

## The Clean Power Plan Is Only Mostly Dead

By Patrick Traylor, Eric Groten and Rachel Comeskey

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*"It just so happens that your friend here is only mostly dead. There's a big difference between mostly dead and all dead. Mostly dead is slightly alive."*

—Miracle Max, *"The Princess Bride"*

The Obama administration's Clean Power Plan is only mostly dead — and could soon spring back to life.

Yes, the U.S. Supreme Court stayed the CPP in 2016. And yes, the Trump administration's Affordable Clean Energy rule repealed the CPP in 2019. Between those two actions, the CPP seemed all dead.

But the Supreme Court's stay has almost certainly been dissolved. And the U.S. Court of Appeals for the D.C. Circuit is on the verge of vacating the ACE rule's repeal of the CPP.

If and when that happens, the CPP will return to legal life. Whether and how the CPP stays dead has important consequences for the Biden administration's efforts to impose greenhouse gas emission limitations on power plants under the Clean Air Act.

### How We Got Here

The D.C. Circuit declined to stay the CPP pending appeal. But the Supreme Court took the unusual step of staying it, all the way through disposition of any petitions for certiorari.

After the 2016 election, the U.S. Environmental Protection Agency reconsidered the CPP, and eventually issued the ACE rule, which repealed the CPP. Almost immediately, the CPP petitioners asked the D.C. Circuit to dismiss the CPP appeals as moot, which it did in September 2019. This dismissal created the conditions for the CPP to spring back to life.



Patrick Traylor



Eric Groten



Rachel Comeskey

The Supreme Court's order that stayed the CPP contemplated the usual course of appellate proceedings in the D.C. Circuit. That is, it stayed the CPP pending disposition of the appeal in the D.C. Circuit, unless that appeal was further appealed to the Supreme Court — as the court no doubt expected it would be.

Because the Supreme Court's stay order was effective pending disposition of the applicant's petition for review in the D.C. Circuit, and there were no petitions for a writ of certiorari appealing the dismissal, it is almost certain that dismissal of the CPP appeals satisfied the expressed conditions for dissolution of the Supreme Court's stay order.

Since the D.C. Circuit issued a decision on Jan. 19 vacating the ACE rule — including its repeal of the CPP — the disposition of the ACE rule appeal almost entirely controls whether the CPP regains any life.

### **Litigation Options That Could Prevent the CPP From Springing Back to Life**

Barring any additional proceedings in the D.C. Circuit or the Supreme Court, the mandate in the ACE rule appeal could be issued as early as March 12.

Supporters of the CPP will want to see the mandate in the ACE rule appeal issued as quickly as possible, putting the final nail in the coffin of the ACE rule and breathing life back into the CPP. Opponents of the CPP will want to avoid or delay issuance of the ACE rule mandate. Here are just some of the options open to the litigants.

#### ***Petition for a D.C. Circuit Order Vacating the Mandate in the CPP Appeal***

Opponents of the CPP persuaded the D.C. Circuit to dismiss their appeals once the ACE rule repealed the CPP. But given the Jan. 19 decision, and the impending issuance of a mandate that will bring the CPP back to life, the D.C. Circuit might be open to vacating its mandate dismissing the CPP appeals.

If the court grants a motion to vacate its CPP mandate, then the Supreme Court's 2016 order would effectively stay the CPP — because the appeal of that rule will not have been finally disposed. If the court denies the motion, opponents of the CPP could appeal that denial to the Supreme Court, as discussed in more detail below.

#### ***Petition for Panel Reconsideration of the Remedy in the ACE Rule Appeal***

The panel opinion in effect declares the ACE rule insufficient, not unlawful. Perhaps one or more of the litigants then might seek panel reconsideration of the remedy, asking that the rule be remanded without vacatur.

This would leave the CPP dead, and the ACE rule in effect, pending a Biden EPA rework of GHG limits in the power sector.

#### ***Petition for Rehearing En Banc***

In addition, opponents of the CPP could file a petition for rehearing the ACE rule en banc in the D.C. Circuit. The filing of a petition for rehearing automatically stays the mandate.

By staying the mandate, the ACE rule's repeal of the CPP would remain effective.

### ***Disposition of the En Banc Rehearing***

It is possible that the en banc D.C. Circuit would grant the rehearing petition and issue an opinion affirming the ACE rule. In that case, opponents of the ACE rule and supporters of the CPP could appeal to the Supreme Court.

In that situation, the Biden EPA likely would move to find ways to delay or reconsider the ACE rule. On the other hand, it also is possible that the en banc D.C. Circuit would deny the rehearing petition or uphold the ACE rule after en banc consideration.

### ***A Motion to the D.C. Circuit for a Stay of the ACE Rule Mandate Pending a Petition for Certiorari***

To avoid the issuance of the mandate upon the denial of rehearing, or an en banc decision upholding the ACE rule, opponents of the CPP could file a motion in the D.C. Circuit to stay issuance of the mandate pending the filing of a petition for writ of certiorari.

If granted, the ACE rule — and its repeal of the CPP — would remain effective pending disposition of the Supreme Court appeal. In that case, the CPP would remain mostly dead. If denied, opponents of the CPP would head to the Supreme Court immediately.

### ***An Application to the Supreme Court for a Stay of the Mandate Pending a Petition for Certiorari***

If the D.C. Circuit declines to stay the issuance of its mandate, the Supreme Court could stay the mandate pending its review of a petition for writ of certiorari.

