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# TO THE POINT™



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October 2017

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**To the Point!** is a fee-based educational resource for corporate executives and managers distributed each month with periodic brief updates for critical items.

**Published by**  
**Governance &**  
**Accountability Institute, Inc.**  
New York, New York

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## THE CLEAN POWER PLAN — Is This a Farewelling to the Obama Administration's Clean Power Plan? If So — What Is Next For America's Electric-Generating Power Plants?

The News of October 10, 2017 — out of Washington, DC

Today, the Administrator of **U.S. Environmental Protection Agency** (US EPA) announced the official start of a long, comprehensive process to repeal the **Obama Administration's "Clean Power Plan"** that would put limits on electric power generating plants' carbon emissions and in the process encourage a shift to renewable fuel sources.



This move is part an ongoing saga in which the new administration basically seeks to roll back some of the political and societal actions of the prior administration. Especially in the areas of environmental protection, energy policy, addressing climate change issues, and Federal oversight of certain industries (like coal, pharmaceuticals, chemicals, electricity generation).

The specific action by **Administrator Scott Pruitt** today was to issue a "Notice of Proposed Rulemaking" (an "NPRM") which proposes to repeal the Obama Administration's Clean Power Plan (the "CPP"). This was issued by Executive Order by **President Barack Obama** in summer 2015 — and has been under legal challenge ever since.

One of the first acts of **President Donald Trump** was to issue an E.O. addressing "Energy Independence," which in part is related to the CPP. There were four E.O.s signed on March 28, 2017; one related to a review of the Clean Power Plan. Today's announcement tells us what that review resulted in.

Said EPA Administrator Pruitt: "We are committed to righting the wrongs of the Obama Administration by cleaning the regulatory slate. Any replacement rule will be done carefully, properly, with humility, by listening to all affected by the rule."

Now the process is to determine whether or not "further regulatory action" is needed, and if so, what would that be? The Obama E.O. further leveraged the **Clean Air Act of 1963**, passed by the Congress; the new rule(s) would have to be anchored in that legislative mandate.



President Trump and Administrator Scott Pruitt are positioning their moves as “repealing” the Obama action. The repeal “package” now available for public view (and public response) is in two parts:

- The “preamble,” setting out the proposed legal interpretation, policy implications and summary of the cost-benefit analysis of the proposed repeal.
- The “**Regulatory Impact Analysis**” (RIA), an in-depth cost-benefit technical analysis. (Under this approach the Trump Administration forecasts \$33 billion savings in compliance costs out to 2030. See the opposing NRDC data below.)

All of this is available from EPA and published in the *Federal Register* as the official public notification.

The EPA promises a “robust, open, transparent presentation of a wide range of analysis scenarios for the public.”

Looking ahead we foresee a range of legal challenges being presented; pushback by NGOs, sustainable investors and other stakeholders; and possibly, a stream of leaks from inside the EPA from people who disagree with the political leaders at the top. Administrator Pruitt when he was Attorney General of Oklahoma was very fond of suing the EPA (clearly on behalf of the fossil fuel industry) and openly advocated abolishing the agency. So he was appointed to lead it.

#### **Background For You From the G&A Team**

In August 2015, then-President Barack Obama issued an Executive Order — this was the “Clean Power Plan” (CPP), designed to (over time) cut carbon pollution from power plants in the United States and encourage the shift to less-polluting power sources.

The influential NGO NRDC has identified carbon emissions as “the largest source of pollution in the country that is driving dangerous climate change.”

Using the statutory authority of the *Clean Air Act*, President Obama attempted to set certain standards that each state would then address in their own, respective CAA plan and standards. (The intention was that each of the 50 states would have their own complementary version of CAA to regulate within their borders.) The President’s action did not actually require each state to have its own plan.

But if a state opted out, then the US EPA would regulate power plants within that state. The target date for “enforceable pollution limits from power plants” was phased in, and be effective in the year 2022.

The long-term goal was that by the year 2030, using US EPA projections, the Plan would help to cut the electric utilities industry’s carbon pollution by 30% plus — relative to the levels of 2005.

#### **NRDC in supporting the Plan projected that by 2030 the annual benefits would be:**

- (1) savings of US\$20 billion in climate cost;**
- (2) delivering \$14 to \$34 billion in health costs;**
- (3) saving American families \$85 on their electric bill.**

President Obama’s action was immediately challenged by industry interest; over time the **U.S. Supreme Court** would rule in February 2016 that the EPA did have the authority to regulate emissions.



But — that the rule was to be suspended until the cases working their way through the lower courts resulted in decisions that would or would not give the Federal government the authority to control pollution from fossil-fuel power plants through the Clean Power Plan. The SCOTUS justices sent the case back to the Appellate Court(s) for hearings. The rule was “stayed” at the high court.

