix of affected sources.

JUDICIAL

- October 23, 2015 EPA publishes CPP
- > October 23, 2015 States and others challenge CPP and request stay
 - Challengers—27 states
 - Defenders—18 states and D.C.
- December 22, 2015 Effective date of rule
- January 21, 2016 D.C. Circuit rejects stay
- February 9, 2016 U.S. Supreme Court issues stay
- September 28, 2016 D.C. Circuit, sitting en banc, hears oral argument on merits
- January 21, 2017 President Trump takes office

NOW WHAT?

NOW WHAT?

From the headlines...

- With Trump in Charge, Climate Change References Purged from White House Website.
- President Trump is committed to eliminating harmful and unnecessary policies such as the Climate Action Plan.
- Trump's nominee for EPA Administrator, Scott Pruitt, as Oklahoma's attorney general, describing himself as a 'leading advocate against the EPA's activist agenda, has sued EPA on 13 occasions, including specifically over the CPP.
- The leader of President Trump's U.S. EPA transition team wants to see the agency's 15,000-person staff axed to about 5,000 employees.
- Trump signs 2-for-1 order to reduce regulations
- Trump names Gorsuch new Supreme Court Justice.

- Legislation has been introduced in the house and senate—the “Separation of Powers Restoration Act of 2016,” that would eliminate the judicial concept of Chevron deference, that is, that a court presume that the interpretation of an agency charged with implementing an ambiguous statute is, in general, entitled to deference.

See Chevron U.S.A. v. NRDC, 467 U.S. 837 (1984).

OPTIONS TO SCUTTLE THE CPP

- Administration, to withdraw from the Paris Accord or the 1992 UN Framework Convention on Climate Change
- EPA, to “slow-walk” EPA regulation and enforcement
- Executive Branch and Congress, to limit EPA employees and funding
- Congress, to use Budget Reconciliation Act to override the CPP
- Congress, to amend the Clean Air Act
- Re the CPP litigation:
 - DOJ, to confess judgment
 - DOJ, to request stay and remand
- EPA, to withdraw CPP in whole or in part or to undo endangerment finding

JUDICIAL REVIEW OF REVISED RULEMAKING

...the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately *indicates*. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it *must*—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account... It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.

FCC v. Fox Television Stations, Inc., 556 US 529, 129 S.Ct. 1800 (2009)

A RECOMMENDED LEGISLATIVE OPTION

Congress should consider a tailored approach, *e.g.*, a carbon tax, to:

- Address identified concerns cost effectively
- Provide regulated industry certainty as to the form regulation is to take so it can plan
- Provide uniformity and avoid inconsistent state-by-state and regional approaches

CONCLUSION

- The CAA and the regulatory programs required by it, as typified by the CPP, are incredibly complex.
- They result in layers of regulation on sources of air pollutants—both conventional and GHGs--and on fossil fuel fired power plants in particular.
- To address these requirements requires an understanding of how they apply and by when they must be implemented.

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CONCLUSION (CONT'D)

- The CPP is particularly unique, because of its statutory underpinnings and method of implementation, and thus raises legal and practical concerns.
- Not only the complexity of the regulations, but also the uncertainty caused by ambiguities in the regulations and by judicial challenges makes this understanding difficult to attain.
- There are obstacles to undoing the CPP.

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CONCLUSION (CONT'D)

- Even were the CPP to be undone, the coal industry is unlikely to return because:
 - There is public support for addressing climate change
 - There are independent state and regional programs that regulate GHGs
 - Market forces likely are a more significant driver, especially,
 - The price of natural gas, which may drop further in response to loosening of regulatory requirements by the new administration
 - The increasingly more competitive pricing of renewables, which may, however, see less support from the new administration
- A technical solution to the problem of storage of renewable energy could be a game changer

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