Such a stay would be an extraordinary remedy — but perhaps not surprising, given that the court undoubtedly would recognize that failing to stay the mandate vacating the ACE rule would resuscitate the Clean Power Plan, a rule that the court has already implicitly found likely unlawful.

### ***A Petition to the Supreme Court to Vacate the CPP Dismissal Mandate***

There is a way for the high court to prevent the CPP from returning to life without granting the extraordinary remedy of staying a D.C. Circuit mandate vacating the ACE rule. If the D.C. Circuit denies a petition to vacate the CPP dismissal mandate, that decision could be appealed to the Supreme Court, likely well before any en banc decision in the D.C. Circuit.

The court would then have the option to reinstate the CPP appeal by vacating the 2019 dismissal mandate and clarifying that its 2016 stay was still effective as to the CPP. That would allow the ACE rule appeal to proceed along the usual course, without extraordinary remedies and without the risk that the CPP regain life.

And if the final disposition of the ACE rule appeal is to overturn the ACE rule, the quiescent CPP appeal could recommence.

### ***Fresh "Grounds Arising After" Litigation Over a Resuscitated CPP***

If the CPP returns to legal life, and the mandate dismissing the CPP appeal stands, it is possible that a new CPP appeal could be filed under a provision of the Clean Air Act allowing for an appeal based on grounds arising after the usual 60-day deadline for appeal.

Because many of the important deadlines in the CPP already have passed, it will be impossible to comply with a newly resuscitated CPP. This could provide the grounds for a new appeal of the CPP.

The Biden administration's options to reimpose GHG limitations on power plants under the Clean Air Act depends, at least in part, on the disposition of the appeals of the CPP and the ACE rule and what the courts say about EPA authorities and mandates in the process of their disposition. The next section summarizes some of those options.

## **Biden Administration Options for Clean Air Act Regulation of Power Plant GHG Emissions**

### ***Attempting to Implement the CPP***

If the ACE rule appeal mandate issues and the CPP dismissal mandate remains in place, the Biden EPA could reasonably conclude that the Supreme Court stay of the CPP has been dissolved. The Biden EPA might then move to begin implementation of the CPP with new implementation deadlines, with those deadlines themselves likely the subject of additional litigation.

However, without comprehensive judicial review of the CPP, further use of Section 111(d) to regulate GHG emissions from power plants will proceed under the shadow of eventual judicial reversal — creating profound commercial and political uncertainty that would distract from broader initiatives, and would be resisted by unwilling states.

### ***Reconsidering the CPP***

If the CPP springs back to life after the ACE rule mandate issues, or if the D.C. Circuit remands the ACE rule without vacating it, the Biden EPA could reconsider the CPP with an eye toward adjusting its deadlines and hardening it against judicial review. A reconsidered new rule might go beyond the fence line, but perhaps not as far as reordering generation portfolios to favor GHG-free power.

A GHG cap-and-trade model for power plants may be seen as a defensible — though not without difficulties — middle ground, and would be consistent with the Bush administration's interpretation in the Clean Air Mercury Rule that Section 111(d) authorizes a multifacility cap-and-trade program.

But even that option was never upheld or implemented — and in any event, is premised on establishing a pool of allowable emissions based only on what can be achieved by inside-the-fence-line regulation of the affected source group.

### ***Starting Over With a New CPP***

The Biden EPA could start afresh with a new rule premised on an application of Section 111(d) that could pass Supreme Court muster. This would be the cleanest way to impose GHG restrictions on power plants — though by far the most time-consuming.

The EPA most likely would proceed with the assumption that the Supreme Court would impose only one limit on authority under Section 111(d) — that the rule cannot expressly direct or rely on a reordering of a state's generation portfolio. Then the task would be to develop an approach that requires emission reductions outside the fence line, but that does not require wholesale changes to generation.

A cap-and-trade model might be proposed. However, this approach — like any approach based on Section 111(d) — could run into heavy seas at the Supreme Court, which might be willing to overturn a rule based on the major question doctrine, the Section 112 preemption argument or new arguments based on the particulars of the new rule.

### ***Reconsidering the ACE Rule and Replacing it With a New CPP***

If the ACE rule is ultimately upheld on appeal or remanded without vacatur, the Biden EPA could reconsider the rule and replace it with a new rule, just as the Trump EPA reconsidered the CPP and replaced it with the ACE rule. And the Biden EPA need not wait until a final mandate in the ACE rule appeal is issued to begin reconsideration.

### ***Seeking a Legislative Solution***

If there is one thing that more than a decade of EPA GHG rules and subsequent litigation have shown, it is that the Clean Air Act is ill-equipped to compel significant reductions in GHG emissions. And efforts to use it take so much time that a new administration could well arrive to undo the rules before the first state plans get issued and approved.

Taking President Joe Biden at his word on a "climate in crisis," something more than a legally controversial and Sisyphean retread of the CPP will be required to achieve the aspirational goals of the Paris Agreement. The Biden administration could press Congress for either surgical or comprehensive amendments to the Clean Air Act that would generate unambiguous statutory authorities to regulate GHGs from the power sector and others.

With a closely divided U.S. House of Representatives and U.S. Senate, the prospects of legislation in this Congress appear dim. That leaves the Biden EPA to pursue largely symbolic — but economically inefficient and environmentally ineffective — GHG emission reduction rule options under the existing Clean Air Act.

For the future of GHG regulation of power plants under Section 111(d), all eyes are on the clerk's office in the D.C. Circuit.

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*Patrick Traylor and Eric Groten are partners, and Rachel Comeskey is a senior associate, at Vinson & Elkins LLP.*

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