Two dozen states had challenged the rule; West Virginia (coal) and Texas (oil) initially sued. The EPA would have to file monthly reports and updates every 90 days with the courts.

One of the points made by Administrator Pruitt is that the *Clean Air Act* did have authority to “take action outside the fence line” of a plant (such as addressing emissions from the smokestack drifting miles away), but there were certain restrictions on these abilities within the law. The Obama E.O., the new EPA leader argued, exceeded these traditional limits.

As the court cases continued, the new CPP Rules did stay in effect; but, were not enforceable. This was a “nothing” ruling, critics charged.

In April 2017 the U.S. Court of Appeals for the District of Columbia granted a request from the Trump Administration to suspend lawsuits against the Clean Power Plan. Litigation was “stayed” against the EPA rule for 60 days.

What to do next was unclear; the new EPA Administrator Scott Pruitt was reviewing the Plan. President Trump had signed an order to EPA to “re-write” rules limiting carbon emissions from new/and existing plans, and to drop litigation involving the rules.

## About the Obama Administration’s Clean Power Plan

The long-term goal was to encourage the shift of power generation out of reliance on fossil fuel power sources (oil, coal) and into renewable sources of power.

There were carrots offered to the states.

For example, a state could receive compliance credits that in turn could be “sold” or granted to private sector companies in states where there are limits or a “tax” on carbon emissions was updated. States could also qualify for certain Federal programs that supported low-income communities. Wind and solar power would get such credits.

The CPP also had authority to protect the electric grid in “unpredictable events” (think: recent hurricane, windstorm, flood, wildfire, earthquake, etc.) through Federal and state actions.





The Environmental Protection Agency in first putting rules in place explained how the plan would work (at Federal and state levels); how EPA determined emission performance rates; addressed “state plans”; discussed emissions trading (an important part of the CPP); the assurance of grid reliability; timing; how the Plan would help communities; community involvement and environmental justice (a long- time consideration for EPA policies).

### **Outside Criticism of the Plan**

The Obama White House Clean Power Plan was not welcomed everywhere.

The **Competitive Enterprise Institute** (CEI) called the CPP “...President Obama’s marquee climate change initiative...with a devastating effect on America’s electricity industry, consumers and the U.S. economy.”

CEI pointed out that the states have always regulated electric power, to assure affordability, reliability, and use of locally-available fuel sources, like coal. The Federal government action was seen as an attempt to replace states’ traditional authority.

### **So here we are in October 2017.**

President Donald Trump is in the White House. He favors repeal of the CPP and encouragement of the coal industry to regain market share. Former Oklahoma Attorney General Scott Pruitt, who made a career out of suing the EPA is now the Administrator of the US EPA.

In a September speech to a New York City conference, Administrator Scott Pruitt made these comments: “Here’s the President’s message: the war on coal is over. I’ll be signing a proposed rule to withdraw the so- called Clean Power Plan of the past administration and thus begin the effort to withdraw that rule. The Plan was really about picking winners and losers.”

### **Will EPA now issue a new rule to attempt to regulate emissions?**

Unclear. Especially in this divided political and cultural environment. The Federal government is seen by many as the enemy, the people who want to put coal miners and oil companies out of business.

The “Advanced Notice of Proposed Rulemaking” will solicit opinions. The public will have 60 days to submit comments.

The news media reaction has been along these lines: “The broader plan of the Trump Administration is to revive the U.S. coal industry and boost domestic fossil fuels production,” reported Reuters.

\* \* \*

It’s interesting to note that when looking for information we find there are now two EPA websites. One existed before January 19, 2017, the day before the new president took office; and, the new website is under the direction of the (new) EPA Administrator.

Here is the “snapshot” archived version, preserved before the swearing in — this has some useful information not available elsewhere (but is not updated):



[https://19january2017snapshot.epa.gov/cleanpowerplan/fact-sheet-overview-clean-power-plan\\_.html](https://19january2017snapshot.epa.gov/cleanpowerplan/fact-sheet-overview-clean-power-plan_.html)

And here is the current EPA web site with current information: <https://www.epa.gov/>

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The Governance & Accountability Institute team has been involved in assisting companies in various industries in addressing environmental issues and public policy challenges. We have worked for leaders in chemicals, pharmaceuticals, tire manufacture, cement manufacture, airlines, airports, railroads, aerospace manufacturing, and other industries. Our work helped companies to address issues in such regulations as the *Clean Air Act*; the *Clean Water Act*; SuperFund (CERCLA); RCRA (resource and recovery); *Endangered Species Act*; the Toxic Release Inventory...public Right-to-Know...and more.

If you have questions about the above brief or the impact of Federal E regulations on your business, please do get in touch.